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Rent Withholding Won't Work: The Need for a Realistic Rehabilitation Policy

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RENT WITHHOLDING WON'T WORK: THE NEED FOR A REALISTIC REHABILITATION POLICY

Current levels of public funding require that the demand for housing by low income families be satisfied by already existent housing.\(^1\) Although the quality of housing in such low income areas may vary, substandard concentrations are typical.\(^2\) Dwelling rehabilitation has thus been recognized as an essential element in meeting the housing needs of urban areas.\(^3\)

Traditionally, those low income tenants residing in substandard housing were forced to rely on the willingness of the landlord to fulfill his duty to maintain leasehold property.\(^4\) To alleviate the tenants' powerless position, "rent withholding" was conceptualized, a proposal which would make the payment of rent contingent upon the landlord's proper maintenance, thus enabling tenants to assume an enhanced bargaining position from which to obtain rehabilitation.\(^5\)

The legal implications of rent withholding have been extensively canvassed in legal journals, and rent withholding has emerged as an object of praise.\(^6\) In light of increased landlord abandonment,\(^7\) however, it is

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3. President's Committee on Urban Housing, A Decent Home 21 (1968) [hereinafter cited as Kaiser Report].
4. See, e.g., Cal. Civ. Code § 1941 (West 1970). This section places a duty on the lessor to maintain the premises. Note that "leasehold property" in this article is not confined to written lease agreements. Indeed, it embraces all rental property. In this context, lease is defined as "[a]ny agreement which gives rise to relationship of landlord and tenant." Black's Law Dictionary 1035 (1968), citing Smith v. Royal Ins. Co., 111 F.2d 667, 671 (9th Cir. 1940).
clear that such evaluations have failed to adequately explore the economic implications of rent withholding. Such exploration indicates that rent withholding cannot be defended as a viable solution to the problem of housing rehabilitation. Policy changes for more effective housing code enforcement are necessary if the increasing trend toward coerced abandonment is to be curtailed.

I. TENANT RESPONSE TO LANDLORD'S FAILURE TO MAINTAIN THE LEASEHOLD

Whether or not the rental agreement outlines the obligations of the landlord, either a statutory or a judicial duty to maintain, controls the residential leasehold. When the rented dwelling space falls below housing code standards, the landlord is obligated to remedy the deficiency. If the landlord fails to repair the premises, tenant options are severely limited. With increasing tenant awareness of legal remedies through tenant organizations and legal services, however, it is not unreasonable to assume that a significant number of tenants in substandard housing will be prepared to avail themselves of whatever options promise improved living conditions.

The first option, reliance on conventional housing code enforcement programs by government, has uniformly failed to assure that low income landlords will comply with the codes. Housing code enforce-

7. See text accompanying notes 112-17 infra.
8. See, e.g., Greenfield v. Garrett Biblical Institute, 1 CCH 1972 Pov. L. Rep. § 2210.10 (Ill. Cir. Ct., 1970) (judicially imposed duty) and CAL. CIV. CODE § 1941 (West 1970) which provides:

The lessor of a building intended for the occupation of human beings must, in the absence of an 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 nineteen hundred and twenty-nine;
11. See KAISER REPORT, supra note 3, at 7. The California state building standards are defined in the California Administrative Code. It should be noted, however, that CAL. HEALTH AND SAFETY CODE § 17925 (West Supp. 1973) allows for modification for local conditions. Los Angeles, as is the case with many other cities, has its own set of building codes.
ment programs have failed primarily because the cost of rehabilitation in low income housing is prohibitive.\textsuperscript{12} Housing code enforcement programs have also been hampered by insufficient staff\textsuperscript{13} and inordinate delays.\textsuperscript{14} Even when housing codes are enforced, courts often impose only minimal fines for noncompliance.\textsuperscript{16}

Since government enforcement of housing codes is ineffective, low income tenants must select from other equally unpromising alternatives. One choice in some jurisdictions\textsuperscript{16} is to utilize repair and deduct statutes. The California statute, one which typifies this approach, allows the tenant to make repairs and deduct the expenditure from the rent. California and other states adopting this approach, however, usually limit the use of this device to once in any year and limit the amount to be deducted to one month's rent.\textsuperscript{17} Ostensibly, such a statutory mechanism is a sufficient catalyst to force landlords to make minor repairs. In the context of inner city low-income housing, however, the necessary repairs are often of such magnitude that repair and deduct statutes fail to provide sufficient rehabilitative funds.\textsuperscript{18} They, consequently, serve neither as an adequate means by which the tenant can repair his dwelling, nor as an effective incentive to landlord maintenance.

Another course which the low income tenant could consider is to

\begin{itemize}
  \item The enforcement procedure as defined in the \textit{Cal. Health and Safety Code} § 17970 (West 1964) provides for an inspection by the local agency. Upon the discovery of a violation, § 17980 requires that a thirty day notice be given during which time the deficiency is to be remedied. §§ 17981-82 then provide for the filing of a complaint in superior court for an order allowing the enforcement agency to abate a nuisance. Finally, § 17995 defines any violation of the Building Code as a misdemeanor punishable by a $500 fine and/or six months in jail.


13. See G. Sternlieb, \textit{The Tenement Landlord} 179 (1966) [hereinafter cited as \textit{Tenement Landlord}].

14. \textit{Id.}


\begin{quote}
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, 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 . . . This remedy shall not be available to the lessee more than once in any 12 month period.
\end{quote}

18. The limitation to one month's rent is such that the repair and deduct remedy cannot meet the $9,000 cost of rehabilitation per dwelling unit. See note 107 \textit{infra} and accompanying text.
change residence. Obviously, a change of residence can provide a solution only if there is housing available which meets required standards. For the typical low income tenant, such housing is simply not available.

The last response available to the tenant is to withhold rent. Because the other alternatives are so obviously ineffectual, tenants in increasing numbers have been withholding their rent when landlords have failed to adequately maintain their premises. Withholding of rent provides the tenant with the quickest means of retribution against the landlord. Significantly, rent withholding can be initiated at the tenant’s option, providing an improvement in his bargaining position.

Until recently, landlord-tenant law did not sanction the withholding of rent by the tenant when the landlord failed to maintain the premises. A lease was treated as containing independent covenants to pay rent and to repair with the result that the landlord’s failure to maintain the premises.

19. See, e.g., CAL. CIV. CODE § 1942(a) (West Supp. 1973) which provides:

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 vacate the premises, in

which case he shall be discharged from further payment of rent, or performance of other conditions.

20. See notes 80-85 infra and accompanying text. Frequent changes of residence may prove burdensome in themselves. The expense of moving, changing phones, paying utility deposits, as well as the time loss involved, may create a financial burden which the low income tenant is not in a position to absorb. This in itself may prevent the low income tenant from venturing a move.

21. An increasing trend in rent withholding has been noted in one study. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A STUDY OF THE PROBLEMS OF ABANDONED HOUSING 167 (1971) [hereinafter cited as HUD].

Perhaps the lack of a hearing before the initiation of rent abatement by the tenant constitutes a taking of property without due process of law under the fourteenth amendment. In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), a prejudgment garnishment of wages was held to be a taking without due process when there was no notice or hearing. Id. at 342. By analogizing rent to wages, it is arguable that abatement is a taking by the tenant without due process. The tenant could avoid this problem by initiating rent abatement through a declaratory relief action. This was the procedure used in Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). The rent escrow method avoids this problem by requiring a hearing at the outset. See text accompanying note 62 infra. Of course, the due process argument would require a showing of state action, which would seem to be quite a formidable task.


24. W. BURB, REAL PROPERTY 150 (3d ed. 1965). In Lindsey v. Normet, 405 U.S. 56, 86-87 (1972), Justice Douglas contended that the concept that covenants of a lease are independent is changing, as evidenced by rent withholding cases such as
premises did not relieve the tenant of his obligation to pay rent. The tenant's only remedy was to move, which, as previously discussed, promised marginal benefits at best.

Tenants in a modern society are renting not merely space in a building but shelter and a number of services as well. The rental "package" includes more than just walls and ceilings, it necessarily implies proper maintenance. Myron Moskovitz, a leading advocate of tenants' rights, contends that making the payment of rent contingent upon the proper maintenance of the leasehold property is essential to tenant protection.

II. METHODS OF RENT WITHHOLDING

Rent withholding attempts to accomplish its goal of coercing the landlord into complying with housing codes, by interrupting the cash flow from rental property to the landlord until necessary repairs are made. There are two ways in which this cash flow to the landlord can be disrupted. The first is by allowing the tenant to remain in possession without payment of rent or with payment of rent at a reduced rate, i.e., rent abatement. The second way of disrupting cash flow is by diverting the rental payments to a third party, i.e., rent escrow.

A. Rent Abatement Methods

Four methods of rent abatement have been utilized to allow tenants to remain in possession without payment of rent or payment of rent in a reduced amount: illegal contract theory, implied warranty of habitability, constructive eviction, and California rent escrow.


26. See text accompanying notes 80-85 infra which indicates that low income tenants cannot readily find alternate housing.


When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Id. (footnote omitted).

28. Myron Moskovitz is the Chief Attorney, Housing Law Section of the National Housing and Economics Development Law Project at Berkeley.

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ability, statutory rent abatement, and rent abatement unsanctioned by law.

1. Illegal Contract Theory

Initially, as a defense to legal actions for rent, it has been advanced that a lease is an unenforceable illegal contract if at the time of the creation of the contract, a substantial building code violation existed and if the landlord knew of its existence. The rationale for allowing such a defense is that a contract which leases property in violation of housing codes has an illegal purpose and thus should not be enforced. Although effective in barring an action for rent, the illegal contract theory is of limited value in this context because it does not bar an action for possession. Its implementation consequently forces the termination of the lease, an undesirable result to the low income tenant who is often without a suitable housing alternative. Even more significantly, since the theory cannot be applied unless a known substantial violation of the housing code exists at the inception of the rental agreement, it is inapplicable if the violation develops, or is discovered, during the period of occupancy.

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32. See note 42 infra.

33. Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. App. 1968) (requires knowledge only on the part of the lessor). In Shephard v. Lerner, 182 Cal. App. 2d 746, 749-51, 6 Cal. Rptr. 433, 454-36 (1960), however, both parties were aware of the violation upon the creation of the contract. In that case, in denying the landlords suit for rent, the court adduced that since the parties acted in pari delicto, the contract was unenforceable by either party. Ostensibly, in Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972), the requirement of mutuality of knowledge was affirmed when the court argued inter alia that since the tenant in Hinson did not willingly acquiesce in the illegality, Hinson fell within the theory of implied warranty of habitability and not that of illegal contract. Id. at 67, 102 Cal. Rptr. at 664.


35. Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968); Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130 (1913); Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960). In the above cases the tenant moved out prior to disposition by the court. In the other cases which have utilized this theory (see note 30 supra) it is unclear whether or not the tenant had moved.

2. Implied Warranty of Habitability

The concept that a lease of residential property carries with it an implied warranty of habitability has been used as a defense both in actions of eviction and actions for rent. The implied warranty theory serves as a defense in either action, if the tenant is able to show that a substantial violation of the housing code existed during the period rent was withheld. The tenant has a responsibility to inform the landlord of the conditions which need repair in a way which will allow a reasonable period to remedy the deficiency. The tenant is not entirely relieved of his obligation to pay rent, but is liable only for the reasonable rental value of the premises.

rev'd on other grounds, sub nom Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). The court in Saunders refused to extend the theory of Brown to cover violations of housing codes which arise after commencement of the lease.

37. Cases which have utilized the implied warranty of habitability theory are as follows: Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969); Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 276 A.2d 248 (N.H. 1971); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Jackson v. Rivera, 318 N.Y.S.2d 7 (Civ. Ct. City N.Y. 1971); Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961). The Hinson case at best is weak authority since the landlord did not even attempt to respond to the tenant's appeal, and the appellate court did not even discuss whether or not the remedies for the landlord's failure to repair set out in CAL. CIV. CODE § 1942 (West Supp. 1973) are exclusive remedies. It was noted in a statement by a consultant for the California State Assembly Judiciary Committee that some of the trial courts in California are not following the Hinson case. L.A. Daily J., Apr. 13, 1973, at p. 1, col. 3.

38. See note 42 infra.

39. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072 (D.C. Cir. 1970). The theory of implied warranty of habitability is most often used as a defense to an action for rent or eviction. In this context the implied warranty of habitability acts as an affirmative defense to the landlord's claim. If the general rule for assigning the burden of proof is followed, the burden of proof would lie with the tenant to demonstrate that a breach of the implied warranty existed. CAL. EVID. CODE § 500 (West 1968).


The implied warranty of habitability theory has distinct advantages over the illegal contract theory. In addition to covering housing code violations whenever they occur, as opposed to those known to be in existence at the creation of the contract, the implied warranty theory does not require termination of the tenancy. Although the theory of implied warranty may be more useful than the illegal contract theory, it, too, is seriously deficient. The standard for determining whether there is a breach of the implied warranty requires that there be a substantial violation of the housing codes. The tenant who chooses to withhold his rent must first determine whether a particular defect or condition is substantial, and then must hope a court will concur. The lack of definite judicial standards for determining the existence of substantial violations of the housing codes necessitates risky guesswork for the low income tenant.

3. Statutory Rent Abatement

Statutory rent abatement has been utilized in a few jurisdictions to allow tenants to remain in possession of leased housing without payment of rent or payment of rent in a reduced amount until housing code viola-

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42. The court in determining whether a housing code violation is substantial enough to justify rent withholding must consider the seriousness of the defect, the length of time it has persisted, and its effect on the tenant’s own dwelling unit or the common areas he uses. Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972). This criterion is far less explicit than those used in rent escrow schemes wherein the typical statute specifically sets out what housing code violations will allow the tenant to utilize the rent escrow mechanism. On the other hand, the New Jersey statute includes any other condition or conditions in substantial violation of the standards of fitness for human habitation established under State or local housing or health codes or regulations or any other condition dangerous to life, health or safety. N.J. STAT. ANN. § 2A:42-88 (Supp. 1973). Thus, although the statute is explicit when it lists particular housing code violations, it does not exclude other grounds. The same is true of the New York statute. N.Y. REAL PROP. ACTIONS LAW § 770 (McKinney Supp. 1972-1973).

43. It is important to recognize that the tenant may be subjected to more than just payment of rent and the inconvenience of moving. Court costs, attorney fees, and statutory penalties are not unusual. California, for example, provides that where the tenant is guilty of unlawful detainer and malice is shown, he may be subjected to treble damages. CAL. CODE CIV. PRO. § 1174 (West 1972). Conceptually, a misinformed tenant could behave belligerently, but whether this would be enough to constitute malice is purely speculative. It is debatable, however, whether these penalties, resulting from uncertainty as to what constitutes a substantial violation of the housing codes, are actually effectual. It can be argued that at worst a tenant will lose, the landlord will be granted an unenforceable judgment, and the tenant will move to housing no better, but presumably no worse, than he faced previously. If the tenant is indigent, at least, the effect of any monetary penalty will be substantially reduced.
tions are corrected.\textsuperscript{44} If the leased premises are in substantial violation\textsuperscript{46} of the housing code and if the tenant has withheld rent, the statutory rent abatement scheme allows the condition of the premises to be offered as a defense to either an action of eviction or an action for rent.\textsuperscript{46}

For example, the Michigan statutory scheme requires every lease of residential property to contain a covenant that the premises are habitable and that the lessor will keep them in repair.\textsuperscript{47} It further provides that, when the lessor sues for possession based on nonpayment of rent, judgment shall not be granted in favor of the lessor if he has breached a covenant of the lease which excuses payment of rent.\textsuperscript{48} The breach of a covenant to repair by a lessor is the type of breach which excuses payment of rent by the tenant.\textsuperscript{49}

Statutory rent abatement schemes have the potential for providing a workable definition of what constitutes a "substantial" violation of the housing code. Instead, those presently in force merely imply a warranty of habitability in residential leases\textsuperscript{50} and thus offer no clearer criteria than the illegal contract theory or the implied warranty of habitability theory.

4. Rent Abatement Unsanctioned By Law

Rent abatement occurs whenever a tenant, remaining in possession of rental property, withholds rental payments because of housing code violations.\textsuperscript{51} It could involve either a single tenant withholding rent or the more dramatic situation in which a number of tenants withhold rental payments in unison, \textit{i.e.}, a rent strike. It could even involve the withholding of rent by a tenant despite the failure of the courts and the legislature to recognize the violation of the housing code by the lessor as a defense in an eviction action or an action for rent. The difference between this type of rent abatement and the previous methods is that

\textsuperscript{44} The following jurisdictions have rent abatement statutes: CONN. GEN. STAT. ANN. § 47-24 (1960), § 47-24b (Supp. 1973); MICH. STAT. ANN. § 27A.5720 (Supp. 1973). California has a bill now pending in the state assembly. A.B. Cal. Legis., Reg. Sess. 1202 (1973). These statutes implement statutory rent abatement by \textit{implying} a warranty of habitability in residential leases.

\textsuperscript{45} See note 42 \textit{infra}.

\textsuperscript{46} See note 44 \textit{infra}.

\textsuperscript{47} MICH. STAT. ANN. § 26.1109(1)(b) (1970).

\textsuperscript{48} MICH. STAT. ANN. § 27A.5720 (Supp. 1973).


\textsuperscript{50} See note 44 \textit{infra}. A discussion of the lack of definite standards to determine whether rent withholding is justified is contained in note 42 \textit{infra}.

\textsuperscript{51} See text immediately following note 29 \textit{infra}.
in time\textsuperscript{52} the landlord would eventually prevail,\textsuperscript{53} but as long as the tenants remain in possession without paying rent, rent abatement un sanctioned by law has the same effect on the cash flow of rental income as any other method of rent abatement.\textsuperscript{54}

**B. Rent Escrow Method**

The second type of rent withholding is the rent escrow method. This method diverts rental property cash flow from the landlord to a third party. The third party may be the court itself or a court appointed receiver.\textsuperscript{55}

In many jurisdictions, agencies which enforce housing codes have long enjoyed the power to obtain a court order requiring the owner to comply with code standards. Should the landlord fail to respond to the order, the agency or a court appointed receiver can take control of the building and correct housing code deficiencies.\textsuperscript{56} This power to control the premises includes the collection of rental payments and the application of them to the cost of the repairs.\textsuperscript{57} If the rental payments prove insufficient, the building is not repaired.\textsuperscript{58}

A more recent development in some jurisdictions, is the grant to the tenant of standing to maintain an action requiring the landlord to comply with the housing code.\textsuperscript{59} This also permits the tenants to deposit

\textsuperscript{52} The time span of a normal civil action is reduced [in an unlawful detainer action] by the following procedural peculiarities: (1) the tenant is required to appear and plead within five days after service of the summons, rather than within the usual 30-day period (CCP § 1167); (2) precedence is given to unlawful detainer actions over all other pending civil actions (CCP § 1179a); (3) the right to assert a cross-complaint or counterclaim is denied; and (4) a stay on appeal is discretionary with the trial court judge (CCP § 1176). M. MOSKOVITZ, P. HONIGSBERG & D. FINKELSTEIN, CALIFORNIA EVICTION DEFENSE MANUAL 5 (1971).

\textsuperscript{53} In California, the unlawful detainer procedure is outlined in CAL. CODE CIV. PRO. §§ 1159-1179(a) (West 1967).

\textsuperscript{54} This statement assumes the landlord will undertake eviction action and that the judiciary does not adopt one of the other theories of rent abatement, such as the illegal contract theory or the implied warranty of habitability theory, thus sanctioning the tenant's action.

\textsuperscript{55} Tenant Moveme\textsuperscript{nt}, supra note 10, at 652-53.


\textsuperscript{57} See note 56 supra.

\textsuperscript{58} See text accompanying notes 134-36 infra.

the rental payments with the court or a court appointed receiver. Some jurisdictions require the tenant to demonstrate that certain specific violations of the housing code exist such as a lack of heat, water, electricity, or sewage disposal. Before the initiation of the rent escrow, a hearing is usually held to determine whether the landlord has indeed failed to provide essential services. If judgment is rendered in favor of the tenant, the rent is deposited with the court or court appointed receiver until the landlord complies with housing code standards. As long as the tenant continues to pay rent in escrow, the landlord has no cause of action to evict the tenant for nonpayment. The court may also empower the receiver to make and finance the necessary repairs with escrowed rental payments. Upon completion of the repairs and repayment of the expenses of rehabilitation, the building and the surplus of the rent escrow are returned to the owner.

The rent escrow approach can be distinguished from the rent abatement approach. First, under the rent escrow approach a hearing is required prior to the initiation of withholding, and thus the tenant knows in advance that his action is statutorily condoned. Under a rent abatement scheme, however, the tenant is forced to act without prior judicial endorsement and must hope a court will ultimately concur. A second difference is that the rent escrow approach does not stop the cash flow of rental income as does the rent abatement approach, although, admittedly, it does interrupt the flow to the landlord.

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giving the tenant standing to initiate a rent escrow. AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 3-301 (Tent. Draft 1969). Two jurisdictions allow tenants to initiate rent escrow but only where there is a petition by a specified proportion of the total tenants. New York requires one third of the tenants to join in the petition. N.Y. REAL PROP. ACTIONS LAW § 770 (McKinney Supp. 1972-1973). Connecticut requires "a majority or more of the tenants" to join in the petition. CONN. GEN. STAT. ANN. § 19-347k (Supp. 1973).

60. See note 59 supra.
64. See, e.g., CONN. GEN. STAT. ANN. § 19-347o (Supp. 1973).
65. See, e.g., CONN. GEN. STAT. ANN. § 19-347n (Supp. 1973); N.J. STAT. ANN. § 2A:42-93 (Supp. 1973). This particular section of the New Jersey statute allows the owner to petition to perform the repairs himself.
From the standpoint of the landlord, the rent abatement approach, which entirely stops the cash flow of rental income, is a harsher remedy. From the standpoint of the tenant, rent abatement entails greater risks because of the uncertainty as to whether or not his complaint will fall within judicially interpreted criteria.

III. Economic Impact of Rent Withholding

Rent withholding must be viewed from the context of the housing market to appreciate its potential impact. A number of studies in urban areas have indicated that substandard housing is concentrated in low income residential areas. A determination of the extent to which rent withholding can successfully coerce landlords into compliance with housing codes must be based on an understanding of the nature of the housing market in low income areas.

A. Housing Market In Low Income Areas

With the migration of middle income families to the suburbs, the housing stock in low income areas has undergone significant change. Previously isolated high income residential areas have tended to lose value and have also experienced a decline in rent levels as their distance from low income areas has narrowed. With the reduction of the price differential between the high and low income neighborhoods, a cycle of expansion of low income areas has developed. Unless equilibrium is reached between high and low income areas, the unstable market will allow continued expansion of low income areas.

This process of gradual expansion of low income areas into what was previously a middle class area has occurred in a number of cities. The process has been especially dramatic in St. Louis, Missouri where in the twenty year period, 1950-1970, the net migration from the city amounted to 400,000 people. One study confirming this was con-

69. URBAN DECAY, supra note 2, at 86; REAL ESTATE, supra note 2, at 14.
71. URBAN DECAY, supra note 2, at 88.
72. Id.
73. Id. at 88-89.
74. Cf. SURVEY OF ABANDONMENT, supra note 1, at 77-78 (dealing with black migration to the inner urban ghetto); HUD, supra note 21, at 29; URBAN DECAY, supra note 2, at 54-55. The cities examined in these studies included: Chicago, Cleveland, Detroit, Hoboken, New Orleans, New York, and St. Louis.
75. URBAN DECAY, supra note 2, at 54-55. There are a number of social factors which have intensified the migration of the middle income families to the suburbs. The most significant factor has been race. As black families have moved into areas...
ducted by the Institute for Urban and Regional Studies of Washington University. It observed an area comprised of a number of streets which intersected low and middle income areas and measured the changes in relative income of tenants, rental payments required, and housing quality. The study indicated a steady expansion of low income areas, decreasing rent levels as middle income areas were gradually absorbed into low income areas, and wide scale deterioration in the housing stock. The results indicated that forty-three per cent of all dwelling units condemned in the city between 1969 and 1971 were located in a single test area.

The available evidence therefore suggests that there is a decline in the quality of housing during the transition from a middle income to a low income area. This is due to the fact that the market response to a fall in rental income is an attempt to cut costs, and the cost of maintenance experiences the greatest reduction, since it is the only unfixed cost. A decrease in maintenance obviously results in a decline in

adjoining middle income areas, migration of the white middle class has accelerated. Moore, Livingston & Galland, Woodlawn, 30 PUB. INTEREST 41, 42 (1973); [hereinafter cited as Woodlawn]. REAL ESTATE, supra note 2, at 13-14; cf. URBAN DECAY, supra note 2, at 54-55. Migration to the suburbs has also been motivated by the increasing crime rate and vandalism of housing associated with low income areas. HUD, supra note 2, at 235; Woodlawn, supra, at 46; URBAN DECAY, supra note 2, at 72. The conditions of the neighborhood have a significant impact on the decision by middle income families to migrate to the suburbs. These same conditions may also have a significant impact on the decision of the landlord to rehabilitate. See TENEMENT LANDLORD, supra note 13, at 155-63; G. STERNLIEB, ABANDONMENT AND REHABILITATION, PAPERS SUBMITTED TO SUBCOMMITTEE ON HOUSING PANELS ON HOUSING PRODUCTION, HOUSING DEMAND, AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, pt. 1, H.R. 92d Cong., 1st Sess. at 316 (1971) [hereinafter cited as ABANDONMENT AND REHABILITATION].

76. URBAN DECAY, supra note 2.
77. Id.
78. Id. The study focused on widely separated blocks along a number of chosen streets. As expected, the twenty year trend of lower income tenant occupancy, lower rent levels, and declining housing quality was observed first in those blocks which were closer to the low income area. Those blocks further from the original low income areas were affected by the same trend at a later date. Id.
79. Id. at 98.
80. The quality of housing is dependent upon rental income generated. The higher the rental income, the more the landlord will have to spend on rehabilitation. See S. PARRATT, HOUSING CODE ADMINISTRATION AND ENFORCEMENT 39 (1970) [hereinafter cited as HOUSING CODE ENFORCEMENT].
82. URBAN DECAY, supra note 2, at 57.
housing quality, and as rental income continues to decrease, the rate of deterioration is accelerated. As the low income area gradually engulfs a middle income area, the low income tenant may receive a temporary rise in the quality of housing. With the lack of maintenance, however, he eventually inhabits a substandard building.

In addition to the potential income of rental property decreasing as areas change from middle income to low income, the actual income of the property decreases even further because of widespread vacancies. These vacancies occur because the emigration of middle income families exceeds the immigration of low income families.

The situation of the owner of rental property has become desperate. Coupled with income decrease has been an inability to liquidate investment. In a normal real estate market, the landlord could sell or refinance his property and realize a return on his investment. The housing market in low income areas, however, is such that neither the resale of the property nor the refinancing of the mortgage by the lending institution is an available option. With the transition of central urban areas from middle to low income family use, there has come a decline in income from rental property coupled with substantial deterioration of the quality of the property. The landlord in a low income area can neither sell nor refinance his rental property. He is locked into an insoluble dilemma.

83. Urban Decay, supra note 2, at 89. Older houses need more maintenance to remain in good condition. Thus the decrease in level of maintenance is particularly disastrous for an older house. Urban Decay, supra note 2, at 56-57.

84. Kaiser Report, supra note 3, at 95.

85. Urban Decay, supra note 2, at 89-90.

86. See note 104 infra and accompanying text.

87. HUD, supra note 21, at 67. The low income tenant may gain a temporary rise in the quality of housing, but a lack of maintenance soon dissipates this gain. See text accompanying note 84 supra. The gradual filtering of houses from middle income families to low income families provides the low income tenant with a house which, if not already deteriorated, is well on its way. See Tenement Landlord, supra note 13, at 8. A housing study in St. Louis found that forty percent of all housing occupied by non-whites in low income areas was substandard. Survey of Abandonment, supra note 1, at 21. Paradoxically, in a number of low income areas experiencing widespread vacancies there is also widespread overcrowding. Low income tenants are often too poor and the size of their families often too great to be properly housed in existing units. In St. Louis, for example, twenty-eight percent of the occupied dwelling units are overcrowded. Survey of Abandonment, supra note 1, at 21.

88. Survey of Abandonment, supra note 1, at 85.

89. Tenement Landlord, supra note 13, at 107; HUD, supra note 21, at 121, 173.

90. Kaiser Report, supra note 3, at 96; Survey of Abandonment, supra note 1, at 88-89; See text accompanying notes 109-111 infra.

91. The low income housing market described above is applicable to many but not
B. Impact of Rent Abatement

From a legal perspective, rent abatement is merely another adjunct to housing code enforcement. Rent abatement is an attempt to coerce the owner of rental property into performing repairs sufficient to comply with housing code standards by cutting off the cash flow of rental income to the landlord.

Housing code enforcement programs for low income housing have often been predicated on the assumption that slumlords were reaping huge profits from low income tenants. If this assumption were accurate, these programs would be successful in rehabilitating the low income property by diverting a portion of the slumlords' high profit margin to maintenance. It is no longer true, however, that large scale operators control the low income rental housing market. The actual landlords of low income property fall into three basic categories: elderly, small-scale absentee, and ethnic minorities. Contrary to the slumlord myth the vast majority of these owners do not realize substantial profits.

An important factor affecting the profit margin of low income housing is the necessary operating cost, which includes expenditures for property taxes, utilities, insurance, management costs, nominal mainte-
inance, and mortgage payments. George Sternlieb, in a 1966 study of Newark, New Jersey, found that the operating cost of low income housing, not even considering mortgage payments, absorbed approximately 61% of all rental income.\(^9\) While it is difficult to determine the normal operating cost for low income property, a number of recent studies have demonstrated that the operating expenses in all categories on an absolute scale are increasing faster\(^{100}\) than rental income.\(^{101}\) The most dramatic increase has been in the cost of maintenance. One recent national survey of low income housing conducted by the National Urban League found that maintenance costs alone are increasing at the rate of three to six per cent annually.\(^{102}\) This same study also determined that increasing vandalism has quadrupled maintenance expenses in a number of low income areas.\(^{103}\)

In addition, the landlord in low income areas confronts an increasing vacancy problem. In many low income areas vacancies run as high as eighteen to twenty-five per cent of the total dwelling units,\(^{104}\) reducing further the rental income received by the landlord.

Two recent studies conducted by the National Urban League and the Institute for Urban and Regional Studies of Washington University both conclude that landlords of low income rental property in most areas have reduced or totally curtailed maintenance in order to reduce costs

\(^{99}\) TEnEMENT LANDLORD, supra note 13, at 78.

\(^{100}\) Property taxes in low income areas absorb from seventeen to twenty-five percent of gross rent. ABANDONMENT AND REHABILITATION, supra note 75, at 328. Property taxes in New York City, for example, are increasing at the rate of four to six percent annually. SURVEY OF ABANDONMENT, supra note 1, at 90. Insurance is often not available in low income areas, and even when it is, the cost is extremely high. HUD, supra note 21, at 120. Insurance rates in St. Louis low income areas were found to be increasing at the rate of seven percent annually. Id. at 59. Capital is important to rental property, for substantial mortgages are normally needed. Presently, capital is not available in low income areas in most cases. See text accompanying notes 109-11 infra. As the interest rate increases, the effect on low income property will become even more evident. ABANDONMENT AND REHABILITATION, supra note 75, at 340.

\(^{101}\) SURVEY OF ABANDONMENT, supra note 1, at 93; Woodlawn, supra note 75, at 46.

\(^{102}\) SURVEY OF ABANDONMENT, supra note 1, at 90. One case study indicated an increase in the cost of maintenance of eight percent annually. HUD, supra note 21, at 67.

\(^{103}\) SURVEY OF ABANDONMENT, supra note 1, at 86. This drastic increase in maintenance costs was verified in case studies conducted by the Department of Housing and Urban Development. HUD, supra note 21, at 55, 116.

\(^{104}\) Sternlieb noted that vacancies in Newark, New Jersey were eighteen percent of the dwelling units. TEnEMENT LANDLORD, supra note 13, at 93. In two other case studies vacancy rates of twenty-five percent were noted. HUD, supra note 21, at 67-68, 122.
and to continue receiving a return on their investment.\textsuperscript{105} Such evidence demonstrates that the landlord of low income property is in the midst of a cost squeeze; he is without sufficient income to meet the needs of even nominal maintenance, much less to make the repairs required by the housing codes.\textsuperscript{108}

In considering the ability of the landlord to conform to housing code standards, the cost of compliance must be included. As the report of the President’s Committee on Urban Housing indicates, the cost of rehabilitation averages about $9,000 per dwelling unit,\textsuperscript{107} which in many instances exceeds the market value of the property.\textsuperscript{108}

The large amounts of capital necessary to comply with housing code standards can only be provided by outside financing. This financing of repairs requires either that new mortgages be placed on the property or that old loans be recast.\textsuperscript{109} Unfortunately, financial institutions have adopted a policy known as “redlining” which provides no new financial assistance within low income areas.\textsuperscript{110} Where loans have been made

\begin{itemize}
\item \textsuperscript{105} Library of Congress, \textit{supra} note 81, at 104; Urban Decay, \textit{supra} note 2, at 56-57; Survey of Abandonment, \textit{supra} note 1, at 86. In a number of low income areas, even if maintenance were completely curtailed, the landlord could not break even. Survey of Abandonment, \textit{supra} note 1, at 34; HUD, \textit{supra} note 21, at 67, 113. One study indicated that in at least seven percent of the housing stock of New York, the curtailment of maintenance is taking place. This statistic includes low, middle, and high income family dwellings. Survey of Abandonment, \textit{supra} note 1, at 15.
\item \textsuperscript{106} Without maintenance, the property will completely deteriorate in a short time. A reduction in maintenance is only a temporary means by which the landlord can continue to receive income from the property. This postpones, but does not prevent, abandonment in many cases. Library of Congress, \textit{supra} note 81, at 104; Urban Decay, \textit{supra} note 2, at 56-57; Survey of Abandonment, \textit{supra} note 1, at 86. This curtailment of maintenance can also be viewed as a form of disinvestment in which the landlord attempts to recapture his investment before he walks away. Survey of Abandonment, \textit{supra} note 1, at 15.
\item \textsuperscript{107} Kaiser Report, \textit{supra} note 3, at 101. These figures are taken from data collected on rehabilitation costs only in low income areas.
\item \textsuperscript{108} See Abandonment and Rehabilitation, \textit{supra} note 75, at 321; Boston Municipal Research Bureau, \textit{Costs and Other Effects on Owners and Tenants of Repairs Required Under Housing Code Enforcement Programs} pt. I, at 3 (1968). [hereinafter cited as \textit{Costs and Other Effects on Owners}]. There are also non-monetary costs of rehabilitation. The duration of loans required to finance housing code enforcement is likely to exceed the expected life of the premises. Abandonment and Rehabilitation, \textit{supra} note 75, at 322. Rehabilitation may be wasteful if the neighborhood is without potential. Kaiser Report, \textit{supra} note 3, at 104-05.
\item \textsuperscript{109} Cf. Abandonment and Rehabilitation, \textit{supra} note 75, at 318.
\item \textsuperscript{110} Kaiser Report, \textit{supra} note 3, at 96; Survey of Abandonment, \textit{supra} note 1, at 90; Abandonment and Rehabilitation, \textit{supra} note 75, at 318; HUD, \textit{supra} note 21, at 238. Numerous reasons for the trend of disinvestment by lending institutions have been noted. Primarily, there has been a limited supply of capital to meet the
for low income property, the terms have included a high rate of interest over a short period of time.\footnote{111}

Because of insufficient rent and high rehabilitation costs, the landlord faced with housing code enforcement is forced to increase rents if he is to maintain a positive return on his low income property.\footnote{112} This is a result which few low income tenants desire or can afford.\footnote{113} The ability of low income tenants to pay increased rent, of course, is limited. It has been demonstrated that rents in low income areas often are tied not to the quality of the housing, but to the financial capability of the tenant.\footnote{114} An increase in the quality of housing by no means insures that the landlord can successfully demand an increase in the monthly rent. Thus, the landlord who must comply with housing code standards is faced with an intractable economic situation. The landlord who is forced to comply with housing codes under a rent abatement scheme, however, is faced with an even more difficult problem because his cash flow of rental income has been terminated.

Rent abatement, like other means of housing code enforcement, places a significant number of the landlords of low income property in the position of having to abandon their property.\footnote{115} Although housing code

\begin{footnotes}
\item[111] Survey of Abandonment, supra note 1, at 90.
\item[112] San Francisco Planning and Urban Renewal Association, A SPUR Report on the San Francisco Redevelopment Process 6 (1972); Housing Code Enforcement, supra note 80, at 39; L. Keyes, The Rehabilitation Planning Game 8 (1969); Kaiser Report, supra note 3, at 106; Douglas Report, supra note 15, at 286; Abandonment and Rehabilitation, supra note 75, at 322. A study conducted by the Boston Municipal Research Bureau concluded that increases forced by housing code enforcement often place the rent above the going market rate for similar accommodations. Costs and Other Effects on Owners, supra note 108, pt. II at 1.
\item[113] See note 80 supra.
\item[114] A study conducted in Columbus, Ohio found that rents in low income areas are tied to the ability of tenants to pay. Property improvement in low income areas did not increase rental income. T. Vaughn, The Landlord-Tenant Relation in Low Income Areas, in Social Problems 212-13 (1968); See also Kaiser Report, supra note 3, at 104; Housing Code Enforcement, supra note 80, at 41.
\item[115] Abandonment is a process which includes more than buildings vacated by their
\end{footnotes}
enforcement is not the sole cause of abandonment, it has served as the decision point at which abandonment has been perceived as the only alternative.

The potential acceleration in the rate of abandonment because of housing code enforcement programs cannot be minimized. The phenomenon has been documented in a number of studies throughout the country. Chicago demonstrates the effect a stringent code enforcement program can have on the rate of abandonment. As many as four thousand units per year were demolished under the code enforcement program because the owners decided that abandonment was economically more feasible than rehabilitation.

Abandonment would not be as serious a condition if it could be viewed as the end product of a long filtering process of housing from high income family use to low income family use by which the poor were able to occupy better housing and discard that of the poorest landlords. It also involves an intermediate step where the landlord does not continue to provide services and does not pay taxes or mortgages. This disinvestment of the landlord is the essence of abandonment. See note 75 supra.

116. Previous discussion of the low income housing market outlined the major socio-economic factors which are significant in creating conditions resulting in abandonment. See note 75 supra.

117. “The owner faced with code enforcement with a limited rent horizon simply will not make the investment but rather will walk away from the parcel.” ABANDONMENT AND REHABILITATION, supra note 75, at 323. This conclusion was also reached in a number of other studies and articles. DOUGLAS REPORT, supra note 15, at 286; Grigsby, supra note 12, at 535; HOUSING CODE ENFORCEMENT, supra note 80, at 42; HUD, supra note 21, at 237; SURVEY OF ABANDONMENT, supra note 1, at 64; LIBRARY OF CONGRESS, supra note 81, at 62.

118. SURVEY OF ABANDONMENT, supra note 1, at 6; HUD, supra note 21, at 7; ABANDONMENT AND REHABILITATION, supra note 75, at 330. The cities covered in these studies included Chicago, Detroit, Hoboken, New York and St. Louis. One study of four low income areas in Philadelphia, where concentrated code enforcement programs were initiated, disclosed increased abandonment in only one area. Law Reform Man, supra note 92, at 625. Most landlords in the Philadelphia areas studied had no mortgage payments to cut down on rental income, and these areas have very low housing density. Thus the areas studied seem to be atypical. See ABANDONMENT AND REHABILITATION, supra note 75, at 334-35; HUD, supra note 21, at 234-35. The author of the study in Philadelphia confirms the point discussed earlier in note 64 supra that it is a mistake to assume that all low income areas are alike. Law Reform Man, supra note 92, at 627.

119. ABANDONMENT AND REHABILITATION, supra note 75, at 326. The National Urban League found in its study, that in St. Louis sixteen percent of the structures in the low income areas studied were abandoned. SURVEY OF ABANDONMENT, supra note 1, at 15. This sixteen percent figure does not take into account more than 24,000 building demolitions over the last decade, many of which were demolished because they were abandoned. HUD, supra note 21, at 82.
quality.\textsuperscript{120} The problem is that abandonment is not selective; it affects not only the lowest quality housing, but also essentially sound housing easily capable of rehabilitation.\textsuperscript{121} The real tragedy of abandonment is that in many cases low income families are forced to move to housing which is of lesser quality than that which has been abandoned.\textsuperscript{122} Unless there is a neat correlation between the most aggressive tenants and the lowest quality housing, rent withholding can only serve to aggravate the abandonment problem.

Abandonment is dangerous not only because it destroys basically sound housing, but also because it adversely affects the surrounding neighborhood. “[T]he process of abandonment, while in part caused by area characteristics, in turn engenders a degeneration of the same area.”\textsuperscript{123} The dynamic nature of the process of abandonment has been described in a study by the National Urban League as “an aspect of a socially destructive process that makes entire neighborhoods and, in some cases, entire cities uninhabitable.”\textsuperscript{124}

The potential consequences of a legal action forcing compliance with housing codes by utilizing rent withholding cannot be ignored.\textsuperscript{125} To tenants as well as landlords, rent increases and housing abandonment are unacceptable results.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{120} ABANDONMENT AND REHABILITATION, \textit{supra} note 75, at 315-16.
  \item \textsuperscript{121} See \textit{Survey of Abandonment}, \textit{supra} note 1, at 6; \textit{Abandonment and Rehabilitation}, \textit{supra} note 75, at 316; \textit{Housing Code Enforcement}, \textit{supra} note 80, at 50.
  \item \textsuperscript{122} \textit{Survey of Abandonment}, \textit{supra} note 1, at 6.
  \item \textsuperscript{123} \textit{Abandonment and Rehabilitation}, \textit{supra} note 75, at 330.
  \item \textsuperscript{124} \textit{Survey of Abandonment}, \textit{supra} note 1, at 6. \textit{See also HUD, \textit{supra} note 21, at 7.}
  \item \textsuperscript{125} Abandonment is not a desirable result when the goal attempted to be achieved is rehabilitation of existing housing. If the goal is complete demolition of housing in an urban renewal area, abandonment may allow the urban renewal agency to acquire the property at little or no cost. This acquisition of property through housing code enforcement which leads to abandonment would reduce one of the major costs of urban renewal projects, that of land acquisition. Whether this procedure would amount to a taking of property without just compensation in violation of the fifth and/or fourteenth amendments is a question beyond the scope of the article.
  \item \textsuperscript{126} Abandonment reduces the number of dwellings available to the low income tenant. This is especially problematic in an area where the overall supply of low income housing is tight. This problem was observed in a study of Sacramento, California. F. \textit{Case}, C. \textit{Elias}, Jr., W. \textit{Hippaka}, S. \textit{Lane} \& W. \textit{Smith}, \textit{Housing the Underhoused: The California Studies} ch. VI, at 7 (1971) \cite{CAL. STUDIES}. It should be noted that the short supply of low income housing in Sacramento is probably not typical of low income areas, for vacancies may run as high as twenty-five percent. See text accompanying note 104 \textit{supra}. Although vacancies often exist, there is never an oversupply of low income housing meeting housing code standards. See note 87 \textit{supra}.
\end{itemize}
C. Impact of Rent Escrow

Like rent abatement, rent escrow is a mechanism for housing code enforcement.\(^{127}\) In contrast, however, it attempts to force compliance with housing codes by diverting rental income from the landlord to a court or a court appointed receiver.\(^{128}\) Although rent escrow programs are not as harsh as rent abatement programs, they similarly effect the precipitation of rent increases and/or the abandonment of property.\(^{129}\) Notwithstanding these similar results, the management of rental property by a court or a court appointed receiver creates unique difficulties.

A major problem with rent escrow programs is the time lag between the initiation of the rent escrow and the completion of rehabilitation. Because the cash flow of rental income is negligible, buildings are often never brought up to housing code standards.\(^{130}\) This situation was encountered in a New York receivership program in which eighteen buildings were placed in receivership.\(^{131}\) Of these, thirteen will never pay for themselves, and five will do so only after an extended period of time.\(^{132}\) As these results demonstrate, once the receiver makes repairs sufficient to meet housing code standards, he must operate the buildings for an indefinite period before the expenses of rehabilitation are reimbursed.\(^{133}\) In a situation where a receiver has been in control of rental property for a number of years, the owner is often unwilling to reassume control. The experience in Connecticut has been that by appointment of a receiver, "the courts often order, indirectly the owner's abandonment of the property."\(^{134}\) The failure to rehabilitate a significant number of buildings, to repay the cost of rehabilitation in those eventually repaired, and to avoid municipal acquisition of slum property\(^{135}\) has

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\(^{127}\) See note 93 \textit{supra}.

\(^{128}\) See text immediately following note 29 \textit{supra}.

\(^{129}\) Since rent escrow and rent abatement are merely different types of housing code enforcement mechanisms, the analysis of the preceding section on the impact of rent abatement is equally applicable to rent escrow programs. A rent escrow is not as harsh a remedy as rent abatement, however, since the rental income is still available for use in rehabilitation. See text accompanying notes 92-126 \textit{supra}.

\(^{130}\) \textit{Abandonment and Rehabilitation, supra} note 75, at 326.

\(^{131}\) \textit{N.Y. Times}, Feb. 12, 1964, at 1, col. 1.

\(^{132}\) \textit{Id}.

\(^{133}\) \textit{Tenant Movement, supra} note 10, at 660; \textit{cf. Abandonment and Rehabilitation, supra} note 75, at 326.


\(^{135}\) The result of rent escrow programs has proven to be the eventual ownership of property by the municipal government. \textit{Abandonment and Rehabilitation, supra} note 75, at 326. The Chicago experience indicates that municipal management of property under receivership has failed. Frequently, financial difficulty has allowed rehabili-
persuaded local Connecticut governments to abandon rent escrow programs.\textsuperscript{136}

The use of rent escrow programs has also increased the investment risks of institutions which finance low income property. Often the rental income is insufficient to meet the expense of repair, and mortgage payments must be utilized to help meet this cost.\textsuperscript{137} While such use may give the receiver more working capital, it has the effect of increasing the risk in financing low income property. As noted previously, the lack of institutional financing in low income areas is a significant factor contributing to the present unstable low income housing market.\textsuperscript{138} Increasing the risk of financing low income property can only further contribute to an unstable market condition.\textsuperscript{139}

Rent escrow, in addition to increasing rents and abandonment, has proved impractical because of significant time delays and deterrence of institutional financing in low income areas. The unanticipated result has been that rent escrow, like rent abatement, has not provided low income tenants with a solution to substandard housing.

IV. POLICY CHANGES FOR MORE EFFECTIVE HOUSING CODE ENFORCEMENT

Since the impact of rent withholding threatens results unacceptable to either the landlord or the tenant, it is evident that governmental policy changes are appropriate. The solution necessarily must include a plan for effective housing code enforcement which will benefit the tenant, without forcing the landlord to abandon.

\textsuperscript{136}Tenant Movement, supra note 10, at 660. Connecticut housing authorities decided not to utilize rent escrow in the enforcement of housing codes. The statute involved was similar to rent escrow statutes with the exception that rent escrow statutes grant the tenant standing to initiate rent escrow. See text accompanying notes 56-59 supra.

\textsuperscript{137}Tenant Movement, supra note 10, at 660. Even by using the money normally paid to the mortgage holder, working capital may still be insufficient.

The use of rent for rehabilitation, rather than for payment of mortgages, is often the result of priority contests. The issue of these contests is whether or not the mortgagee's claim should be subordinated to that of the receiver who became indebted in the rehabilitation of the rental property. Tenant Movement, supra note 10, at 660. In Connecticut a lien is placed on all rents until the cost of rehabilitation is recaptured. Conn. Gen. Stat. Ann. § 19-347c (1969).

\textsuperscript{138}See text accompanying notes 88-90 supra.

\textsuperscript{139}See Woodlawn, supra note 75, at 47-48.
Presently, the most prohibitive barrier to effective code enforcement is the inflexible nature of the housing codes. They apply the same criteria both to existing housing and to housing under construction.\textsuperscript{140} This uniform set of standards governs every house, regardless of age or of the physical and economic condition of the neighborhood.\textsuperscript{141} The very requirement of such high standards deters rehabilitation.\textsuperscript{142}

Two approaches would provide a more viable set of standards for housing code enforcement. Initially, the development of two housing codes, one for existing housing and another for housing being constructed,\textsuperscript{143} would reduce the cost of rehabilitation, and provide a more realistic standard. A second approach would be to require correction only of those defects which could be repaired at a reasonable expense.\textsuperscript{144} This would not sanction unsafe housing and in fact is the type of flexible housing code enforcement effectively employed in Great Britain.\textsuperscript{145} When a neighborhood is in need of total rehabilitation, the English mobilize short term improvements until the larger task is completed.\textsuperscript{146} This procedure enjoys the dual advantage of maximizing the utility of investment and reducing rehabilitation cost.\textsuperscript{147}

The adoption of a more reasonable set of housing codes will not only

\textsuperscript{140} Curry, The Federal Role in Housing Code Enforcement, 3 URBAN LAW. 567, 569 (1971) [hereinafter cited as FEDERAL ROLE]. Housing codes written mainly for new construction purposes can contain such provisions as the distance between studs, which for the rehabilitation of a building is irrelevant. Also they often ignore items important to a low income tenant such as rodent control. TENEMENT LANDLORD, supra note 13, at 233; Grigsby, supra note 12, at 53.

\textsuperscript{141} Grigsby, supra note 12, at 535. Housing codes do not consider the hidden costs of rehabilitating a building which because of its age is not utilized in the most efficient manner. See note 108 supra.

\textsuperscript{142} ABANDONMENT AND REHABILITATION, supra note 75, at 321-22. See text accompanying note 107 supra.

\textsuperscript{143} The Department of Housing and Urban Development is presently considering the use of two housing codes. FEDERAL ROLE, supra note 140, at 569; see HUD, supra note 21, at 277; URBAN DECAY, supra note 2, at xix.

\textsuperscript{144} 1 NEW YORK STATE DIVISION OF HOUSING, HOUSING CODES 79 (1960). A number of factors could be introduced to determine what is a reasonable expense, including the cost of the repairs needed, the value of the property, and the physical and economic condition of the neighborhood.

\textsuperscript{145} Id.

\textsuperscript{146} Mandelker, supra note 70, at 604. Implicit in this type of system is the recognition that housing code enforcement is not enough. One study proposed that in some areas the best approach would be to require only stopgap repairs. J. SLAVET & M. LEVIN, NEW APPROACHES TO HOUSING CODE ADMINISTRATION 28 (1969). Slavet and Levin suggest this solution but caution that stopgap repairs “shouldn’t be used as a permanent substitute for or as an alternative to renewal.” Id. (footnote omitted).

\textsuperscript{147} The administrative problem would be greatly increased because of the flexible nature of the standards. ABANDONMENT AND REHABILITATION, supra note 75, at 323.
affect the viability of conventional housing code enforcement programs but also the potential success of rent withholding mechanisms. If the housing codes required the landlord to repair only that which was reasonable, the likelihood of bargaining between the landlord and the tenant would increase, and rent withholding could enhance the tenant's bargaining position. This would be especially true if the landlord lacked motivation to rehabilitate.

The second area requiring reformation is the high level of property taxes assessed in low income areas. The present level of taxation has deterred code enforcement because money needed for rehabilitation has to be paid to the city in taxes. Presently, property taxes in low income areas absorb twenty-five per cent of gross monthly rent in many low income areas. One reason for the high level of property taxes in low income areas is that taxes are based on the value of the land rather than a realistic assessment of its income potential. Since the true value of rental property depends upon its ability to earn income, the failure to consider earning power results in over appraisal in low income areas.

In addition, the fear of having property reassessed after rehabilitation, thus leading to higher taxes, has further deterred landlords from improving their property.

Consequently, property taxes must be substantially reduced in low income areas. The problem is that cities are already without adequate sources of revenue. Reducing city taxes might create further hardship. On the other hand, such a reduction could prevent the loss of tax revenue through abandonment; thus a partial balance might be attained.

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148. See note 93 supra and accompanying text.
150. Tenement Landlord, supra note 13, at 217.
151. See notes 94-106 supra and accompanying text.
152. See note 100 supra.
153. Tenement Landlord, supra note 13, at xxi.
155. Tenement Landlord, supra note 13, at 211-12; see note 154 supra.
156. Inner-City Housing, supra note 96, at 118; Survey of Abandonment, supra note 1, at 48.
157. The survey conducted by the National Urban League indicated that Hoboken,
The most substantial limitation on housing code enforcement is the absence of an adequate financial package. The first element of this financial package is the provision of capital necessary for rehabilitation. The large amounts of money necessary for rehabilitation are presently not available to the landlord of low income property from institutional lenders. Instead, as noted previously, institutional lenders are withdrawing from low income housing markets by refusing to refinance loans.

Federal programs providing capital for rehabilitation do exist, but these programs have been implemented almost exclusively in connection with concentrated code enforcement activities within specific project areas. One program, known as the 312 program, seeks to provide the necessary working capital either through new loans to cover the cost of rehabilitation or through the refinancing of old mortgages to cover both the old mortgage and rehabilitation. These loans are particularly beneficial because the annual interest rate is three percent. A second

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New York will not enforce housing codes if it means the loss of buildings from the tax rolls. SURVEY OF ABANDONMENT, supra note 1, at 48. It is not contended that the loss due to the reduction of property taxes will balance the loss averted by controlling abandonment. It is contended that the offset could be significant.

158. See note 109 supra and accompanying text.
159. See note 110 supra.
160. Id.
161. Federally Assisted Cost Enforcement programs (FACE) provide grants to local government to cover a proportion of the cost of housing code enforcement in a concentrated area under authority of 42 U.S.C. § 1468 (1970). Loans and grants are available within those areas specified for concentrated code enforcement under authority of 42 U.S.C. § 1452b (1970) and 42 U.S.C. § 1466 (1970) respectively. Although these loans and grants can be made available in other areas, the conditions for which this is possible are severely limited. 42 U.S.C. § 1452b(a)(1) (1970) and 42 U.S.C. § 1466 (1970). Loans and grants under these programs are generally available only in areas of concentrated code enforcement. ABANDONMENT AND REHABILITATION, supra note 75, at 323.
162. 42 U.S.C. § 1452b (1970); see ABANDONMENT AND REHABILITATION, supra note 75, at 321.
163. 42 U.S.C. § 1452(c)(4)(A) (1970). Unless the old mortgage is refinanced, a rehabilitation loan would simply add to the existing expenditures for operating expenses. With refinancing, the overall cost of the old mortgage and the rehabilitation is lowered, making rehabilitation more feasible. ABANDONMENT AND REHABILITATION, supra note 75, at 323. Presently, only those landlords who meet certain income and residence criteria can qualify for the refinancing provision. Id. One problem in recasting mortgages is that they are greatly inflated when slum property is involved. Unless the government adjusts these with an appropriate sale to assessment ratio, it will be paying off these inflated mortgages. Id.
program presently available, known as the 115 Rehabilitation Grants,\footnote{165} provides working capital by a direct grant to the property owner. This program provides for grants of up to $3,500.\footnote{166} The 115 Rehabilitation Grants are so severely limited both in the amount of aid available and in the criteria used to determine recipients, that they can offer but minimal assistance to the beleaguered landlord.

Present federal programs can be criticized on several grounds. First, their scope is too confined. Code enforcement areas do not include all areas in need of rehabilitation, particularly those areas just beginning the process of deterioration. Immediate aid in these latter areas could avoid the necessity of substantial rehabilitation.\footnote{167} The programs also rely on FHA standards which are not only unrealistically high\footnote{168} but which also require costly certification of loans even for small projects.\footnote{169} Presently, rent withholding, like other forms of housing code enforcement, cannot utilize federal financing of rehabilitation unless the property involved is within a specific code enforcement area.\footnote{170} The expansion of this type of financing is critical to adequate housing code enforcement. As one study of this problem indicated, the availability of low interest loans greatly increases the number of structures for which rehabilitation is feasible.\footnote{171}

While the availability of low interest loans to landlords increases the number of buildings for which rehabilitation is possible, where deterioration is substantial, rent subsidies to low income tenants are essential.\footnote{172} The availability of such subsidies is the second element required of any financial package. Under present federal programs, tenant housing subsidies are only available in the rental of newly constructed dwellings and urban renewal,\footnote{173} but are not available to tenants of presently existing substandard housing.\footnote{174} Thus, low income tenants who pres-
ently lack adequate financial resources with which to demand better housing\textsuperscript{175} are not eligible to receive subsidies with which to pay higher rent which in turn could provide landlords with the capital necessary for rehabilitation.

The essential elements of the financing package for rehabilitation are lacking. Working capital through loans is available only in limited areas, while rent subsidies are not available at all. Housing code enforcement, including rent withholding, "is simply not feasible without adequate financing mechanisms."\textsuperscript{176}

CONCLUSION

As a legal response to a social problem, it is readily apparent that rent withholding has failed miserably in low income areas. Rather than supplying the low income tenant with a bargaining advantage useful in obtaining adequate housing, it instead serves to his detriment, precipitating rent increases and frequently forcing abandonment. The housing codes and rent withholding mechanisms have ignored the fact that:

[U]ltimately the question gets back to one of economics. The gadgetry will work if it pays the owner to repair. Normally, if it doesn't pay the owner to repair and live up to code standards, the best remedial devices in the world won't do the job. . . .\textsuperscript{177}

\textit{David W. Tredway}

\begin{footnotes}
\footnote{The paradox of the welfare system is that, although it provides a subsidy to welfare recipients, "it is the standard American welfare policy to pay clients an amount to keep them just below the line considered by the same American public to constitute standard housing." \textit{Housing Code Enforcement}, supra note 80, at 40 (emphasis added).}
\footnote{175. \textit{Cal. Studies}, supra note 126, ch. II, at 16.}
\footnote{176. \textit{Abandonment and Rehabilitation}, supra note 75, at 322.}
\end{footnotes}