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*By Stephen Nathan Dorsi**

INTRODUCTION

San Francisco has a housing problem. In recent years the vacancy rate has remained below five percent, the rate necessary for average mobility.[1] At times it has even dropped close to two percent.[2]

Additionally, the demolition of blighted areas in San Francisco's urban core during the past five years has decreased the number of units available to low-income families. Most replacement housing consists of modern low-density developments. Despite San Francisco's love for Victorian architecture, most residents would agree that the new community developments are less objectionable than the decrepit buildings formerly occupied

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[1]San Francisco Department of City Planning, SURVEY OF HOUSING. (December 1969). p. 4.

[2]*Id.*

by the poor in these areas and considerably more attractive than the traditional high-rise housing project. However, this kind of redevelopment has further limited the number of available units and has, in this respect, compounded the problem for the low-income family in search of a home.

For the past three years *Golden Gate Law Review* has concerned itself with the problems of urban renewal.[3] Aroused by the alleged atrocities of Yerba Buena,[4] a study was undertaken to formulate ways to assure the relocatee of his rights.[5] During that study students became involved with the problems of relocatees who, due to the shortage of available housing, were forced to move into public housing.[6] Public housing offers low rents and basic minimal maintenance requirements, but is plagued with high crime rates in addition to a general discontent on the part of the residents. The resident forced to live here feels he has no control over his environment and subsequently lacks respect for the neighborhood.

Students discovered that the problems of residents in all forms of public housing are rooted in the administrative inability to realize the ultimate goal of redevelopment. The declared policy of the National Housing Act of 1949 is to provide "a decent home and a suitable living environment for every American family".[7] The redevelopment process, initiated by relocation and culminating with the establishment and operation of housing projects and community developments, seems to lose sight of this goal at an early stage.

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[3]1 GOLDEN GATE LAW REVIEW 9 (April 1971).

[4]Yerba Buena is a section of downtown San Francisco extending south of Market Street between 3rd and 5th Streets. It was formerly the site of hotels and boarding houses predominantly occupied by the elderly poor. Upon condemnation of these structures, the San Francisco Redevelopment Agency attempted to relocate the inhabitants to other areas of the inner city. The result was disastrous, due to the lack of adequate substitute housing and the generally dangerous nature of the neighborhoods where low-rent units were available. See 1 GOLDEN GATE LAW REVIEW 35, 47 for case studies and comparative crime statistics for these neighborhoods.

[5]2 GOLDEN GATE LAW REVIEW 448 (Spring 1972).

[6]*Id.* at 455.

[7]42 U.S.C. § 144la.

During relocation the official justification for administrative action which detrimentally affects the resident is premised on the hope that the ends will justify the means. This is no justification for the shortcomings of decision-makers in the operation of any public housing program. Furthermore, it is difficult to justify any administrative action which does not fully take into account the direct impact of such decisions on the residents. Yet, in practice, citizen participation is given only lip service. Because there never seems to be effective input by the resident,[8] our inner cities are faced with a seemingly never-ending spiral of demolition of old ghettos to make way for the construction of new model ghettos which, in ten years, will also have to be demolished.

This staff endeavored to determine how to protect public housing residents from capricious legislation and ineffectual bureaucratic actions. Our approach to the study of the problems of the public housing resident was twofold. First, we attempted to uncover the roots of the problem by personally contacting project area residents who could tell us which problems were most pressing. Second, we reviewed recent legislation and litigation which have expanded tenants' rights in general, pointing out many shortcomings. Criticism is directed toward the lack of citizen participation in the operation of public housing. And we analyze the propriety of extending principles of constitutional law to the problems of welfare living in 1973.

More specifically, our thesis is that the rights of the resident must be protected. Through landlord-tenant law, new rights and remedies must be put within the ready grasp of both low-income tenants and public housing residents. Through legislation and adjudication, procedures must be established and enforced which will promptly remedy the problems encountered by tenants regarding day-to-day maintenance. And if the low-cost nature of

[8]The Project Area Committee (PAC) is the official mechanism for citizen participation. Under HUD regulation RHA 7217.1 every project area must have a PAC. The PAC consists of *interested* persons with roots in the project area. The nature of the committee attracts persons who are interested financially and politically. Seldom do such committees represent the affected low-income resident. PAC is an example of *defined citizen participation.* Other varieties of citizen participation have no place in redevelopment.

public housing is to be preserved, residents must be granted every opportunity to challenge proposed rent increases and ultimately must have a voice in determining priorities for maintenance and operation expenditures.

EFFORTS IN THE COMMUNITY

Armed with idealism and the cooperation of the San Francisco Redevelopment Agency,[9] we endeavored to establish an exchange of information between law students and the residents of public housing through the use of the resident associations in some of the newer housing developments built under programs of the Department of Housing and Urban Development (H.U.D.).[10]

The particular developments chosen for the study lie in the shadows of decrepit high-rise Housing Authority Projects. Though the modern architecture of the new structures differs drastically from the "projects", we found many similarities among the residents of both types of public housing. Typically, the residents of low-rent housing are politically inefficacious. Even if they are concerned and aware of their plight, poverty makes it impossible for them to finance the kind of legal and political battle needed to create and maintain a voice in the future of their environment. For the most part, public housing residents are forced into lethargy by the shortcomings of a politically motivated legislature, an ineffectual bureaucracy, and an unsympathetic judiciary.

Our hope was to attend meetings of resident associations and observe their operation. From the residents themselves, we expected to learn which problems were most pressing. If possible, we then anticipated providing information which might be of

[9]The San Francisco Redevelopment Agency is the Local Public Agency (LPA) dealing with housing problems in San Francisco. William R. Jones, Housing Specialist with this agency, extended his assistance and endorsement to our efforts.

[10]Resident Associations are an additional aspect of *defined citizen participation* recommended by the Department of Housing and Urban Development (H.U.D.). H.U.D. recommends that the management and the L.P.A. establish these organizations to provide social ties among the residents of the development, and to urge that they develop mechanisms among themselves for handling grievances, self-policing, and various other aspects of maintaining a "community"

interest and benefit to the residents. In this regard, we were willing to offer explanations of the legal aspects of their problems, and to discuss the nature of the lease used in these developments.[11] The extent of this discussion would be limited to instructional definitions and hypothetical problems to demonstrate the application of these concepts.[12] Unfortunately, this stage of the project has not, as yet, materialized because severe problems were encountered that had not been fully anticipated.

To begin with, we were unaware of the lack of sophistication of the resident associations. We learned that there had not been any constructive action taken by these associations since their formation over three years ago. Second, we learned that very few residents attended the association meetings. In our experience the meetings were attended by a manager, a representative from the Redevelopment Agency, four or five residents, and *Golden Gate Law Review* staff members. Third, attempts to improve attendance were unsuccessful since the residents fail to take the prospective function of the associations seriously. Last, the holding of the meetings appeared at best to be a ritualistic formality performed by the manager to satisfy the whims of H.U.D.

At this point we have concluded that further effort on this project should be devoted to attracting increased attendance and participation by the residents in resident associations. This could be achieved by disseminating information which suggests what we think we could do for the associations. A detailed presentation of our goals might attract the kind of enthusiasm and interest needed to convert these associations into tools useful to the residents.

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[11]Virtually all of the San Francisco Developments now employ the H.U.D. Model Lease found in the NEIGHBORHOOD DEVELOPMENT PROJECT HANDBOOK, HM G 4351.1 Ch 5, Form no. 1728, 3133, 2503a (revised 1972).

[12]We had planned on using the curriculum developed in 2 GOLDEN GATE LAW REVIEW 1 (Winter 1972) and 3 GOLDEN GATE LAW REVIEW 1 (Winter 1973). Though adopted for use in high schools, much of the material could be applied to adult education.

THE EVOLUTION OF THE LEGAL RIGHTS OF TENANTS

Virtually every member of the urban community is a party to a landlord-tenant relationship. As the general description of urban life in America changes, so do the laws which govern the urban dweller. Nowhere is this more evident than in the field of landlord-tenant law.

The evolution of the common law of landlord-tenant has affected situations where the landlord is a private individual, or the government, or some entity subsidized by the government. However, in housing that is operated by the government directly or indirectly under a government housing program, avenues for additional tenant's rights have emerged which are not otherwise present in private housing. The development of the legal rights of tenants in federally funded housing thereby necessitates a twofold analysis.

First, it is necessary to describe the formation of modern landlord-tenant law. Being applicable to all kinds of landlord-tenant relationships, the discussion concerns both public and private housing.

Second, in public housing the need for expansion of the legal rights of tenants is analyzed in relation to the growth of the rights of welfare recipients. Additional rights for low-income public housing tenants, based upon constitutional principles of due process, are urged whenever housing decisions affect the standard of living of the tenants.

From Fealty to the "Bundle of Goods and Services"

Traditionally, a lease has been considered a conveyance of an interest in land. Consequently, courts have usually relied on the rules governing real property transactions in dealing with controversies involving landlords and tenants.[13]

[13]Javens v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

Under these rules the lessee is considered to be the equivalent of an owner of the property for the term of the rental agreement.[14] As a purchaser, the lessee was bound by the doctrine of *caveat emptor,* and was expected to inspect the property before entering into an agreement.[15] Under this doctrine there were no implied warranties as to the condition of the property or its fitness for the uses of the lessee.[16] Once the lessee entered into the agreement the lessor had performed all the acts that were required of him and, absent an express covenant, fraud, or concealment, he had no duty to maintain or repair the leased premises.[17]

The rules governing real property transactions were solidified before the development of the concept of the mutual dependency of covenants.[18] As a result, the courts have traditionally held that even if there is an express covenant by the landlord, the doctrine of independent covenants applies, and the lessee's duty to pay rent will not be suspended by the landlord's breach.[19]

These common-law conceptions of the character of a lease and the duties of the lessor and lessee were logical at the time they were developed, during a predominantly agrarian period. When property was leased, the lessee was primarily interested in the land, and any buildings on the land were incidental. The rural tenant of that day was in a better position than the owner to make repairs and maintain the property. The tenant lived on the property, while the owner did not, and was thereby better able to determine what repairs were necessary. Dwellings were simple enough in design and construction for any defects to be easily ascertainable, and the tenant usually possessed the skills necessary to make repairs.

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[14]49 AM.JUR.2D *Landlord-Tenant* § 768 (1970).

[15]*Id.*

[16]Hughes v. Westchester Development Corp., 77 F.2d 550 (D.C. Cir. 1935).

[17]49 AM.JUR.2D *Landlord-Tenant* §§ 768, 769 (1970).

[18]Lesar, *Landlord and Tenant Reform,* 35 N.Y.U. L. REV. 1279, 1281 (1960).

[19]Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423 (1915).

These practices were consistent with the type of society then existing. Since the landlord agreed only to give the tenant the right of possession, the tenant was justified in withholding rent only when there was a denial of possession. In accord with this concept is the common-law rule that if there is a physical eviction of the tenant by the landlord or by a paramount titleholder, the rent is suspended.[20]

The original relationship between the common law and the setting in which it was applied began to dissolve when tenants moved from their farms in the country to the city. The tenant no longer lives on a tract of land which he cultivates; instead, he is often several stories above the ground and forced to share vital services with others occupying the same building.

When the feudal tenant's fireplace failed to heat the rented home, it was the tenant's duty to determine what the problem was and to correct it. When the heat goes off in today's rented apartment, the tenant's problem is more difficult. The complexity of the heating system and the tenant's lack of skill at repairing furnaces makes self-help out of the question. Even if the tenant could repair the furnace, it is usually not located within the property subject to his control.

This change in the landlord-tenant relationship was described by Judge Wright in *Javens v. First National Realty Corp.*[21] After mentioning that the common-law rules may still be reasonable in certain cases, he went on to say:

> But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40

[20]Smith v. McEnovy, 170 Mass. 26, 48 N.E. 781 (1897); Edmison v. Lowry, 3 S.D. 77, 52 N.W. 583 (1892).

[21]428 F.2d 1071, 1074 (D.C. Cir. 1970).

> feet below, or even in the bare right to possession within the four walls of his apartment. 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.

Today we are suffering from the consequences of the law's failure to adapt to this change in housing patterns. A good portion of every major city is composed of deteriorating housing in which those who cannot afford to leave, live in an environment not fit for humans. These slums breed evils which spread far beyond their borders and do inestimable damage to those who must, because of poverty, remain within them. Not only has the law failed to provide solutions for these problems, but its outdated policies have exacerbated them. The law hasn't forced landlords to maintain their property, and many landlords refuse to do so voluntarily. Since the tenant is financially unable to make repairs, buildings once adequate often deteriorate until they become part of the slums that are slowly choking our cities.

The law has been unconscionably slow to adapt to the altered situation. The picture is not, however, completely one of a stubborn refusal to recognize reality. There have been certain changes which relieve to some degree the bind in which a tenant finds himself when his landlord refuses to make needed repairs.

Constructive Eviction. The doctrine of constructive eviction was first applied in this country by a New York court in *Dyett v. Pendleton.*[22] In that case the court held that it was tantamount to eviction if the tenant could show that the lessor was responsible for the maintenance of a bawdy house on the premises, and the tenant would then be relieved of the duty to pay rent. While the

[22]4 N.Y. 581 (1825), *on writ of error* 8 N.Y. 727 (Court for Correction of Errors 1826).

decision of that court met criticism as being too extreme, [23] and was subsequently rejected by some courts;[24] the doctrine established has gradually been accepted nation-wide.

The court in *Dyett v. Pendleton,* felt that a constructive eviction was a breach of the covenant of quiet enjoyment. Today, a covenant of quiet enjoyment will usually be implied if it is not expressly written into a lease. A breach of the covenant by the landlord gives rise to the doctrine of constructive eviction, which is a complete defense to any action brought by the landlord either to collect the rent or enforce the lease.[25]

In California, the doctrine was further defined by *Groh v. Kover's Bull Pen, Inc.*[26]

> A constructive eviction occurs when the acts or omissions to act of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion thereof, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises.

The doctrine may be used offensively in a suit by the tenant against the landlord for damages the tenant has suffered as a result of the constructive eviction,[27] as a defense against the landlord's suit for rent still due on the lease,[28] or as both a defense and a cross-claim in the same action.[29]

There are a number of prerequisites a tenant must fulfill in

[23]Gray v. Goff, 8 Mo.App. 329 (1880); Lay v. Bennett, 4 Colo.App. 252, 35 P. 748 (1894).

[24]Dewitt v. Pierson, 112 Mass. 8 (1873).

[25]R. POWELL & R. ROHAN, POWELL ON REAL PROPERTY § 225 (1968).

[26]221 Cal.App.2d 611, 613, 34 Cal.Rptr. 637 (1963).

[27]Pierce v. Nash, 126 Cal.App.2d 606, 272 P.2d 938 (1954).

[28]Bakersfield Laundry Assoc. v. Rubin, 131 Cal.App.2d 862, 280 P.2d 921 (1955).

[29]Tregoning v. Reynolds, 136 Cal.App. 154, 28 P.2d 79 (1934).

order to avail himself of the doctrine of constructive eviction. The most important of these is that the tenant must abandon the premises within a reasonable time after the acts or omissions of the landlord,[30] and must give notice to the landlord stating the reasons for abandoning the premises.[31]

While abandonment is nearly always required in order to invoke the doctrine, there have been exceptions in situations where the tenant could not vacate for reasons beyond his control. A New York court in *Majen Realty Corp. v. Glatzer*[32] felt that abandonment of the premises should not be required when there were no other accommodations available because of a severe housing shortage (as evidenced by governmental regulations adopted in response to the shortage). The trial court felt the reasoning behind the abandonment requirement was that if the premises were not fit for occupancy the tenant would abandon them, and if he did not move out it would show that they were fit to be occupied. Since there was nowhere for the tenant to move; the court concluded that the reason for the rule had disappeared, and held that a constructive eviction had occurred even though the tenant had not abandoned the premises.

However, in spite of exceptions found by some courts, most courts insist on abandonment within a reasonable time. What amounts to a reasonable time is usually considered a question of fact to be decided in light of the circumstances of each case.[33] Many cases, however, hold that one month is a reasonable time, as a matter of law.[34]

Intent was not mentioned as a necessary element to invoke the doctrine in *Dyett v. Pendleton,* but most cases since have

[30]Veysey v. Moriyama, 184 Cal. 802, 805, 195 P.662 (1921); 52 C.J.S. *Landlord and Tenant* § 457 (1968).

[31]Green v. Redding, 92 Cal. 548, 28 P. 599 (1891).

[32]61 N.Y.S.2d 195 (N.Y.C. Mun.Ct. 1946).

[33]Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942).

[34]Bakersfield Laundry Assoc. v. Rubin, 131 Cal.App.2d 862, 280 P.2d 921 (1955).

discussed it. Some early cases stressed the necessity of subjective intent on the part of the landlord to cause the tenant to leave the leased premises.[35] Today, the prevailing view is that there need not be an express intention to evict the tenant. It is enough that the natural and probable consequences of the landlord's acts or omissions will be to deprive the tenant of the use and enjoyment of the premises.[36]

What does the foregoing mean to a tenant whose landlord refuses to make needed repairs? It means that in order to successfully employ the doctrine of constructive eviction the tenant must make a series of sophisticated decisions, any one of which, if made incorrectly, will deprive him of relief.

First, the tenant must decide if the condition of the property is bad enough to convince a court, blessed with the accuracy of hindsight, that the ". . . acts complained of result in depriving the lessee of a substantial, as distinguished from an insignificant or inconsequential, portion of the premises".[37] If he decides he is sufficiently deprived of the use of the premises he must then inform the landlord of the problem and give the landlord a chance to correct it. The tenant cannot wait too long, however, since his next decision is to determine what is a reasonable time within which to abandon. If he decides he is within the reasonable time to abandon the premises, he may vacate and attempt to find suitable quarters. If all his decisions were correct, and can be so proven in court, he will not be required to pay the landlord for the time remaining on the lease. If, however, the court decides that any of his decisions were incorrect, the tenant will be liable to the landlord for breach of the rental agreement.

Even where applicable, the doctrine of constructive eviction is only useful to allow a tenant to escape the remainder of a lease term. Today, many urban dwellers are month-to-month tenants without leases. The doctrine is thereby of limited value to sub-

[35]Buchanan v. Orange, 118 Va. 511, 88 S.E. 52 (1916).

[36]Pierce v. Nash, 126 Cal.App.2d 606, 272 P.2d 938 (1954).

[37]Tregoning v. Reynolds, 136 Cal.App. 154, 28 P.2d 79 (1934).

stantial numbers of tenants. Consequently, some courts have taken the more logical course of dealing with a rental agreement as a contract in which both parties exchange promises, rather than as a conveyance of an interest in real property. The tenant agrees to pay rent in return for the landlord's promise to supply him with the "package of goods and services"[38] necessary to insure him that the dwelling for which he is bargaining is habitable. These courts have adopted the view that in every rental agreement there is an implied warranty of habitability, or fitness for use, of the leased premises.

Implied Warranty of Habitability. In areas of the law not so closely related to real property the concept of implied warranty has been more readily accepted. Contract and tort law have for some time recognized that a warranty of fitness for use is implied when a consumer purchases goods.[39] Most states have codified implied warranties into statutes through the adoption of the Uniform Commercial Code.[40] The practice of implying warranties of merchantability has been extended beyond the sale of goods to situations where the consumer pays for services as well as goods, or rents a chattel.[41]

Warranties have also been implied as to the furnishings in a rented house where the tenant was injured as a result of their being defective.[42] Courts have also attached an implied warranty of merchantability to the purchase of a mass-produced home, choosing to treat the manufacturers of homes like any other manufacturer.[43]

As early as 1892, a Massachusetts court refused to allow a

[38]Javens v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

[39]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95 (4th ed. 1971).

[40]UNIFORM COMMERCIAL CODE §§ 2-314 and 2-315.

[41]Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

[42]Fisher v. Pennington, 116 Cal.App. 248, 2 P.2d 518 (1931); Charleville v. Metropolitan Trust Co., 136 Cal.App. 349, 29 P.2d 241 (1934).

[43]Kriegler v. Eichler Homes Inc., 269 Cal.App.2d 224, 74 Cal. Rptr. 749 (1969).

landlord to collect rent from a tenant who had moved out of the furnished house he had rented for the summer because of an infestation of vermin.[44] The court felt that when one rents a furnished house for a short period of time, part of what he is bargaining for is a dwelling which is immediately ready for use.

Many cases holding landlords liable have been tort cases involving defects which violated housing codes.[45] In 1967 a California court, for the first time, found that a tenant could recover his deposit for the last month's rent because of the landlord's violation of housing codes in failing to eradicate vermin from the property he rented.[46] While actually holding that the landlord's violations constituted a constructive eviction, the court favorably quoted the earlier Wisconsin case of *Pines v. Perssion*[47] asserting that the old rule of *caveat emptor* should no longer be applied and that the doctrine of implied warranty of habitability should be adopted.

Pines v. Perssion was the first American case to completely reject the doctrine of *caveat emptor* as applied to rented property, and to adopt the doctrine of implied warranty of habitability. That court felt that the adoption of housing codes by the legislature evidenced a policy for imposing the duty of maintaining property on the owner, and that the common-law rule was inconsistent with that policy. The court added that, "the need and social desireability of adequate housing for people in this era of rapid population increase is too important to be rebuffed by the obnoxious legal cliche *caveat emptor*".[48]

It was not until 1969 that other courts began to follow the lead of Wisconsin. The New Jersey Supreme Court in *Reste Realty Corp. v. Cooper* held that whenever a tenant had a right to

[44]Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

[45]Ewing v. Balan, 168 Cal. App.2d 619, 336 P.2d 561 (1959); McNally v. Ward, 192 Cal. App.2d 871, 14 Cal.Rptr. 260 (1961).

[46]Buckner v. Azulai, 251 Cal.App.2d 1013, 59 Cal.Rptr. 806 (1967).

[47]14 Wis.2d 590, 111 N.W.2d 409 (1961).

[48]*Id.*, 111 N.W.2d at 413.

vacate leased premises because the landlord's acts had deprived him of their beneficial enjoyment ". . . it is immaterial whether the right is expressed in terms of breach of covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects".[49] In *Academy Spires, Inc. v. James*,[50] the *Reste Realty* holding was said to give a tenant a choice when the landlord sues for possession for nonpayment of rent. The tenant may either vacate or pay what, in view of the landlord's breach, the premises are worth. In other words, he need not pay the contract price.

The Supreme Court of Hawaii agreed that a warranty of habitability should be implied in rental contracts.[51] This court felt that the rationale underlying implied warranty in the sale of chattels was equally persuasive when dealing with the rental of real property. Although this case involved the rental of a furnished house, in *Lund v. MacArthur*[52] the Supreme Court reversed a lower court's decision that there was no implied warranty of habitability when renting unfurnished premises.

Probably the most notable case in this area is *Javens v. First National Realty Corp.*,[53] wherein the court held that a warranty of habitability is implied in all leases of urban dwelling units covered by the Housing Regulations for the District of Columbia. The court went on to say that a breach of the warranty by the landlord would give rise to all normal remedies for breach of contract, thus applying the doctrine of mutuality of covenants. The court pointed out that the use of contract rules in interpreting leases was gradually increasing[54] and that leases of urban dwellings should be treated like any other contract.

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[49]53 N.J. 444, 251 A.2d 268, 277 (1969); *citing both* Pines v. Perrsion, 14 Wis2d 590, 111 N.W.2d 409 (1961), *and* Buckner v. Azulai, 251 Cal.App.2d 1013. 59 Cal.Rptr. 806 (1967).

[50]108 N.J.Super. 395, 261 A.2d 413 (1970).

[51]Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969).

[52]51 Hawaii 473, 462 P.2d 482 (1969).

[53]428 F.2d 1071 (D.C. Cir. 1970).

[54]Medico-Dental Building Co. v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457 (1942).

Javens was an action for unlawful detainer. It was decided that in such an action, when it is alleged by the defendant that the landlord breached his implied warranty, the jury must make two findings. First, it must determine whether the alleged violations actually existed during the period for which rent is claimed, and, second, it must decide what portion of the rent due was suspended by the breach. If the jury finds that no rent was suspended, the unlawful detainer action would succeed; if all the rent had been suspended it would fail. If only part of the rent had been suspended the action would succeed unless the tenant paid that portion of the rent not suspended.

California, in *Hinson v. Delis,*[55] decided that judicial fictions such as constructive eviction were outmoded by the more appropriate theory of implied warranty of habitability. After favorably quoting *Javens,* the court adopted the D.C. Circuit's rationale, declaring that the implied warranty approach is "... the most equitable remedy, in that the tenant is not absolved from all liability for rent, but remains liable for the reasonable rental value of the premises ... ".[56] The court cautioned that minor housing code defects would be considered *de minimus* and would not justify a rent reduction. As a protective devise, the court said that the trial court could, at the request of either party, require the rent payments to be paid to the court, at the contract rate, until it is determined how the money should be distributed.

Statutory Remedies. The court in *Hinson v. Dells*[57] did not enter a field totally unoccupied by statutory regulation. California was, in fact, one of the first states to enact legislation governing the relations of landlord and tenant.[58] As originally enacted in 1872, *California Civil Code* § 1941 imposed on the landlord a duty to repair all rental buildings intended for human occupancy.

[55]26 Cal.App.3d 62, 102 Cal.Rptr. 661 (1972).

[56]*Id.* at 70, 102 Cal.Rptr at 666.

[57]26 Cal.App.3d 62, 102 Cal.Rptr. 661 (1972).

[58]Templeton, *California's New Legislation on a Landlord's Duty to Repair*, 3 U.C.D. L. REV. 131, 135 (1971).

Thus, the common-law rule placing this duty on the tenant was reversed. Two years after § 1941 was enacted, however, it was amended to allow landlord and tenant to agree that the landlord could be relieved of his statutory duty to repair. Given the relative bargaining strength of landlord and tenant, landlords were easily able to escape the effects of § 1941 by inserting clauses in rental agreements under which tenants waived their § 1941 rights.[59]

A statutory remedy for the landlord's failure to make repairs was created in *California Civil Code* § 1942. This remedy allowed the tenant to make repairs and deduct the cost of the repairs from rental payments. It was usually waived along with the § 1941 rights. Even if not waived, however, § 1942 had two additional flaws. First, the tenant was allowed to repair and deduct only up to the equivalent of one month's rent, or to vacate the premises. There could clearly be necessary repairs whose cost would exceed one month's rent. Second, if the tenant was on a monthly rental agreement, the landlord could simply give any tenant who tried to repair and deduct costs from rent a 30-day notice to vacate. The great demand for housing, particularly for moderate and low-income housing, made the possibility of landlord retaliation an effective deterrent to exercising the repair-and-deduct remedy.[60]

New legislation in 1971 further added to the statutory relationship of landlord and tenant in California. The changes made in §§ 1941 and 1942 included limiting the repair-and-deduct remedy to use once every twelve months (§ 1942 as amended, 1971); placing an affirmative obligation on the tenant not to damage the property (§ 1941.2); and prohibiting eviction of the tenant for 60 days after making a written complaint about the condition of the premises (§ 1942.5). These changes show a general attempt on the part of the legislature to iron out ambiguities and answer previously uncertain questions which arose under §§ 1941 and

[59] *Id.*

[60] Durham, *Landlord and Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAWYER 298 (1971).

1942.

The most important question regarding the doctrine of *Hinson v. Delis,*[61] and the implied warranty of habitability is whether the statutory scheme of §§ 1941–1942.5 was intended to completely define the landlord-tenant relationship, or only to define the relation between landlord and tenant which grew out of their duties within the narrow scope of the old §§ 1941 and 1942. If §§ 1941–1942.5 are found to be a complete definition of the law, the *Hinson* doctrine of implied warranty of fitness may be abrogated. Such abrogation would be ironic in one of the first states to reverse the common-law duty of the tenant to repair.

An argument can be made that the original impetus for the 1872 version of *California Civil Code* §§ 1941 and 1942 was an attempt to deal with one problem of the common-law landlord-tenant relationship, and that the 1971 changes were merely clarifications and definitions of the terms found in the original §§ 1941 and 1942.[62] Thus, under this interpretation, the definition in § 1941.1 of an "untenantable" dwelling would be a definition of the conditions which would allow use of the § 1942 repair-and-deduct remedy. *California Civil Code* § 1941.1 should not be held to define for *all* purposes which dwellings are deemed fit and safe for human occupation; housing codes are another viable legislative source of standards for habitable dwellings. The original purpose of §§ 1941 and 1942 was to change the relationship which the lease as a conveyance of real property created under common law. The addition of §§ 1941.1, 1941.2, and 1942.5 was an attempt to further clarify the relationship of landlord and tenant created by the lease as a conveyance of real property.

The *Hinson* doctrine of implied warranty of habitability, on the other hand, is a doctrine derived from an analysis of a lease as a contract. The contract remedy may exist alongside the §§ 1941 *et seq.* scheme that governs the relations which arise from

[61]26 Cal.App.3d 62, 102 Cal.Rptr. 661 (1972).

[62]11 SANTA CLARA LAWYER 298, 308.

a lease as a conveyance. The Court of Appeals, Second Appellate District, expressly ruled that *California Civil Code* §§ 1941 *et seq.* were not exclusive remedies, and did not "embody all of the relief which the law should afford to a tenant with respect to premises which are not in a state of habitability".[63]

The *Hinson* doctrine is in line with decisions in Hawaii, Wisconsin, New Mexico, and the District of Columbia. In *Hinson,* the court relied on *Kriegler v. Eichler Homes, Inc.*[64] for the idea that warranty law was applicable to contracts conveying real property. Clearly, contract principles have an established place in areas formerly thought to be governed purely by the law of real property. The legislative intent evidenced by the creation of a limited remedy even under real property principles favors expanding tenant's remedies, and should not be construed as limiting them. The legislative concern for decent housing shown by the enactment of housing codes calls for affirmance of the *Hinson* doctrine.

Currently, further clarification of the status of the *Hinson* doctrine in relation to *California Civil Code* §§ 1941 *et seq.* is being sought in the form of a petition for Hearing and Stay of Proceedings before the Supreme Court of the State of California. The petition involves the cases of *Hall v. Municipal Court*[65] and *Green v. Superior Court,*[66] both of which originated in the courts of the City and County of San Francisco. The questions raised are whether breach of warranty (by the landlord) is a defense only to the question of damages, and does not affect the landlord's right to possession; whether a tenant must first employ § 1942 before raising the defense; and how "fair rental value" is determined.[67]

This challenge is extremely important in the fight for the

[63]Ball v. Tobeler, 2d. Div. Civ. no. 38424 (decided September 19, 1972).

[64]269 Cal.App.2d 224, 74 Cal.Rptr. 749 (1969).

[65]D.C.A. No. 32597 (1st App.Dist., *filed* January 10, 1973).

[66]D.C.A. No. 32598 (1st App.Dist., *filed* January 10, 1973).

[67]Brief for Petitioner praying for alternative writ. Hall v. Municipal Court, D.C.A. No. 32597 (1st App.Dist., *filed* January 10, 1973).

expansion of tenant's rights. The crisis to be resolved is whether the statutory provisions are in fact designed to serve the tenant, or whether they will be used to bind the tenant exclusively to the letter of the statute. These lower courts have insisted on reading §§ 1941 and 1942 as inclusive. Section 1941 requires the landlord to keep the premises in a habitable condition, and § 1942 provides that the tenant may deduct up to one month's rent per year for the landlord's failure to make needed repairs. The *Hinson* and *Ball* cases[68] take the position that the warranty of habitability is separate from any statutory remedy. They seem to reject the notion that repair-and-deduct is the exclusive remedy. Yet, San Francisco municipal and superior courts have disagreed with the appellate court's interpretations.

The two cases pending arise in an ideal test-case context. Poor families are being subjected to wrongful detainer judgments where they had been evicted from dilapidated housing. The houses involved have been cited numerous times by various city agencies for Health and Safety Code violations.[69] The issue of uninhabitability is not disputed. The only questions in either case are: what remedy is available to the landlord, whose hands are unclean; and what defenses are available to these tenants, who have been forced into the vicious fight to find suitable housing in the city.

The greater significance of the cases lie in their value as precedent. The question is whether, in the context of private or government-operated housing, effective tenant remedies will be available? Code regulations are worthless unless landlords can be forced to comply. And if the current practice of allowing land-

[68]Hinson v. Delis, 26 Cal.App.3d 62, 102 Cal.Rptr. 661 (1972); Ball v. Tobeler, 2d Div.Civ. no. 38424 (1972).

[69]The Supreme Court of Illinois recently held in Jack Springs Inc. v. Little, 50 Ill. 351, 280 N.E.2d 208 (1972), *citing* Javens, that violation of housing codes evidences a violation of the warranty of habitability and that modern court-made law recognizes such circumstances as a relevant defense to an action for unlawful detainer. (The court ordered remand in a four-to-three decision.)

lords to collect rent for housing which is virtually condemned as uninhabitable is tolerated, the cumulative effects will undermine much of the liberalized landlord-tenant law of recent years.

With the rights of the tenants in the balance, the California Supreme Court must either support the modern liberal trend, acknowledging the existence of the choice of available remedies; or it may reverse directions. In view of continuing urban decay, an anti-code enforcement decision could nullify much of the progress toward the dream of an urban design which respects human dignity. However, the proper decision, it is felt, would afford tenants the option of either employing those statutory remedies granted to them by the legislature, or pursuing their rights under the principles enunciated by *Hinson.* Under such an enlightened approach, it should necessarily follow that in applying the *Hinson* doctrine the fair market value of housing in gross violation of housing codes is never more than zero. Only in this manner will tenants be afforded the bargaining power they deserve and need to maintain a residence as a home; to force landlords to comply with the law or get out of the rental business; and to enforce those standards which will eventually create an urban environment which is suitable for healthful family living.

The Right To Challenge Public Housing Rent Increases

Any survey of the problems of residents of government-subsidized housing must essentially recognize the fact that the residents are poor. In order to qualify for admittance, the applicant must generally be needy. Thus, one obvious, though not always clearly enumerated, function of government housing is the "welfare function": that is, the resident is placed in low-cost housing instead of receiving additional welfare money.[70]

[70]For example, in San Francisco, admittance is governed by standards based on family income, family size, and with consideration to those persons who were forced to relocate during the construction of new housing. The function of finding tenants for both privately owned housing

Further, if the low-cost aspect of government-subsidized housing is part of a welfare package, certain ancillary rights must then be afforded the residents. Among these is the right of equal access to the programs in accordance with the equal protection principles of the Fourteenth Amendment.[71] Also of importance is the right to continue receiving benefits once an applicant qualifies. This latter right, based on the due process clause of the Fourteenth Amendment, was defined in *Goldberg v. Kelly*.[72] In that case, the court extended the principle of *Sniadak v. Family Finance*[73] which held that a debtor's wages could not be garnished prior to a judgment without a hearing. *Goldberg v. Kelly* applied this principle to actions curtailing a welfare recipient's benefits. The court compared the wage earner's basic need for his wages to the welfare recipient's basic need for welfare payments for his support, and held that deprivation of these payments without an adequate hearing in either situation amounts to deprivation of property without due process of law.

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which was constructed under an F.H.A. mortgage agreement and for publicly owned and operated housing is handled by the San Francisco Redevelopment Agency.

It is clearly H.U.D. policy to select residents on the basis of their need in the same way that welfare is distributed. 42 U.S.C. 1401. *See also* Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); City of Cleveland v. U.S., 323 U.S. 329 (1945); Kleiber v. City and County of San Francisco, 18 Cal.2d 718, 117 P.2d 657 (1941).

For a broad application of this principle, *see* Male v. Crossroads Associates, 337 F.Supp. 1190 (S.D. N.Y. 1971), where a private developer was found to have violated the Petitioner's rights under the equal protection clause of the Fourteenth Amendment when he denied him admission to public housing on the basis that Petitioner was a welfare recipient!

[71]In cases dealing with access to housing, there have been decisions granting attorney's fees to claimants denied admittance for reason of race. *See* Lee v. Southern Homes Sites Corp., 444 F.2d 143 (5th Cir. 1971). And though in the general case a housing authority may deny admission simply by stating its reasons, *e.g.* Matter of Sumpter v. White Plains Housing Authority, 28 N.Y.2d 420, 278 N.E. 892 (1972), where denial of admission is based on a classification related to financial status, the applicant is entitled to a full hearing, *see* Neddo v. Housing Authority of Milwaukee, 335 F.Supp. 1394 (E.D. Wis. 1971). In the latter case the court held that since it is impermissible to deny someone admission simply because he is poor, denial of admission for the reason that the applicant has a record showing failure to pay rent in past housing experiences would employ an inflexible classification that could result in invidious discrimination. The case was remanded for a due process hearing on the issue of the applicant's qualifications for the apartment.

[72]397 U.S. 254 (1970).

[73]395 U.S. 337 (1969).

In a comprehensive opinion in *Escalera v. Housing Authority,*[74] the Second Circuit extended the principles of *Goldberg v. Kelly* to protect public housing tenants from actions affecting the terms of their residency. Here, the multiple claims of the tenants were dealt with jointly by establishing the requirement of a due process hearing whenever a resident was to be terminated for "nondesireability", or for violation of Housing Authority regulations. (The Housing Authority in this case is the landlord.) The court referred to *Caulder v. Durham Housing Authority* for the minimum requirements of a due process hearing.[75] But, more importantly, this court held that such a hearing must be afforded to a tenant who is being subjected to a rent raise.

In *Escalera,* the additional rent imposed was in the form of penalties assessed for the continued violation of Housing Authority regulations. For example, a tenant was charged $10 per month for keeping a dog where dogs were prohibited. The court's decision takes what appears to be the proper direction in classifying assessment of additional rent as an action which requires the formalities of a due process hearing. Further action has not been taken against the New York Housing Authority on this ground, and it is therefore assumed that it now grants such hearings.

The challenges that have followed the *Escalera* case, but which have bypassed its holding, have arisen in housing governed by National Housing Act § 221(d)(3), § 236, and other Federal Housing Authority mortgage developments.[76] These cases did not have the combination of claims exhibited in *Escalera.* Instead, they attempted to challenge across-the-board rent increases.

[74]425 F.2d 853 (2d Cir. 1970).

[75]433 F.2d 998, 1002 (4th Cir. 1970). The enumerated minimum requirements are: (1) The timely and adequate notice detailing the reasons for the proposed eviction; (2) An effective opportunity to defend and to confront adverse witnesses; (3) A right to be represented by retained counsel (no requirement that counsel be provided for indigents); (4) A decision based on evidence adduced at the hearing and findings setting forth the basis; and (5) An impartial decision-maker. *See* 2 GOLDEN GATE LAW REVIEW 448, 458 (Spring 1972).

[76]12U.S.C. § 1715 (*l*)

Rather than attempt to distinguish the *Escalera* holding and confront the constitutional question head-on, these courts have taken a different approach. Under the fire of the important question of due process, these courts have chosen to dismiss for lack of jurisdiction, lack of standing, and arguments to the effect that the government interest in summary procedure outweighs the residents' interest in procedural safeguards.

Under Federal Housing Authority (F.H.A.) programs, a rent increase is achieved through the following summary procedure. The landlord files an application, including an accounting report, showing the need for an increase in rents for the continued operation of the project. This petition is reviewed by an administrative board within the F.H.A., and a decision is made based on the following factors:

> 1. The rental income requested is necessary to maintain the economic soundness of the project, and
>
> 2. The rental income requested is necessary to provide a reasonable return on the investment consistent with providing reasonable rental rates to tenants.[77]

A careful analysis of the procedure for approving rent increases discloses that not only is there no place for input from those persons affected most by the increase (i.e., the tenants), but there is no expression either for or against allowing courts to review these administrative findings. The procedure should be condemned as an inadequate protection of the rights of the residents to a due process hearing prior to action which would deprive them of their property. Or, in the alternative, the general

[77]24 C.F.R. § 221.531 (C)

principles of administrative law should be adherred to: namely that persons aggrieved by administrative action may challenge that action except (1), where the statute precludes review, and (2), where the action is "committed to agency discretion".[78] Unfortunately, attempts to obtain either a predetermination hearing or a postdetermination review have been thwarted.

One New Jersey Superior Court judge demonstrated his sympathy for the residents of Wayne Village, who were subjected to an increase in rents, by ordering that the residents be given notice of any proposed increase along with the reasons therefor and that they be provided an opportunity to respond. On appeal by the landlord, the decision was reversed.[79]

This case arose in housing constructed with the assistance of an F.H.A. mortgage under a program designed to provide incentive for private investments in the construction of low-rent housing. The landlord included a provision in the lease which read, "If any rent increase is allowed by the governmental authorities having jurisdiction, tenant agrees to pay such increases from date granted."[80] The appellate division noted the reality of hornbook law that the month-to-month tenant must pay the rent as established by the landlord, and noted further that a lease may modify this condition of tenancy by setting the rent amount for a given period. Here, the court emphasized, the landlord included a clause which allowed him to raise rents during the term of occupancy with the approval of an independent agency using some ascertainable standards. The appellate court found nothing wrong with such a clause, and found nothing in the arrangement with the F.H.A. which should compel the landlord to allow tenant participation in hearings to authorize rent increases.

The underlying flaw in the appellate court's analysis stems from the failure to recognize the weighted advantage given to

[78]5 U.S.C. §§ 701, 702, 704.

[79]Wayne Village Tenants' Association v. Wayne Village, 118 N.J.Super. 546, 289 A.2d 265 (1972).

[80]*Id.* 289 A.2d at 266.

landlords in this position. To begin with, the clause designating the "standard" for establishing the rental rate is not itself negotiated. And, secondly, the F.H.A. determines whether to allow an increase after examining the arguments of a landlord who claims that he will not be able to continue meeting his obligation under the mortgage agreement in the absence of a rent increase. The procedure thereby not only fails to be an adversary proceeding, but, additionally employs processes geared to a one-sided finding, even though the procedure purports to be an impartial inquiry. The net result is hardly a "standard"!

The appellate court in the *Wayne Village* case chose to avoid rather than to distinguish *Goldberg v. Kelly.* They approach the dispute by accepting the premise that the landlord of Wayne Village is a private individual raising rents! In the eyes of the resident, is there any difference between government-operated housing and the situation in *Wayne Village,* where a project developed for the purpose of providing low-rent housing to the poor is funded by the government and operated privately under government guidelines? Does legal reasoning or logic allow us to find a material distinction between imposition of a rent increase by the government and an increase proposed by a private landlord and sanctioned by the government? And does such a charge assessed against a low-income family amount to any less a deprivation of property than curtailment of all or part of a welfare recipient's welfare check?

The *Wayne Village* case holds that there can be no resident participation in the determination of rent increases by the F.H.A. since Congress did not include the right to participation in the statute.[81] The decision, founded in administrative law, follows the notion that where Congress establishes administrative procedure for the resolution of problems arising under a statutory scheme, that procedure is exclusive. The court echoes the sentiments of the Second Circuit expressed in *Langevin v. Chenango Court.*[82]

[81] 5 U.S.C. §§ 701 *et seq.;* 12 U.S.C. § 1715.

That decision declared that "it would be most unusual for Congress to subject to judicial review discretionary action by an agency in administering a contract which Congress authorized it to make".

In *Langevin,* Judge Oakes objected to the reasoning of his two fellow justices and, in a brief dissenting opinion,[83] urged recognition of the constitutional importance of the rights involved. The majority apparently failed to distinguish in their minds the administrative decisions involved. First, there is a decision to establish a mortgagee-mortgagor relationship between the federal government and the landlord. This administrative decision would properly be the one referred to by the majority opinion in the above quotation. But in *Langevin,* as in *Wayne Village,* a subsequent administrative decision works to modify the original mortgage contract. These administrative decisions can be distinguished in that the decision to grant a mortgage does not alter the rights of any third parties, whereas the latter decision to allow a rent increase alters the budgets of every family residing in the affected housing. These aggrieved parties should at least have recourse to challenge the determination of the F.H.A.

The refusal of the courts to allow for the adjudication of administrative shortcomings seems contrary to the general rule in comparable situations. Many administrative decisions involve governmental actions on privately operated industries. But this does not, in itself, bar the aggrieved consumer from challenging these administrative decisions.[84]

Furthermore, denial of review of administrative determinations where constitutional questions are involved has been severely scrutinized by the courts for the past 25 years. Beginning with

[82]447 F.2d 296, 303 (2d Cir. 1971).

[83]*Id.* at 304.

[84]In public utility rate assessments, *e.g.* Ohio Bell Tel. Co. v. Public Utilities Commission, 301 U.S. 292 (1936); Petition of New England Tel. and Tel. Co. v. Public Utilities Commission, 115 Vt. 494, 66 A.2d 135 (1949). Or regulating rates of public transit, *e.g.* Hessey v. Capital Transit Co., 193 Md. 265, 66 A.2d 787 (1949). Or interstate railroads, State v. Northern Pacific R.R., 229 Minn. 312, 39 N.W.2d 752 (1949).

the *Morgan* cases,[85] courts have been urged to afford adequate hearings whenever they are statutorily recommended, and to recommend hearings wherever the rights involved in the administrative decision are so deserving. As Judge Streissguth said in *Martin v. Wolfson*,[86] "Courts must turn a deaf ear to cries of 'administrative finality' when . . . constitutional questions are involved."

These decisions of the 1940's are still followed, and the dogma is often cited in current cases. Examples of the vitality of these decisions are found in cases involving the enforcement of minimum wage requirements,[87] or, more closely related to the point in contention, where relocation prerequisites are attacked as insufficient.[88]

Without good reasons for denying the review of an administrative decision to increase rents, it seems that the courts should be bound by the constitutional requirements and by the general policy of administrative law.[89] The rule has been clearly delineated in *Martin v. Wolfson*[90] that "the constitution is a standing guarantee to all litigants that the order or judgment of any board, commission, or court must fall, whenever attacked, upon a showing that fundamental requirements have not been observed." And, as pointed out by the United States Supreme Court in *Sniadak v. Family Finance*,[91] "the fact that a procedure would pass muster under a fuedal regime does not mean it gives necessary protection to property in its modern forms".

Under the weight of these arguments, the decisions of

[85]Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1(1937).

[86]218 Minn. 557, 16 N.W. 884, 889 (1944).

[87]Rivera v. Division of Industrial Welfare, 265 Cal.App.2d 576, 71 Cal.Rptr. 739 (1968).

[88]Western Addition Community Organization (W.A.C.O.) v. Weaver, 294 F.Supp. 433 (N.D. Cal. 1968). Urging a hearing to protect the rights of relocatees, *citing* 42 U.S.C. § 1455 (c)(1)(f) which does not expressly preclude such hearings.

[89]5 U.S.C. §§ 701, 702, 704.

[90]218 Minn. 557, 16 N.W. 884, 889 (1944).

[91]395 U.S. 337, 340 (1969).

courts[92] which hold review of F.H.A. approval of rent increases to be "most unusual" should crumble and give way to the long-standing and well-established trends in administrative law. And the path should then be clear to providing a "trial-type" hearing prior to imposition of rent increases on low-income housing residents.

But rather than order a pre-rent increase hearing, the court in *Marshall v. Romney,*[93] gave lip service to the fundamental rights involved, groped in the direction of liberal expansion of consitutional rights, and then mustered up an awkward stumbling block in the form of additional reasons for denying tenant participation in the administrative decision-making process. In this case, the public housing tenants, represented by Neighborhood Legal Services, posed a challenge to the rent increase process, relying on the principles of *Goldberg v. Kelly.* Unable to avoid a direct response, the district court issued a temporary restraining order against the proposed rent increase and denied the government's motion to dismiss. Though there is no published opinion of the court, to arrive at this point they had to find standing to sue and a need for immediate relief from possible irreparable harm or violation of a fundamental right of the petitioners.

On rehearing, the district court granted summary judgment for the government. To arrive at this decision, the court accepted the proposition that a hearing would be futile. A balance was drawn between the government's interest in a summary administrative procedure for approving rent increases and the tenant's interest in greater procedural safeguards. The court felt that there was a legitimate interest presented on behalf of the tenants, but proceeded to rule against this interest. The only explanation offered for the court's decision is a very brief statement in which the court claimed that the tenants did not possess the requisite expertise to effectuate an administratively efficient hearing.

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[92] *E.g.*, Langevin v. Chenango Court, 447 F.2d 296 (2d Cir. 1971); *[and]* Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).

[93] Civil no. 2288-70 (D.D.C., *filed* August 14, 1970, *final order* June 15, 1971), CCH POVERTY LAW REPORTS ¶¶ 2655.652, 2655.73 (1972).

If this were the only basis for the court's decision, it could be readily refuted by a glance at precisely what such a hearing would, in fact, entail. In the same way that experts testify for landlords to persuade the F.H.A. that an increase in rent is necessary, experts would testify on behalf of tenants. The court speaks in terms which imply that the landlord relies on his own personal expertise and that such expertise could not possibly be matched by the personal expertise of the tenants.

The court further infers that the technical knowledge required for such administrative decisions is much more complex than other administrative decisions. They express the notion that the tenants were "unlikely to have special familiarity with their landlord's financial condition, the intricacies of project management, or the state of the economy in the surrounding area".[94] But do any of those factors render the administrative decision materially more complex than hearings for utility rate setting,[95] or minimum wage law enforcement,[96] or hearings as a prerequisite to alterations in urban renewal plans,[97] as well as for relocation planning?[98] And are the rights involved here any less precious than those affected by eviction from public housing,[99] or curtailment of welfare payments?[100] In all of these cases, the courts found room for a predetermination hearing, and in all of these cases there is a quantum of expertise that is somehow matched by adversaries who are as different as day and night, or landlord and tenant.

The D.C. court concluded in *Marshall v. Romney* that the petitioners have a right which rests somewhere in limbo and is

[94]See CCH POVERTY LAW REPORTS ¶ 2655.652.

[95]Ohio Bell Tel. Co. v. Public Utilities Commission, 301 U.S. 297 (1936).

[96]Rivera v. Division of Industrial Welfare, 265 Cal.App.2d 576, 71 Cal Rptr. 739 (1968).

[97]Shannon v. United States Dept. of Housing and Urban Development, 305 F.Supp. 205 (E.D. Pa. 1969), *vacated on other grounds* 436 F.2d 809 (3d Cir. 1970).

[98]W.A.C.O. v. Romney, 320 F.Supp. 308 (N.D. Cal. 1969).

[99]Escalera v. Housing Authority, 425 F.2d 853 (2d Cir. 1970).

[100]Goldberg v. Kelly, 397 U.S. 254 (1970).

incapable of ever being enforced. The court seems to acknowledge that the residents are being deprived of property without due process, but decides that due process is not applicable in this case. In light of the refusal of courts to review the administrative findings of the F.H.A. on setting rents, the cost of finding such due process impractical is that tenants may be left without any effective means by which they can challenge a rent increase. They are deprived of a right granted under the Housing Acts and consonant with the policies of the Housing Acts.

It is the goal of the Housing Acts to provide "a decent home and a suitable living environment for every American family".[101] This statement of policy implies that poor families will be accomodated too. When Congress establishes programs designed to house the poor at low rents, the effect is distribution of welfare in pursuit of the policies of the Housing Acts. This welfare should stand on equal footing with other payments of welfare. To the recipient, low-rent for his apartment is as important to basic survival needs as are other forms of welfare. And, therefore, the right to continued receipt of this benefit should be protected as are other forms of welfare under the doctrine of *Goldberg v. Kelly.*

[101] 42 U.S.C. § 1441a.