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Landlord and Tenant--The Cost of Repair Necessary to Bring a Leasehold into Housing Code Compliance As a Relevant Factor in the Determination of Whether the Code is Constitutional As Applied

James Kevin Checkett

pense involved in the present monthly accounts and conceivably could amount to less.

In conclusion, it is evident that the formulation of a statutory scheme allowing the parties freedom to contract according to individual circumstances while protecting their respective interests is preferable to the decision in *Jamaica* which inflexibly forced the mortgagor to make monthly escrow payments and at the same time required the mortgagee to pay interest on the account to the mortgagor.

Martha Hardwick

LANDLORD AND TENANT—THE COST OF REPAIR NECESSARY TO BRING A LEASEHOLD INTO HOUSING CODE COMPLIANCE AS A RELEVANT FACTOR IN THE DETERMINATION OF WHETHER THE CODE IS CONSTITUTIONAL AS APPLIED. *City of St. Louis v. Brune*, 515 S.W.2d 471 (Mo. 1974).

The common law rule in the field of landlord and tenant is that of *caveat emptor*. That is, a lease is a conveyance and not a contract and there exists no implied warranty in regard to the condition of the leased premises.[1] This rule, long ingrained in American and English jurisprudence, has recently given way to the more modern concept of a warranty of habitability.[2] A reason often given for this change is that *caveat emptor*, although it may have sufficed for the medieval, feudal, agrarian societies, is now inadequate to cope with the problems which have arisen in the present urban housing environment. The warranty of habitability is often measured in terms of whether or not the leased premises are in compliance with the local housing code at the time of the lease inception.[3] Based on the theory that the courts will not enforce an illegal contract, actions by landlords against tenants for nonpayment of rent have been denied upon a showing of a code violation.[4]

1. 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1230 (1959 repl.).
2. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).
3. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
4. Brown v. Southall Realty Co., 53 N.J. 444, 251 A.2d 268 (1969).

The housing code has become a substantial factor to be reckoned with in landlord and tenant law, as well as in the field of housing and urban renewal.[5] The rule of judicial noninquiry into the wisdom or judgment of the legislature, so long as the judgment is reasonable, has resulted in shifting the burden of proof from the person who asserts the code validity to the one seeking to challenge the code.[6] This principle has served to aid housing codes in their vitality and growth. Although it has been the policy of Congress since 1937 to provide all citizens with safe and sanitary housing,[7] decades later, a decent home for every American is still but an ideal.[8] Thus, the questions arise what beneficial effect, if any, results from the existence of housing codes, and what is the extent of judicially imposed constitutional limits on the legislative power to govern by these codes. *City of St. Louis v. Brune*[9] seems to give a tentative answer to these questions. This decision will be relevant to all jurisdictions if it marks a trend away from judicial rubber-stamping of code validity.[10]

In *Brune*, the defendant landlord stipulated that his rental property was in violation of the city ordinance which set minimum housing

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5. *See generally* Marco & Mancino, *Housing Code Enforcement—A New Approach*, 18 CLEV.-MAR. L. REV. 368 (1969); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Note, *The Plight of the Indigent Tenant: The Failure of the Law to Provide Relief*, 5 SUFFOLK U.L. REV. 213 (1970); Note, *Housing Codes: Court Determination of Reasonableness*, 23 U. FLA. L. REV. 195 (1970).

6. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Block v. Hirsch, 256 U.S. 135 (1921). These decisions indicate a willingness by the judiciary to presume legislative regulation constitutionally valid so long as "reasonableness" is demonstrated.

7. Housing Act of 1937, ch. 896, § 1, 50 Stat. 888 (1937), *as amended* 42 U.S.C.A. § 1437 (Supp. 1975). The section, as originally enacted, provided:

> It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.

8. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 301, 79 Stat. 474 (repealed by Act of Dec. 31, 1970, Pub. L. No. 94-609, § 503(5), 84 Stat. 1786). The section provided in part:

> (a) The Congress finds that the general welfare of the Nation requires that local authorities be encouraged and aided to prevent slums, blight, and sprawl, preserve natural beauty, and provide for decent, durable housing so that the goal of a decent home and a suitable living environment for every American family may be realized as soon as feasible.

9. 515 S.W.2d 471 (Mo. 1974).

10. There are other courts which have also recently denied validity to similar code provisions. *See* Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. 1970); Gates v. Housing Appeals Board, 10 Ohio St. 2d 48, 225 N.E.2d 222 (1967); Dente v. City of Mt. Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (Sup. Ct. 1966).

standards.[11] The ordinance required each dwelling unit in the city to have a tub or shower, in good working condition, equipped with hot and cold water. The defendant urged the Missouri Supreme Court to rule the ordinance unconstitutional as in contravention of the Fourteenth Amendment to the United States Constitution as unreasonable, arbitrary, and confiscatory. He contended that the ordinance bore no reasonable relationship to health, welfare, or safety, and therefore deprived him of his property for public use without just compensation.[12] Although the court was not willing to completely agree with the defendant, it concluded that the attendant circumstances were such as to make compliance unreasonable and, therefore, held the ordinance to be unconstitutional as applied.[13] In upholding the taking argument, the court was pursuaded by the medical expert testimony given on behalf of the defendant to the effect that there was no medical requirement of pipes and a tub and that their absence was not detrimental to the occupants.[14]

Especially noteworthy is the court's consideration of the cost involved in putting the premises into conformance with the code as a relevant factor going to the question of reasonableness.[15] In a time when the trend is toward a heavy judicial presumption of code validity, no matter what the cost, this is truly a significant development.

The crux of *Brune* lies in the constitutional application of the ordinance to the property and the landlord in question. It is widely recognized that a landlord's cost in bringing property into code conformance will not be relevant so long as the requirement of the code is not unreasonable.[16] This may be viewed in conjunction with the concept that a code is a legislative policy which places a duty of compliance upon the landlord.[17] In fact, authoritative writers give code con-

11. ST. LOUIS, MO., HOUSING CODE, ORDINANCE 51637, § 390.080 (1969). § 390.080 forbade the occupancy of any dwelling unit not in compliance with the ordinance; § 390.040 required as a minimum that each dwelling unit "shall have a tub or shower bath in good working condition, properly connected to approved hot and cold water and sewer systems in the toilet room or in a separate room adjacent to such dwelling unit."

12. 515 S.W.2d at 472.

13. *Id.* at 476-77.

14. *Id.* at 474.

15. *Id.* at 476.

16. *See* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Dankner v. City of New York, 20 Misc. 2d 557, 194 N.Y.S.2d 975 (Sup. Ct. 1959).

17. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). This was perhaps the first judicial pronouncement that the minimum standard of habitability, as set forth by the housing code, was a public and social policy.

formance a positive connotation by advocating that the degree to which a building is in conformance should be a determinative factor in fixing compensation in eminent domain proceedings,[18] and that the cost of compliance should only be weighed in terms of the value of the property after such compliance is achieved.[19]

Upon such a background, the Missouri Supreme Court sought to weigh the cost of compliance against the public health goal of the ordinance. The circumstances were such as to tip the scales in favor of the landlord. The court apparently felt that a cost of $1200 per unit to install the tub or shower connection to hot water was too financially burdensome relative to the police power objective sought. The court gave great deference to evidence that the property had little or no resale or mortgage value. Also significant was the fact that the tenants were largely on fixed incomes and could not afford the inevitable rent increase. The court sought to alleviate urban blight with this decision upon the rationale that conformance would cause the landlord to abandon the property which in turn would create more slums and deplete the city tax base. Besides, the court reasoned, the tenants apparently did not mind living without bathing facilities as long as the low rent rate continued.[20]

The ramifications of the *Brune* decision may bewilder contemporary legal thought. There are landlords throughout the country in the same position as was Mr. Brune. Code provisions requiring hot water bathing facilities are prevalent in Oklahoma[21] as well as the rest of the nation.[22] It would be appropriate to consider the effects of such a decision on any landlord or tenant involved and the urban environment surrounding.

As the dissent in *Brune* points out, the effect of the majority decision will be to exempt the worst housing from the province of the hous-

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

19. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 281 (1971).

20. 515 S.W.2d at 476.

21. TULSA, OKLA., MINIMUM HOUSING CODE § 14.04 (1973); OKLAHOMA CITY, OKLA., CODE art. VII, § 19-58 (1972).

22. Some of the nationally recognized uniform and model codes, often adopted in whole or in part by various cities, which require such facilities are: BASIC HOUSING CODE; BUILDING OFFICIALS CONFERENCE OF AMERICA, INC.; NEW YORK STATE MODEL CODE; SOUTHERN STANDARD CODE, vol. III; WEST CAL. STATE HOUSING ACT (1939). *See also* U.S. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, S. DOC. No. 91-34, 91st Cong., 1st Sess. 273-307 (1968).

ing code.[23] That is, the areas and people for which the code was enacted will now be beyond its reach, provided the defense is established that the dwelling is so deteriorated, and the cost is so great, as to make the improvement a substantial financial burden for the landlord. The issue is reduced to a balancing test between the effect of compliance to the public health weighed against the financial strain on the landlord.

While the *Brune* decision may be an easy one to criticize both in the area of constitutional law and urban renewal, formulating a more equitable solution is the challenge.

Perhaps the basic problem with housing codes is that, although they set forth minimum standards and seek to force property owners into compliance, they simply have not aided in the struggle against housing deterioration.[24] Many critics fail to realize that the landlord simply must make a profit in order to keep his capital in slum real estate, a very high risk investment.[25] Further compounding the problem are such factors as the low level of education of many slum dwellers, a high crime rate and the lethargic attitude of most slum landlords and tenants. Moreover, slum investments do not react according to the usual market forces. The last point is reflected in *Brune* by the court's acknowledgment that the tenants were willing to live without hot water showers or tubs so long as they were permitted to pay low monthly rent rates.[26] The problem then is to compose a solution which will insure safe and sanitary housing for tenants on low,

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23. 515 S.W.2d at 480.

24. *See* Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW AND CONTEMP. PROBLEMS 220 (1967). For a discussion of how housing codes may contribute to problems of abandonment see G. Sternlieb, *Housing Abandonment: What is to be Done?*, in POLITICAL POWER AND THE URBAN CRISIS 548-49 (A. Shank ed. 1973). Housing codes are also, in many cases, inadequate to accommodate new building materials and techniques. D. NETZER, ECONOMICS AND URBAN PROBLEMS: DIAGNOSIS AND PRESCRIPTION 91-98 (1970). For estimates of how many million people reside in housing that fails to comply with the local housing code see B. Frieden, *Housing and the National Urban Goals: Old Policies and New Realities*, in THE METROPOLITAN ENIGMA: INQUIRIES INTO THE NATURE AND DIMENSIONS OF AMERICA'S "URBAN CRISIS" 164-65 (J. Wilson ed. 1968).

25. S. Greer, *Urban Renewal and American Cities*, in TOWARD A NATIONAL URBAN POLICY 295 (D. Moynihan ed. 1970). Profit probability generally controls the decisions of whether the landlord will comply with the housing code or abandon the premises. *See* W. Grigsby, *A General Strategy for Urban Renewal*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 641 (J. Wilson ed. 1963). For a discussion of possible alternatives to the traditional profit motivations for landlords, as researched by the Harvard Graduate School of Business Administration see M. KILBRIDGE, URBAN ANALYSIS 83-112 (1970).

26. 515 S.W.2d at 476.

fixed incomes while still providing an adequate return for the landlord.[27]

This article does not profess to have a panacea for these problems which have eluded all branches of government for decades. If the housing code makes the dwelling financially impossible to rent, the landlord will be forced to close the dwelling, which gives rise to the problem of abandonment.[28] When property in a slum area becomes vacant, some neighborhood residents, old and young alike, participate in its complete devastation by stealing gutter and plumbing fixtures, breaking windows and using the yard to dump trash, until the point is reached where a health and safety hazard is created. The property is then condemned by the city and torn down. This forces the tenants and landlord to move to a new area where the entire process may begin again.

There may be a way to solve the problem rather than just transfer it to a new area. If the premise is accepted that a housing code is just one tool for the cities' use in the solution of urban blight and is not, in and of itself, the solution, then the landlord could be allowed to operate the dwelling upon an agreement to remedy the health and safety hazards, even if it requires a period of years.

Housing codes may also be used in a positive approach to housing decay when coupled with provisions for repair,[29] restoration, rent subsidies,[30] demolition and new construction,[31] or relocation. The solution may be more effective if basic planning and decision making can be moved from the federal to the local level. It is unacceptable to answer with federal government intervention by way of public housing or financial aid whenever a local housing problem arises.[32]

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27. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 287 (1971).

28. *See generally* G. STERNLIEB, THE TENEMENT LANDLORD (1969).

29. Oklahoma long ago enacted statutory provisions to allow for a rent setoff for repair by the tenant. *See* OKLA. STAT. tit. 41, § 31, 32 (1971).

30. D. MANDELKER & R. MONTGOMERY, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 479 (1973). Perhaps rent subsidies will be more effective than the aggressive action manifested by rent strikes. Such strikes often are of little worth to the tenant other than acting as a vent for his anger; they also cause many legal entanglements in the area of constitutional validity as well as the threat of foreclosure when a mortgagee is involved. *See* City of St. Louis v. Golden Gate Corp., 421 S.W.2d 4 (Mo. 1967).

31. *See generally* Article, *The Public Housing Leasing Program: A Workable Rent Subsidy?*, 1 URBAN L. ANNUAL 57 (1968).

32. For a discussion concerning the impact of federal funds see P. VAN BUSKIRK, THE RESURRECTION OF AN AMERICAN CITY 184-94 (1972). Problems are often created when federal and local funding programs are not coordinated or if funds are not con-