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New Judicial Approaches to Maintaining Housing Quality in the Cities

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NEW JUDICIAL APPROACHES TO MAINTAINING HOUSING QUALITY IN THE CITIES

I. Introduction

Virtually every member of the urban community is a party to a landlord-tenant relationship. As the general tenor of urban life in America changes, so must the laws which govern the urban dweller. For years the doctrine of caveat emptor prevented the tenant from forcing the landlord to make necessary repairs or to retain the leased premises in a habitable condition. The doctrine of constructive eviction afforded him little relief;[1] and housing and sanitation codes, while achieving a measure of success, were generally ineffective.[2]

1. *See* R. POWELL, REAL PROPERTY ¶ 230(3) (1971); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?* 40 FORDHAM L. REV. 123 (1971).

2. Housing codes are normally municipal ordinances "designed for comprehensive and effective regulation of occupancy and facilities in existing housing." Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1116 (1956). Their objectives include the installation of certain facilities such as electricity, heating, waste disposal, and ventilation, the establishment of standards for the continued maintenance of the structural facilities, and the regulation of the density of occupancy. *Id.* at 1115-16.

While today's housing laws vary greatly from state to state, there are three generally recognized categories of statutes. One requires the landlord to maintain the premises in good condition and expressly provides for recovery in tort by those persons injured on the leased premises. *See, e.g.*, GA. CODE ANN. § 61-112 (1966); LA. CIV. CODE ANN. arts. 670, 2322, 2692-93, 2695 (West 1952). A few states have the "repair and deduct" type statutes, which provide that, if the landlord fails to make necessary repairs, the tenant may either abandon the premises or may with certain limitations, make the repairs himself and deduct the expense from the rent payment. *See, e.g.*, CAL. CIV. CODE §§ 1941-42 (West 1954), *as amended*, (West Supp. 1975). The most common is the penal type statute. This type of code, which applies mainly to multiple dwellings and tenement houses, requires the owner of the premises to keep them in repair. Violations are punishable by fine or imprisonment. *See, e.g.*, MASS. ANN. LAWS ch. 144, §§ 66, 89 (1972); N.Y. MULTIPLE DWELL. LAW § 304 (McKinney 1974).

These codes fix minimum standards for all dwellings within the code's jurisdiction. Generally, minimum housing code standards are designed to maintain a marginal level of health and safety in dilapidated housing units often located in the slum areas of the municipality. A code designed to serve the needs of this housing population would appear both inadequate in scope and impractical in application to satisfy the needs of a housing population in a conservational area, where deterioration has not progressed too far and the upgrading of existing units is the desired goal. *See generally* Note, *supra* at 1118, 1122.

Another problem encountered in enforcement is the financial inability of the landlord to effect repair. In the worst areas, the amount of repair required to bring the dwellings within the standards set by the code is bound to involve relatively large expenditures. Although the average landlord may be unable financially to comply with the repair order or may view such

Only when conditions became unbearable did the law protect him.[3]

Increasingly, however, the trend has been to enlarge the responsibilities of the landowner,[4] through such devices as rent strikes,[5] rent abatement,[6] and the warranty of habitability.[7] This has been due, in large measure, to the recognition of the need for quality housing, the unequal bargaining positions of the landlord and tenant, and the changed status of the tenant from rural to urban.[8] The cases which serve as the focus of this Note, wherein contract and tort theories are used in novel ways to impose greater duties on landowners, are the most recent developments in this progression.

II. Extending the Warranty of Habitability

In *Key 48th Street Realty Co. v. Munez*,[9] plaintiff-tenants sued for restoration and rehabilitation of their fire-gutted apartments. The destruction was complete and forced plaintiffs to vacate.[10] During rehabilitation the tenants were free of their obligation to pay rent.[11] The court held that the landlord had a duty to restore and repair the premises at his own expense.[12] In addition, upon renovation, the apartments were to retain their rent-controlled status.[13]

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an order as economically infeasible, repairs, nevertheless, must be made if code sanctions for noncompliance are to be avoided.

The standards established by housing codes are often minimal, inflexible, and unable to keep up with changing needs. The codes generally impose no standards delineating how the landlord is to carry out his duties, and enforcement has been ineffective. *See generally* Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem*, 22 CASE W. RES. L. REV. 739, 756 (1971). While housing codes are a step in the right direction, they do not protect the tenant completely.

3. For a general discussion of the inadequacies of the traditional approach to landlord-tenant law, see Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969).

4. For a comprehensive bibliography of this trend, see *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689, 731-44 (1973).

5. *See, e.g.*, MO. ANN. STAT. §§ 441.570-.580 (Vernon Supp. 1975); N.J. STAT. ANN. § 2A:42-85 to -97 (Supp. 1975); N.Y. REAL PROP. ACTIONS LAW §§ 769-82 (McKinney Supp. 1975); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975).

6. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-24a (Supp. 1975); MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974); N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974).

7. *See* text accompanying notes 23-27 *infra*.

8. *See* Cooper, Kwartler & Reiss, *Pointing the Way to Housing Quality*, 2 FORDHAM URBAN L.J. 1 (1973).

9. 174 N.Y.L.J. 17 (Civ. Ct. Sept. 22, 1975).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

The court based its decision on an extension of the policy surrounding the implied warranty of habitability doctrine.

Until recently, a lease had been considered primarily a conveyance of an interest in land,[14] with major emphasis on the tenant's right to possession. Under the traditional theory, the lessor's letting without specific stipulation implied only that he held title and guaranteed the lessee quiet enjoyment and occupation. The lessor did not warrant that the conveyed property was in any particular condition or state of repair.[15] Moreover, the implied covenant of quiet enjoyment did not impose upon the landlord a concomitant obligation to repair or to maintain the premises, absent an express provision in the lease.[16] Caveat emptor was the law regarding repairs; when the tenant signed the lease, he simply accepted the leasehold and assumed all the possible risks of damage.[17] The conveyance theory was justified by the rural agrarian character of society; a lessee's primary interest was the land he would farm to secure a livelihood.[18] For the quiet enjoyment of the estate the tenant was obliged to pay rent. If he failed to do so, he was in danger of losing possession, the real value of the bargain.[19]

Modern-day courts have recognized that the conditions forming the basis of the English common law rule have changed.[20] The shift from independent farmers to transient apartment dwellers removed the basis for the rule that a lease is a real property conveyance; the traditional construction of a lease unfairly placed severe burdens on the urban lessee, forcing him to pay rent so long as he remained in

14. 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

15. *See, e.g.*, Lawler v. Capital City Life Ins. Co., 68 F.2d 438 (D.C. Cir. 1933); Bailey v. Kelly, 93 Kan. 723, 145 P. 556 (1915); Daly v. Wise, 132 N.Y. 306, 30 N.E. 837 (1892). *See generally* 1 H. TIFFANY, REAL PROPERTY § 99 (3d ed. 1939).

16. 1 H. TIFFANY, REAL PROPERTY § 103 (3d ed. 1939).

17. R. POWELL, THE LAW OF REAL PROPERTY ¶ 233 (1966). However, the landlord could expressly covenant to make certain repairs. For example, in Broadway Flame Co. v. Saunders, 163 N.Y.L.J. 2 (Civ. Ct. Jan. 26, 1970), the court was faced with a situation similar to *Key 48th Street*. Tenants were forced to abandon their fire-gutted apartments. In this case there was a specific clause in the lease providing that in the event of fire the leased premises were to be repaired by the landlord. *Id.* The court ordered the landlord to comply with the lease provision and institute the repairs at his own expense. *Id.* at 13.

18. *See generally* Comment, *Landlord and Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAW. 298 (1971).

19. Quinn & Phillips, *supra* note 3, at 226.

20. *See, e.g.*, Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

possession, regardless of defects in the leased premises. Despite this recognition, these same courts have been reluctant to explore the contractual nature of a lease as a solution to landlord-tenant problems. Thus, the breach of an express covenant to repair or supply services was held not to excuse the tenant from his obligation to pay rent, even though the failure of the covenant destroyed or impaired the real value of the lease.[21] Even if the tenant chose to abandon the premises he was liable for the rent covering the entire term of the lease under a periodic tenancy or tenancy for years.[22]

Only two exceptions to the basic rule of caveat emptor have developed. There was an implied warranty of habitability in short-term leases, since tenants in such situations are often unable to inspect a dwelling adequately and wish "to enjoy . . . without delay, and without the expense of preparing it for use."[23] *Pines v. Perssion*[24] extended the short-term lease exception to cover leases up to one year in duration. Two other decisons indicated a desire to abolish the rule entirely in favor of a contractual theory of leases embodying a judicially implied warranty of habitability. In *Reste Realty Corp. v. Cooper*[25] the Supreme Court of New Jersey stated that the present day demands of fair treatment are adequate to impose upon a landlord an implied warranty against latent, remediable defects.[26] In *Lemle v. Breeden*,[27] the lessee of a furnished house sought to recover a deposit and rent payment from the lessor on the ground that the house which he had rented for two separate but quite short periods was so rat-infested that it was uninhabitable. This "material breach of the implied warranty of habitability and fitness for the use intended . . . justified [the lessee's] rescinding the rental agreement and vacating the premises."[28]

In *Javins v. First National Realty Corp.*,[29] plaintiff-landlord

21. Quinn v. Phillips, *supra* note 3, at 233.

22. Stone v. Sullivan, 300 Mass. 450, 455, 15 N.E.2d 476, 479 (1938); Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 471 (Tex. Civ. App. 1969).

23. Ingalls v. Hobbs, 156 Mass. 348, 350, 31 N.E. 286 (1892); *see, e.g.*, Young v. Povich, 121 Me. 141, 116 A. 26 (1922); Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942).

24. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

25. 53 N.J. 444, 251 A.2d 268 (1969).

26. *Id.* at 454, 251 A.2d at 273 (dictum).

27. 51 Hawaii 426, 462 P.2d 470 (1969).

28. *Id.* at 436, 462 P.2d at 476.

29. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

brought an action for possession of leased premises alleging nonpayment of rent due under a written lease.[30] The tenants admitted nonpayment but in defense offered to prove that the landlord was guilty of over 1,500 violations of the District of Columbia Housing Code.[31] The court held that a warranty of habitability measured by the standards of the housing regulations is implied in all leases covered by those regulations, because leases or urban dwelling units should be interpreted and construed like any other contract. The court recognized that the common law interpretation of a lease as a conveyance of property interest was based on certain factual assumptions which are no longer true.[32]

In *Tonetti v. Penati*,[33] New York formally rejected the common law approach and adopted the implied warranty of habitability theory.[34] Defendant entered into an agreement to rent a private house, in which a terrible stench had been created by the previous tenant's dogs. Defendant was assured by plaintiff-landlord that the odor would be removed. However, upon occupation, the defendant and his family found that the odor persisted and were later unsuccessful in their own attempts at fumigation. In addition, it was discovered that the furnace emitted an intolerable odor and that rats were present in the basement. The court found that the premises were not habitable for residential purposes, and held, on a warranty of habitability theory, that defendant was not liable for the rent.[35]

The court likened the urban dweller to a consumer[36] and stated

30. *Id.* at 1073.

31. *Id.*

32. *Id.* at 1079-81.

33. 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975).

34. The lower New York court opinions which supported the implied warranty of habitability are: Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Civ. Ct. 1973); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971). Several jurisdictions have adopted an implied warranty of habitability. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

35. 48 App. Div. 2d at 30, 367 N.Y.S.2d at 808.

36. *Id.* at 29, 367 N.Y.S.2d at 807. In other areas of the law the concept of implied

that landlord-tenant law must be brought into harmony with the principles underlying consumer protection cases. In analyzing the law, the court found that the common law rule of caveat emptor "has no rational basis in a modern, urban society."[37] The same factors[38] which were considered controlling in developing warranties of fitness and merchantability in sales of goods and services, as well in other areas,[39] should be applicable to the urban lease. No longer was the rule caveat lessee valid.[40]

What constitutes a breach of implied warranty varies among jurisdictions. Some require a material breach rendering the dwelling so unsafe or unsanitary as to be unfit for human occupation.[41] Others grant recovery for lesser defects.[42]

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warranties has been readily accepted. Contract and tort have recognized that a warranty of fitness for use is implied when a consumer purchases goods. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95 (4th ed. 1971). Most states have codified implied warranties through the adoption of the UNIFORM COMMERCIAL CODE §§ 2-314 to -315.

37. 48 App. Div. 2d at 29, 367 N.Y.S.2d at 807. The main concern of today's tenant is that he acquires premises which he can enjoy for living purposes; he is more mobile and generally less skilled at maintenance than the agrarian tenant; repairs are more costly and dwellings with modern plumbing and electrical facilities are more complex. *Id.*

38. The characterization of a lease as a "package of goods and services" has prompted several courts to apply products liability principles to the landlord-tenant relation by analogy. Like the consumer, the modern urban tenant relies on the landlord's implied representation that the premises are fit for human habitation. Like the commercial businessman, the landlord has the "greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building." Green v. Superior Ct., 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974). Moreover, if the landlord is in the business of leasing, he is in a better position to distribute the cost of maintaining the premises. Note, *Contract Principles and Leases of Realty*, 50 B.U.L. REV. 24, 37 (1970). These similarities between the merchant-consumer transaction and the landlord-tenant relation have prompted the courts to conclude that there should be an implied warranty of habitability in the lease of real property, just as there is an implied warranty of merchantibility in the sale or lease of personal property, and just as there is an implied warranty of habitability in the sale of real property.

39. *See, e.g.*, Cintrone v. Hertz Trucks Leasing and Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965). *See generally* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

40. 48 App. Div. 2d at 30, 367 N.Y.S.2d at 808. The Court of Appeals for the District of Columbia has found that one who seeks to purchase adequate shelter for a specified period of time is forced to rely on the skill and honesty of the landlord, who has "much greater opportunity, incentive and capacity to inspect and maintain the condition of his building." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

41. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

42. *See, e.g.*, Brown v. Southall Realty Co., 237 A.2d 834, 835-36 (D.C. App. 1968).

The triers of fact who must determine whether the implied warranty of habitability has been breached, so as to justify the suspension of rent payments, will find little assistance in the uncertain guidelines issued by *Tonetti*. The unbearable odors and unsanitary conditions in that case made living impossible.[43] Strictly construed, *Tonetti* indicates that New York may require extremely bad conditions to justify rent withholding.[44]

In *Cohen v. Werner*,[45] decided shortly after *Tonetti*, the defendant-tenant claimed that noise emanating from another apartment in the building forced him to move out.[46] The court held that the landlord could have made the premises habitable by attempting to restrain the noise.[47] Since he did not, the defendant was justified in quitting the premises, thereby terminating his obligation to pay the rent.[48]

The *Cohen* court recognized[49] that there is implied in every

> residential tenancy a warranty by the landlord to maintain the apartment in a condition suitable for decent living. Where there has been a *substantial failure* by the landlord to maintain the apartment in habitable condition, the right to receive rent is made subject to a defense comparable to that available in virtually every part of our society to one who does not receive that for which he agreed to pay.

Neither *Cohen* not *Tonetti* attempt to define the factors which constitute "habitability," or to detail how substantial the landlord's failure must be in order to justify rent withholding.

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43. 48 App. Div. 2d at 26-27, 367 N.Y.S.2d at 805-06.

44. In an earlier decision, Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 21, 318 N.Y.S.2d 11, 19 (Civ. Ct. 1971), the court based its decision on the proven attempts of the owner to force the removal of the tenants under an established plan of non-compliance, and upon his refusal to effect greater building security after each of the tenants was victimized by intruding drug addicts. Three conditions were set forth as constituting grounds for withholding rent:

> (1) Where the landlord has not made a good faith effort to comply with the law, and there have been substantial violations seriously affecting the habitability of the premises.
>
> (2) Where there are substantial violations and code enforcement remedies have been pursued and have been ineffective.
>
> (3) Where substantial violations exist and their continuance is part of a purposeful and illegal effort to force the tenants to abandon their apartments.

Id.

45. 84 Misc. 2d 295, 368 N.Y.S.2d 1005 (Civ. Ct. 1975).

46. *Id.* at 295-96, 368 N.Y.S.2d at 1005.

47. *Id.* at 298, 368 N.Y.S.2d at 1008.

48. *Id.*

49. *Id.* at 297, 368 N.Y.S.2d at 1007, *quoting* Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 999, 343 N.Y.S.2d 406, 410 (Civ. Ct. 1973) (emphasis added).

Several jurisdictions have based the implied warranty of habitability on the enactment of housing codes; others have relied on judicial constructs. In the former, the standard of habitability is set by statute.[50] Not every housing code violation is a breach of the implied warranty; only "substantial" violations are actionable.[51] However, what is, and what is not, a "substantial" violation is far from certain.

When the implied warranty is judicially determined it is even less susceptible to definition.[52] A typical warranty is that the premises are "habitable and fit for living."[53] Once again, only "substantial" or "material" breaches are actionable.[54] The following factors have been identified as relevant to a determination of the issue of materiality: (1) the nature and seriousness of the deficiency or defect; (2) the effect of the defect on habitability, safety, or sanitation of the premises; (3) the length of time the defect has existed; (4) the age of the structure; and (5) the amount of the rent.[55] By requiring materiality, courts do not require the landlord to ensure that the premises are in perfect or aesthetically pleasing condition, but rather that "bare living requirements" are maintained.

Several courts, which have adopted a judicially determined warranty of habitability based on public policy considerations, have used the housing code as a minimum standard of habitability or as a factor in determining whether the warranty has been breached.[56] The New York Court of Appeals, however, has not yet equated the standards established by the implied warranty of habitability with those mandated by municipal housing codes. New York has, how-

50. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972). For a discussion of housing codes, see note 2 *supra*.

51. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.63 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Jack Spring, Inc. v. Little, 50 Ill.2d 351, 366, 280 N.E.2d 208, 217 (1972).

52. Lemle v. Breeden, 51 Hawaii 476, 462 P.2d 470 (1969); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969); Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971).

53. *See, e.g.*, Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971).

54. *See id.*

55. *Id.*; *accord* Mease v. Fox, 200 N.W. 2d 791, 796-97 (Iowa 1972); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

56. *E.g.*, Green v. Superior Ct., 10 Cal. 3d 616, 637-38, 517 P.2d 1168, 1183, 111 Cal. 704, 719 (1974); Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 999, 343 N.Y.S.2d 406, 410 (Civ. Ct. 1973).

ever, recently passed an implied warranty of habitability statute[57] which protects tenants from any "conditions which would be dangerous, hazardous or detrimental to their life, health or safety."[58]

Key 48th Street Realty dealt with a situation in which fire had damaged the landlord's building. The tenants, who were routed by fire, attempted to force the landlord to repair the building. The court ordered the landlord to restore the fire-gutted apartments. The theory adopted by the court requires the landlord to maintain an entire building in habitable condition in addition to his implied contractual duty to provide essential services and keep individual dwelling units in a fit condition if the remaining portion of the landlord's destroyed building remains viable.[59] A building is viable, in the court's opinion, if the percentage of destroyed apartments is less than 25 percent of the total number of apartments in the building, no major structural renovations are required, fire insurance proceeds are forthcoming, and the total amount of repairs is not disproportionate to the assessed valuation of the building.[60]

Key 48th Street Realty set out the above rules in a situation where the landlord's building was rent controlled. Rent control[61] was intended to prevent "unfair" rent increases. However, the result of rent control has often been undermaintenance and reduction of services.[62] Owners of controlled properties often do not receive sufficient income to justify even normal maintenance.[63] As conditions deteriorate and monies remain the same, the buildings become ripe for abandonment. It would seem that in situations similar to *Key 48th Street Realty Co.*, where the landlord has additional obliga-

57. Act of Aug. 1, 1975, ch. 597, § 1, N.Y. SESS. LAWS ch. 597 (McKinney 1975).

58. N.Y. Real Prop. Law § 235-b (McKinney Supp. 1975).

59. 174 N.Y.L.J. 17 (Civ. Ct. Sept. 22, 1975).

60. *Id.*

61. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 51, tit. Y (1975). Rent control legislation was passed in 1947 to deal with post-war housing shortages. In 1971, a decontrol law was enacted removing any apartment vacated after June 30, 1971 from rent control. Act of June 1, 1971, ch. 371, § 6 [1971] N.Y. Laws 1161. However, in 1974, the law was again amended so as to subject those apartments which were vacancy decontrolled to the rent stabilization law. Act of May 29, 1974, ch. 576, § 2, [1974] N.Y. Laws 1510 (codified at N.Y. UNCONSOL. LAWS § 8605 (McKinney Supp. 1975)). For the provision of New York City's rent stabilization law, see NEW YORK, N.Y. ADMIN. CODE ANN. ch. 51, tit. YY (1975).

62. Mann, *Receivership of Problem Buildings in New York City and its Potential for Decent Housing of the Poor*, 9 COLUM. J. OF LAW AND SOC. PROBS. 309, 320 (1973).

63. NEW YORK CITY RAND INSTITUTE, RENTAL HOUSING IN NEW YORK CITY 6-7 (1970).

tions to perform without rental increases, maintenance will be foregone and abandonment will result. Nonprofitability is no defense to a landlord's failure to repair.[64] However, by ignoring the issue of profitability in this type of case, courts may force the landlord to give up his investment. Thus the *Key 48th Street Realty Co.* decision seems to ignore the financial predicament of the landlords. If the plaintiff's rent-controlled apartment allowed only a minimal profit margin, even court imposed renovation costs that do not appear excessive on their face[65] may cause hardship to the point of abandonment. Landowners who can no longer operate their rental property because of the impossibility of recouping the cost of repair will elect an obvious alternative—closing the building. The effect will be to evict the tenants into a housing market with an inadequate supply of low-income units.[66]

From the tenant's point of view, several aspects of the landlord-tenant relationship may justify *Key 48th Street Realty Co.* The inequality of bargaining power, the adverse social impact of substandard housing, and the critical housing shortage suggest that the tenant's expectations that the landlord will rehabilitate an unintentionally destroyed apartment should be protected. Millions of American families have no effective choice but to live in dwellings that suffer from any or all of the defects by which bad housing is measured: insufficient size; inadequate facilities; unsuitable location; danger to safety or health; and cost that exceeds the means of the family. By charging the landlord with maintaining a total building, the court has placed the burden of maintaining the available housing fit for human habitation where public policy seems to dictate.

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64. 1972 WASH. U.L.Q. 374 (1972). For cases dealing with the power of the state to require changes in existing buildings in accordance with new building codes, see Annot., 109 A.L.R. 1117 (1937).

65. The court in *Key 48th Street Realty Co.* took note of the fact that defendant had fire insurance to cover his losses. 174 N.Y.L.J. at 17. But even the recovered amount may not be enough to pay all renovation costs.

66. The current housing crisis in this country is characterized by an insufficient number of quality housing units. *See* PRESIDENT'S COMM. ON URBAN HOUSING, REPORT: A DECENT HOME 7-8 (1968). The President's Committee noted a study by TEMPO, General Electric's Center for Advanced Studies, which found that even though in 1968, 66 million housing units existed for 60 million households an estimated 6.7 million of the units occupied were in substandard condition (four million lacked indoor plumbing and 2.7 million were in a dilapidated condition.) *Id.*

III. Applying Nuisance Law to the Abandoned Housing Problem

Just as an extension of the contract theory of implied habitability has subjected landlords to greater responsibilities vis-a-vis their tenants, so too a new tort application of nuisance law has recently been applied to increase the potential liability of landlords to neighboring property owners if such landlords fail to maintain their premises.

Ownership of real property has never conferred an absolute right to do whatever one pleases with the land.[67] One common law doctrine which recognizes limitations on the rights of property owners is the law of nuisance.[68] As a mode of land-use control, nuisance prevents one landowner from making an unreasonable use of his own premises to the material injury of his neighbor's property.[69] If he does, the injured party has a right of action even though he is not driven from his dwelling.[70] Of all common law tort theories, nuisance affords the abutting landowner the broadest possible recovery, since the cause of action may arise through intent, negligence, or absolute liability for ultra-hazardous invasion of property.[71] Remedies for nuisance include abatement, injunction, contempt damages, declaratory judgments, and, in the case of a public nuisance, criminal sanctions.[72]

In *Puritan Holding Co., Inc. v. Holloschitz*[73] plaintiff owned a renovated apartment building located directly across the street from defendant's abandoned building. Due to the unsightly condition of the defendant's building, plaintiff was unable to obtain a mortgage. In addition, a real estate expert testified that plaintiff's building

67. Gross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

68. W. PROSSER, LAW OF TORTS § 86 (4th ed. 1971).

69. The general rule as stated in Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 274, 35 N.E. 592, 594 (1893) is that "no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbor to the use of his property . . . ."

70. McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907).

71. RESTATEMENT OF TORTS § 822 (1939). The interference must be substantial, unreasonable, and offensive to a person of normal sensibilities. RESTATEMENT OF TORTS, Explanatory notes § 822, Comment g at 229 (1939). A defendant to a private nuisance may prevail by proving that he is making a reasonable use of his property.

72. RESTATEMENT OF TORTS, Explanatory Notes § 941, Comment c at 711-12 (1939).

73. 82 Misc. 2d 905, 372 N.Y.S.2d 500 (Sup. Ct. 1975).

had suffered a significant depreciation in value. Proof at trial indicated that defendant's building had deteriorated and been taken over by derelicts.[74] The court noted that the two buildings were located in a residential community which was attempting to redevelop, and found that the failure of the defendant to supervise her abandoned property constituted the maintenance of a private nuisance.[75]

The central issue in any private nuisance action is not merely whether there has been an interference with the natural right to reasonable enjoyment of one's property, but whether this interference is an unreasonable one.[76] Reasonableness in a particular case depends upon several factors: gravity of harm to the plaintiff; utility of the defendant's conduct; the character of the neighborhood; and the use to which plaintiff puts his land.[77] These criteria are neither rigid nor exclusive; rather, the judge has discretion to include and emphasize these factors and others as the details of the situation and the social implications of responsible land use require.

In nuisance actions, courts attempt to strike a balance between the rights of the parties in considering the social value of their conduct.[78] In *Puritan Holding Co.* there were no competing interests to balance. Plaintiff sought to utilize her property constructively as part of a neighborhood redevelopment effort.[79] Defendant's abandoned building, however, could only be considered a detriment to plaintiff and the surrounding vicinity, with no redeeming value. Therefore, the court's conclusion that defendant's property constituted a private nuisance seems correct.

In *Puritan Holding Co.* the interference with plaintiff's use and enjoyment of her land was the depreciation of its property value.[80] However, the general rule is that depreciation of property value is

74. *Id.* at 905, 377 N.Y.S.2d at 501.

75. *Id.* at 906, 377 N.Y.S.2d at 502.

76. Waters v. McNearney, 8 App. Div. 2d 13, 185 N.Y.S.2d 29 (3rd Dep't. 1959).

77. *See, e.g.*, Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907); Messina v. Scarlata, 26 N.Y.S.2d 594 (Sup. Ct. 1940), *aff'd*, 261 App. Div. 875, 26 N.Y.S.2d 597 (4th Dep't 1941); Johnson v. Drysdale, 66 S.D. 436, 285 N.W. 301 (1939).

78. *See, e.g.*, Beam v. Birmingham Slag Co., 243 Ala. 313, 10 So. 2d 162 (1942); Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 149 A.2d 599 (1959); Roberts v. C.F. Adams & Son, 199 Okla. 369, 184 P.2d 634 (1947).

79. 82 Misc. 2d at 907, 372 N.Y.S.2d at 502.

80. *Id.* at 905, 372 N.Y.S.2d at 501.

not in itself sufficient to support a cause of action for nuisance.[81]

In *Diocese of Rochester v. Planning Board of Town of Brighton*,[82] community members complained when their property suffered a depreciation in value. They alleged that the depreciation was caused by noise and inconvenience occasioned by the establishment of a church and school with appurtenant play areas and parking fields.[83] The New York Court of Appeals held that this was insufficient to sustain a nuisance cause of action.[84] The benefit to be gained from a church in the community outweighed the interests of individual landowners. "Moreover, in view of the high purposes, and moral value, of these institutions, mere pecuniary loss to a few persons should not bar their erection and use."[85] The social value of the defendant's land use was a controlling factor in the court's decision to deny relief to the plaintiffs. The problem is striking a balance as nearly as possible between the respective rights of the parties. Unlike *Diocese of Rochester*, there was no high purpose and moral value to defendant's actions in *Puritan Holding Co.*; thus, in such a case plaintiff may recover the lost value of her property.

The general rule in these cases is that no action will lie for aesthetic discomfort and inconvenience alone.[86] The basic reasons for the reluctance of the courts to recognize offensive visual stimuli as bases for nuisance actions are the association of such perceptions with aesthetics. Courts guard against the fear that the recognition of visual stimuli as an element of a cause of action will lead to petty actions based on different tastes rather than substantial injuries.[87]

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81. *See, e.g.*, Nicholson v. Connecticut Half-Way House, Inc., 153 Conn. 507, 218 A.2d 383 (1966); White v. Bernhart, 41 Idaho 665, 241 P. 367 (1925); Morin v. Johnson, 49 Wash. 2d 275, 300 P.2d 569 (1956); Crawford v. Central Steam Laundry, 78 Wash. 355, 139 P. 56 (1914).

82. 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

83. *Id.* at 516, 136 N.E.2d at 830, 154 N.Y.S.2d at 854.

84. *Id.* at 526, 136 N.E.2d at 837, 154 N.Y.S.2d at 863.

85. *Id.* at 524, 136 N.E.2d at 835, 154 N.Y.S.2d at 861.

86. Something is not a nuisance solely because it is unsightly or offensive to the aesthetic sense: Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Martin v. Williams, 141 W. Va. 595, 93 S.E.2d 835 (1956); as to unsightliness of buildings: Bristol Door & Lumber Co. v. Bristol, 97 Va. 304, 33 S.E. 588 (1899).

87. *See* Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939).

The test in determining aesthetic nuisances is one of reasonableness. In *Puritan Holding Co.* it is not impracticable to ascertain a reasonable man's reaction to defendant's abandoned building even though no interference with physical comfort is involved. The unsightliness of defendant's structure did not involve questions of taste and preference. The difficulties of determining the effect on the ordinary man are little greater than in those branches of the law of nuisance, which deal with contamination of the atmosphere by odors or with disturbance by noise. "An eyesore in the neighborhood of residences might be as much a [public] muisance [sic] and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health."[88]

Remedies for nuisance are varied and flexible. Formerly, a plaintiff seeking damages from a defendant for the maintenance of a nuisance was limited to damages for harm suffered up to the commencement of the action.[89] This required a plaintiff to institute multiple suits, as the actions arose, in order to gain full compensation for his continuing injury.[90] Eventually, however, it was recognized that "[w]here a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery . . . ."[91] Permanent damages are based on the theory of servitude on land,[92] and assume that a monetary award is sufficient compensation for causing the plaintiff's property to remain subject to the adjudicated nuisance.

One disadvantage of the award of permanent damages in *Puritan Holding Co.* is the possibility of a multiplicity of suits.[93] The opinion states that "[t]he building's condition has caused a deterioration

88. State *ex rel.* Civello v. New Orleans, 154 La. 271, 284, 97 So. 440, 444 (1923).

89. Generally, in an action for damages for a temporary or abatable nuisance, the recovery is limited to the damage occasioned up to the time of the commencement of the action. Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 434, 21 P. 565 (1889).

90. Western N.Y. Water Co. v. City of Niagara Falls, 91 Misc. 73, 80, 154 N.Y.S. 1046, 1050 (Sup. Ct. 1915), *aff'd*, 176 App. Div. 944 (4th Dep't 1917), *aff'd*, 226 N.Y. 671, 123 N.E. 894 (1919).

91. 66 C.J.S. *Nuisances* § 140 (1950).

92. United States v. Causby, 328 U.S. 256, 261-62, 267 (1946).

93. 372 N.Y.S.2d at 502. *See also* Shearing v. City of Rochester, 51 Misc. 2d 436, 439, 237 N.Y.S.2d 464, 467-68 (Sup. Ct. 1966) ("An injunction prevents a multiplicity of suits, a policy which the law favors since the peace and good order of society are best promoted by the termination of such litigations by a single suit.")

in values *on the block*."[94] Granting a monetary award to one apartment owner in the community may be an incentive for others to institute similar suits. Moreover, the invasion of plaintiff's rights is not necessarily permanent. The offending situation may be remedied, and plaintiff's land may be restored to its former condition.

A more frequent remedy employed in nuisance cases is the injunction.[95] The primary reason for injunctions in nuisance cases is that the interest protected, personal investment in the enjoyment of one's property, is incapable of measurement in monetary terms.[96]

Ordinarily an injunction is framed in specific terms; the defendant is ordered not to do certain acts, or, when the court issues a mandatory decree, to carry out designated acts. However, the court is not bound to issue such a decree, but rather it can leave the means of performance to the defendant's discretion, reserving the power to modify the decree.[97] It would seem that from the plaintiff's point of view a grant of permanent damages is far less satisfactory than an injunction. With a monetary grant the abandoned building remains and plaintiff still would be unable to obtain her desired mortgage.

Since many potential conflicts in modern urban environments may involve less tangible interferences with land, such as odors, smoke, and dilapidated buildings, nuisance law provides the most important source of common law rules for shifting the risk of loss for these harms. The failure to grant injunctions in such cases as *Puritan Holding Co.* could lead to long term economic loss; a result may be the flight of more prosperous tax-paying residents to other areas, thereby compounding the existing situation.

Declaring buildings to be nuisances and granting permanent damages does not increase the available housing supply. Those who sue may be compensated, but other property owners will not be

94. 82 Misc. 2d at 905, 372 N.Y.S.2d at 501 (emphasis added).

95. *See* D. DOBBS, REMEDIES § 5.7 (1973).

96. *See, e.g.*, Adams v. Snouffer, 88 Ohio App. 79, 82, 87 N.E.2d 484, 486 (1949).

97. In modern cases, the balancing of hardships and equities has led to the development of the partial and experimental injunction. See D. DOBBS, REMEDIES § 5.7 (1973). The power of the court to issue a flexible decree can insure the proper adjustment of conflicting interests. Practical considerations may militate against giving full or immediate protection to the plaintiff's interest. Experimental relief benefits both the plaintiff and the defendant. It enables the defendant to satisfy the duty the court finds owing, but at the same time to minimize the adverse effect to his interests. It enables the plaintiff to obtain some measures of relief, when otherwise any relief might have been denied due to hardship, impracticality or the like.

benefited as they would have been had the defendant owner been induced to put the judgment money into upgrading his dilapidated housing.

IV. Conclusion

Courts are increasingly regulating the landlord and tenant relationship by the use of contract principles. But even standard contract remedies have often proved inadequate. The use of tort principles to expand the legal protection available to neighboring property owners is an important additional step. A tenant subjected to uninhabitable living conditions, or a neighboring landowner whose premises are adversely affected by the condition of adjoining land, should not be left without effective relief measures. However, a fundamental weakness in any approach is the bleak monetary situation which often prevents such relief. It may well be the comprehension of such economic realities by future courts that will limit the influence of *Key 48th Street Realty* and *Puritan Holding Co.* on the law of real property ownership in urban areas.

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