The Pennsylvania Project - A Practical Analysis of the Pennsylvania Rent Withholding Act

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COMMENTS

THE PENNSYLVANIA PROJECT — A PRACTICAL ANALYSIS OF THE PENNSYLVANIA RENT WITHHOLDING ACT

I. INTRODUCTION

It has recently been the policy of the Board of Editors of the Villanova Law Review to devote the greater part of one issue of each volume to what is entitled the Pennsylvania Project. The Project generally takes the form of a detailed analysis of some aspect of the law having particular relevance to Pennsylvania jurisprudence.

In view of the serious and continuing nature of the urban housing problem, it was considered appropriate to center upon that area, and to that end, the Pennsylvania Project for Volume Seventeen deals with the Pennsylvania Rent Withholding Act, Pa. Stat. tit. 35, § 1700-1 (Supp. 1971). Since the subject matter of the forthcoming discussion is of a most relevant and important nature, a somewhat different and, by law review standards, novel approach was taken. Rather than the typical comment which is done, in large part, in a law library, the Pennsylvania Project is an empirical study. The bulk of the data and information herein was gathered in the "field."

This field work consisted primarily of interviews conducted with various entities in the City of Philadelphia: the Department of Licenses and Inspections, particularly the Central Unfit Unit, and approximately fifteen of the more prominent escrow agents in the areas designated by the Department of Licenses and Inspections as districts "3" and "K" (see Appendix, p. 885 infra). These areas were chosen because of the nature of their housing; by comparison to other areas of the city, the dwelling units are "older" and are occupied by low socio-economic groupings of blacks and Spanish-speaking peoples. A contrast also existed due to the fact that district "K," which for the most part is within district "3," was the subject of federally-funded programs for a time while district "3" was not.

Interviews were held with the various officers of the Department of Licenses and Inspections, with people who worked at or were in charge of administering the entities which functioned as escrow agents, with legal counsel for the escrow agents, and with representatives of the landlords' interests. By far the greatest efforts, however, were expended laboriously pouring over the individual files of the escrow agents. More than 1100 accounts, each representing a tenant who utilized the escrow procedure pursuant to the Act, were examined in detail. These accounts were labelled...
"open," where the tenant was or appeared to be using the escrow procedure, and "closed," where the tenant was or appeared to be no longer using it for one reason or another.

The purpose of the study was to view the Act in a pragmatic vein — to ascertain how the Act is actually functioning in terms of the procedure being utilized, particularly in Philadelphia. Data was compiled on the basis of the escrow accounts to determine the rate of "compliance" by landlords, the length of time properties remained in escrow, the rate of abandonment by the tenant, etc. The data was correlated to determine the effects of the Act in terms of realities and is reflected in the latter half of the article and the appendices thereto. On the basis of the correlations certain proposals and recommendations were made.

Such a study, however, which depends on field data, should be qualified. The completeness and accuracy of the data depended greatly upon the scope and detail of the individual escrow agents' files, some of which were excellent and others merely cursory. Notwithstanding, it is believed that the data portrayed herein is the best obtainable. The "open" accounts were particularly lacking in comprehensive information, although it was not possible to discern why this fact existed. For the purposes of determining the Act's viability over a period of years, ending with March 1972, the "closed" accounts were used because of their greater number and completeness.

Since there was a fair amount of preliminary information used herein to place the Act in its proper perspective, a short outline of what follows may be helpful. First, the common law remedies available to the tenant were examined, particularly in light of recent developments. The problems created by the common law were next viewed in the context of precipitating the enactment of the Rent Withholding Act. Then the mechanisms of the Act and subsequent Pennsylvania judicial clarifications of the same were examined.

To further put the Act in perspective, the alternative programs in other jurisdictions were scrutinized and comparisons, both favorable and unfavorable, were made with the Pennsylvania statute. The last section analyzed the data in terms of practicalities, and the figures obtained in the Project were reflected in the appendices at the end of the study. As mentioned previously, certain conclusions, proposals, and recommendations, expressing what is hoped is an equitable middle ground from all relevant points of view, were posited.

The Board of Editors believed it desirable to have the Act analyzed also in terms of its economic effects, both theoretical and actual, and to that end the assistance of two graduate economists was obtained. This analysis is reflected in a separate article at the conclusion of the student comment. The article examines the effect of housing codes and other enforcement tools in general, and the Act in particular, in light of their economic effect. The article also contains some innovative, albeit compli-
cated, formulas for use in determining certain economic decisions which are of importance to landlords.

II. BACKGROUND

A. The Common Law

Pennsylvania, like most other jurisdictions, has traditionally adhered to the concept that a lease is a conveyance of an interest in land, and consequently, real property law dictated the rules applicable to landlord-tenant disputes. Significantly, the doctrine of caveat emptor was invoked by landlords and applied by courts to severely restrict the recourse of a tenant injured either physically or economically. This was true even where the demised premises were, in fact, defective from the commencement of the tenancy. Therefore, as between landlord and tenant, unless an express provision to the contrary were included in the lease, a landlord was under no obligation to maintain the leased premises, to see that they were fit for rental or to keep the premises in repair. Concomitantly, it was no defense


Caveat emptor literally means "let the buyer beware." The doctrine's obvious effect, as applied to landlord-tenant law, was to insulate the landlord from liability arising out of defects in the leased premises, for the tenant was presumed to have been put on notice that he took the premises in their existing condition. As one court summarized the rule, "[t]he lessee's eyes are his bargain. He is bound to examine the premises he rents, and secure himself by covenants, to repair and rebuild." Moore v. Weber, 71 Pa. 429, 432, 10 Am. R. 708, 711 (1872).

Several exceptions to the doctrine have arisen, at least two of which are applicable in Pennsylvania. In McAuvic v. Silas, 190 Pa. Super. 24, 151 A.2d 662 (1959), the court noted two exceptions to the doctrine of caveat emptor, but the general doctrine was held to govern the case. The court observed that:

A landlord out of possession may be liable where he conceals a dangerous condition of which he has knowledge and of which the tenant has no knowledge, or cannot be expected to discover, or where he should know of a dangerous condition and leases the premises for a purpose of involving a public use and has reason to believe the tenant will not first correct the condition. A landlord of a multiple-tenanted building, having control of sidewalks, common approaches, passageways or parts of the building common to all tenants, becomes liable where he either had actual notice of a defective condition therein, or was chargeable with constructive notice.

Id. at 25, 151 A.2d at 663–64. See also Lopez v. Gukenback, 391 Pa. 359, 137 A.2d 771 (1958).

Two other exceptions to the doctrine which have apparently not been expressly adopted in Pennsylvania are: (1) the exception for a short term lease of a furnished dwelling, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892); and (2) the situation where a tenant is restricted by his lease to a particular use and an agreement was reached before construction of the premises was completed. If the premises as constructed did not conform to the agreement, the doctrine of caveat emptor did not apply to bar the lessee from recovery in an action against the landlord. J. D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930), rev'd on other grounds, 66 S.W.2d 676 (Tex. Civ. App. 1933).


Under feudal tenure, and in more recent times, in the setting of a largely agrarian society, the tenant rented land primarily for the production of crops.
to an action by the landlord for nonpayment of rent that the premises were in an unfit and uninhabitable condition.\(^4\)

Theoretically, the tenant could insist upon a covenant by the landlord that the latter would maintain and repair the premises. In actuality, however, this alternative was almost meaningless due to the obvious lack of bargaining power of most tenants — especially the urban poor.\(^5\) Assuming arguendo that a tenant was able to muster the power necessary to insist upon such a clause, its effect might be less than satisfactory due to the existence of another outgrowth of the real property approach to landlord-tenant law — the doctrine of independent covenants. This doctrine, long established in Pennsylvania jurisprudence,\(^6\) had the effect of making the covenant of the tenant to pay rent and any covenant of a landlord to make repairs independent of one another. Thus, the landlord’s performance of his promise was not a condition precedent to his recovery of accrued rent.\(^7\) Consequently, the tenant was unable to exert any pressure upon the landlord to perform his obligations by ceasing to perform his own. Since the landlord was probably in better financial condition than the tenant (especially in the context of urban dwellings) and, similarly, was more apt to be knowledgeable in legal matters, he had a distinct advantage in resorting to the courts to enforce the tenant’s covenant to pay rent. The tenant was not without recourse to enforce the landlord’s covenant; however, his former alternatives did not include withholding rental payments.

The fact that a building or dwelling stood on the premises was, in the main, incidental, because the major emphasis was on the tenant’s right to till the soil for the production of crops to supply him a livelihood. For as long as the tenant rented the land he was the holder of an estate for years; in effect, he was the owner for a limited term. If he wanted to live in comfort, and if a dwelling stood on the land, it was his business to make that dwelling livable, to see to it that the roof was watertight, that the well was in good shape, and that whatever sanitary facilities there were, were adequate. While he was not to commit "waste" — destruction of the property that would leave it in less productive condition than when he rented it — the owner owed him no obligation to assist in maintaining his buildings in a livable or decent condition.

If anything, the obligation ran the other way, because an intentional or grossly negligent destruction of buildings on the premises might be construed as waste by the tenant. Thus, from its very beginning, the obligation to repair went hand in hand with control. Since the landlord gave up control of the premises for the stated term of years of the leasehold, during that term whatever the obligation to repair would rest on the temporary owner, the tenant, rather than on the holder of the reversionary interest, the owner of the fee. Initially, the dependence of the obligation to repair on the capacity to control was retained and applied to non-rural housing as well.

*Id.* at 110-11.


5. See note 46 infra. The lease which most tenants sign today is virtually an adhesion contract in which the tenant surrenders most of his rights. No longer is there an arm’s length bargaining process between a prospective tenant and landlord, and it is therefore wholly unrealistic to assume that a tenant would be able to insist upon a covenant by the landlord to maintain the premises. *See* Reitmeyer v. Sprecher, 431 Pa. 284, 290, 243 A.2d 395, 398 (1968); Clough, *Pennsylvania’s Rent Withholding Law*, 73 DICK. L. REV. 583, 590 (1969).


7. *Id.* See also White v. Connelly, 223 Pa. 359, 72 A. 637 (1909).
Under the common law, if a landlord breached a covenant to repair, the tenant had several alternatives. He could, of course, bring a separate suit or a counterclaim for damages arising out of the landlord’s breach, the measure of damages in such a situation being the difference between the value of the premises in their present unrepaired state and the condition in which they would have been had the landlord’s covenant been performed. Another remedy which the aggrieved tenant might have pursued when his landlord breached a covenant to repair was to make the repairs himself and to deduct their cost from his rental payment. The landlord’s breach also gave the tenant the option of surrendering possession of the premises, thereby releasing himself from further obligation to pay rent.

The doctrine of constructive eviction provided another form of common law relief for the tenant who was living in an uninhabitable dwelling and either had no covenant from the landlord to repair or, if one existed, could not enforce it. To invoke the doctrine, two basic elements were necessary: (1) substantial interference with the tenant’s possession by the landlord; and (2) abandonment of the premises by the tenant. This was generally an unsatisfactory remedy since the latter requirement precluded a tenant from simply withholding his rental payments and remaining in possession of the premises. Moreover, by requiring that the tenant relinquish his leasehold, the doctrine of constructive eviction often ran counter to the tenant’s real desire — upgrading his place of dwelling — and merely exacerbated his plight by forcing him to vacate when tight housing market conditions might exist.

In recent years, a growing number of courts have become aware of the combination of factors which made the common law governing land

   (1) Upon the landlord’s failure of performance, the tenant can perform it at his own expense and defalck the cost of such performance from the amount of rent due and payable; or . . . (2) he can retain possession of the premises and deduct from the rent the difference between rental value of the premises as it would have been if the lease had been fully complied with by the landlord and its rental value in the condition it actually was.
   Id. at 177-78, 172 A. at 98. Of course, if the tenant chose the latter method, the premises would remain in their non-complying condition albeit at a lesser cost to him.
lord-tenant relations inadequate to cope with the myriad problems facing the tenant (especially the slum tenant) in his struggle for better living conditions. A method often used by courts in escaping from the grasp of archaic real property concepts has been through the utilization of implied warranties of habitability.

In Javins v. First National Realty Corp., for example, the court held that a continuing warranty of habitability, measured by the standards set forth in the Housing Regulations of the District of Columbia, was implied by operation of law in leases of urban dwellings and a breach of this warranty gave rise to remedies for breach of contract. The Supreme Court of New Jersey took a somewhat different approach in Marini v. Ireland. There the court held that a landlord, in a lease agreement for a residential dwelling, warranted that the vital facilities of the leased premises were in a habitable condition at the inception of the lease, and that they would be maintained as such throughout the lease period. If the landlord failed to so maintain the premises, the tenant, after having notified the landlord of the defect and having given sufficient time for the latter to remedy the situation, could either vacate the premises or have the defect repaired and offset the cost against the rent due. This result was

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14. See, e.g., Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968) (failure of landlord to substantially comply with the housing code at the beginning of the lease term rendered the lease void as an illegal contract); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (implied warranty of habitability and fitness for the use intended in a lease of a dwelling house); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (at the inception of a lease there is an implied warranty against latent defects); Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968); Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (lessor’s covenant to provide a habitable dwelling and lessee’s covenant to pay rent held to be mutually dependent).

15. The argument for implying warranties of habitability with respect to leases is basically as follows: since a modern lease is more appropriately to be viewed as a contract for the purchase of space and services, it therefore can be considered a sale of personal property to the purchaser through implied warranties (see, e.g., UNIFORM COMMERCIAL CODE §§ 2-314, 315), an implied warranty should also apply to leases. Comment, Tenant Remedies — The Implied Warranty of Fitness and Habitability, 16 VILL. L. REV. 710, 719 (1971).


17. Although the court based its holding on the D.C. Housing Code, it did supplement this holding by emphasizing that “the common law itself must recognize the landlord’s obligation to keep his premises in a habitable condition.” Id. at 1077. This premise was supported by three principal arguments: (1) that certain factual assumptions upon which the “no-repair” rule rested are no longer viable; (2) that recent consumer protection cases require that a new rule be adopted in order to interpose those principles into landlord and tenant law; and (3) that the current status of the housing market and the inequality of bargaining power between landlord and tenant command the relinquishment of the old rule. Note, 16 VILL. L. REV. 383, 390 (1970). See also Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).


19. The defective facilities which precipitated the Marini dispute were plumbing fixtures. Id. at 134, 265 A.2d at 528.

20. The court justified its disregard of property law on two bases: (1) the doctrine of caveat emptor is simply inapposite when viewed in the context of modern
premised in part upon a recognition by the court that the implied covenant of habitability and the tenant's agreement to pay rent were mutually dependent covenants. Thus, two anachronistic real property concepts were overturned — caveat emptor and independency of covenants — clearing the way, at least theoretically, for legitimate common law rent withholding.

Unfortunately, however, few jurisdictions have seen fit to imply warranties of habitability in lease arrangements. Pennsylvania falls within the majority that has not done so, and under its common law, the tenant remains without remedy for the uninhabitable condition of his dwelling, absent a constructive eviction or an express covenant by the landlord to repair. In either case, his common law remedies do not include the cessation of rental payments as a device to coerce the landlord into repairing the leasehold.

The United States Supreme Court recently rendered a decision which is certain to raise doubt in some circles as to the constitutionality of judicial implementation of tenant remedies which allow the withholding of rental payments to coerce landlords into making necessary improvements. In Lindsey v. Normet, the appellants were month-to-month tenants in a dwelling which, on November 10, 1969, was declared unfit for habitation by the City (Portland, Oregon) Bureau of Buildings. Appellants requested appellee—landlord to make certain repairs. With one minor exception, the landlord refused to make the requested repairs. Appellants then refused to pay the December rent until the requested improvements had been made and were threatened on December 15 with a court order "unless the accrued rent was immediately paid." Before statutory eviction procedures were begun in the Oregon courts, however, the tenants filed suit in federal district court under 42 U.S.C. § 1983 seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer Statute

urban dwellings; and (2) caveat emptor should be disregarded because of the tenant's subordinate bargaining position and the landlord's superior knowledge of the premises. Id. at 141–43, 265 A.2d at 532–33.

21. Id. at 145, 265 A.2d at 534.


23. ORE. REV. STAT. §§ 105.105–105.160 (1969). The Act provides in pertinent part as follows:

105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force.

105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

105.115 Causes of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or
was unconstitutional on its face and an injunction against its continued enforcement. The three-judge court that heard the case held that the statute was not unconstitutional under either the due process clause or the equal protection clause of the fourteenth amendment but the tenants appealed.

Appellants contended that the following three provisions of the Oregon statute violated both the equal protection and due process clauses of the fourteenth amendment: (1) the requirement that a trial be held no later than six days after service of the complaint unless security for accruing rent is provided; (2) the provision which limited the triable issues in a suit under the statute to the tenant’s default and which precluded consideration of defenses based on the landlord’s breach of a duty to maintain his premises; and (3) the requirement of posting a bond, on appeal from an adverse decision, in twice the amount of the rent expected to accrue pending the appellate decision. The Supreme Court agreed with respect to their final contention on the basis of the equal protection clause since the double bond provision was required in Oregon only under the statute in question. The Court noted that the provision imposed “additional requirements which in our judgment bear no reasonable relationship to any valid state objective and which arbitrarily discriminate against tenants appealing from adverse decisions in FED [Forcible Entry and Detainer statute] actions,” and that the provision therefore denied appellants the equal protection of the law.

105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court. The Act provides further that a tenant may obtain a two-day continuance, but the grant of a longer continuance is conditioned on the tenant’s posting security for the payment of any rent which may accrue, if the plaintiff ultimately prevails, during the period of the continuance. Id. § 105.40. The suit may be tried to either a judge or jury, and the only issue is whether the allegations of the complaint are true. Id. §§ 105.145, 105.150. The only award which a plaintiff may recover is restitution of possession. Id. § 105.155. A defendant who loses such a suit may appeal only if he obtains two sureties who will provide security for the payment to the plaintiff, if the defendant loses on appeal, of twice the rental value of the property from the time of commencement of the action to final judgment. Id. § 105.160. See 405 U.S. at 63-64.

25. 405 U.S. at 60.
26. Id. at 76-77. The Court observed that while the due process clause does not require a state to provide appellate review where there is a full and fair trial on the merits, when an appeal is granted, it cannot be afforded to some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause. Id. at 77. The Court concluded that:

The discrimination against the poor, who could pay their rent pending appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirements of ORS § 105.160 violates the Equal Protection Clause.

Id. at 79.
As to the other two issues raised, however, the Court found that neither was violative of the fourteenth amendment. The Court cursorily dismissed the claim that the early trial provision violated appellants' due process rights, for "tenants would appear to have as much access to relevant facts as their landlord . . ." and there was always the availability of a continuance upon the posting of security for rent accruing during the continuance. The early trial provision likewise was held not to contravene the equal protection clause. Noting that the end purpose of the Oregon statute was the "prompt as well as peaceful resolution of disputes over the right to possession of real property," the Court observed that "the provisions for early trial and simplification of issues are closely related to that purpose." The Court thus utilized the rational relation test as to whether the statute contravened the equal protection clause, despite appellants' argument that the "need for decent shelter" and the "right to retain peaceful possession of one's home" were fundamental interests and therefore could be curtailed only by a showing of a compelling or superior state interest.

The Court concluded:

We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative not a judicial function. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

This language constitutes a very strong disapproval of judicially-created tenant remedies and, on its face, could jeopardize innovative judicial approaches to the antiquated landlord-tenant law. In light of this language, cases like Javins and Marini are constitutionally suspect.

It is submitted, however, that the quoted language is not as devastating as it might appear at first glance. Courts have never been denied the

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27. Id. at 65.
28. Id.
29. Id. at 70 (emphasis added).
30. Id. The Court stated that "[t]he equal protection claim with respect to these provisions thus depends on whether the State may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement." Id. at 70-71. It held that a state could do so because of the "unique factual and legal characteristics of the landlord-tenant relationship," including the facts that one of the two must be denied possession, that expenses continue to accrue to the landlord whether a tenant pays his rent or not, and that speedy adjudication is necessary to prevent undue economic loss to the landlord and undue harassment of the tenant when he is legally in possession. Id. at 72-73.
31. Id. at 73.
32. Id. at 74.
power to adjudicate rights existing under contracts and that is, in effect, what a court does when it applies warranties of habitability in leases of residential dwellings. Thus, there should be little question that the definition of landlord-tenant relationships can be, and often is, a judicial function, notwithstanding the Court's dicta.

Moreover, the Court itself recognized the viability of implied warranties of habitability in its discussion of appellants' claim that they were denied due process by restricting the issues in FED actions to whether the tenant has paid his rent and has honored the covenants he has assumed and by the fact that rental payments were not suspended while the alleged wrongdoings of the landlord were litigated. The Court denied both contentions; the latter summarily, by stating that:

The Constitution has not federalized the substantive law of landlord-tenant relations . . . and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants. Likewise, the Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated.

In spite of this language and its assertion that "the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative not a judicial function," the Court noted that:

In some jurisdictions, a tenant may argue as a defense to an eviction for nonpayment of rent such claims as unrepaid building code violations, breach of an implied warranty of habitability, or the fact that the landlord is evicting him for reporting building code violations or for exercising constitutional rights.

It would be anomalous to consider the Court's dicta as denying the right of a state judiciary to define landlord-tenant relations in light of the Court's recognition of the above-quoted defenses, at least some of which are judicially-created. The obvious conclusion is that the Court was not really inclined to stifle judicial innovation in the landlord-tenant area.

The precise holding of the case is that there is no constitutional right of a tenant to occupy a dwelling without the payment of rent or otherwise
in contravention of the terms of the agreement. This holding is not ill-
considered. It is submitted, however, that the Court's broad dicta may
prove to have an unfortunate and stifling influence on the judiciary's
attempts to overthrow archaic common law concepts which have proven
ineffectual in coping with modern landlord-tenant relationships. It is
further submitted that the Supreme Court, if it wished to achieve such a
stifling effect, could have squarely laid the matter to rest by deciding
a case like Javins. This it chose not to do, at least at that time, by refusing
to grant certiorari. If the Court in Lindsay merely meant that there is
no constitutional guarantee to adequate housing, a conclusion both logical
and apparently undebatable, it should simply have stated it in that fashion
directly, and not by the use of such sweeping language which arguably is
susceptible to conflicting interpretations. It is a shame that such an un-
fortunate choice of language, which dealt with matters beyond the scope
of the problem at issue, could place in jeopardy formerly valid, judicially-
created tenant remedies.

B. The Problem

The common law, which placed the burden of upkeep and repair upon
the tenant, was not inconsistent with a way of life which was largely
rural and agrarian. The conveyance of a leasehold interest in real property
vested the lessee with actual ownership for the extent of the term and
with all the rights and liabilities which accompanied such a possessory
interest. Moreover, in the last few decades, the population has once
again moved toward non-urban living; however, the rush to the suburbs
has involved, almost exclusively, the white, higher socio-economic groups.
Conversely, this emigration has been countered by a steady influx of lower
income blacks and Puerto Ricans to the inner cities. These urban poor,
unlike the agrarian tenant, are not interested in obtaining a possessory
interest in land for a term of years. Their main concern is to obtain some
sort of shelter, and to this end, they contract to rent shelter in much the
same manner as they would purchase any other consumer commodity.
Viewed in this context, the tenant is no longer the party in the better position to make repairs. Not only is the landlord in a better financial position to effectuate repairs, but also, since lease terms are usually for relatively short periods of time, he has a much greater long term interest in maintaining the dwelling in a habitable condition.43

While the slum dweller is doubtless impoverished, it is not this factor alone which forces him into the vicious cycle of slum tenancy.44 In fact, the rent paid by the typical slum dweller is not significantly less than that paid by the lessee of more desirable housing.45 Because of severe urban housing shortages,46 the market is wholly the landlord’s; consequently, he is required to make few if any improvements to attract or hold tenants.47 The slum tenant, because of his poverty, immobility and the lack of alternatives, is forced into accepting whatever shelter he can locate. The resulting lease could be called, more properly, an adhesion contract which “grants to the tenant the right to pay rent and precious little else.”48

The Pennsylvania Supreme Court took judicial notice of this dilemma in Reitmeyer v. Sprecher.49 In that case a tenant sued his landlord for injuries sustained on the leased premises when he fell on stairs as a result of a defective condition which the landlord had promised to repair. The

serviceable plumbing facilities, secure windows and door, proper sanitation, and proper maintenance.

Special attention should be directed to the word “seek” in the quoted language, lest anyone assume that this “package” is obtained by rich and poor alike.


The question has been raised as to whether income level is responsible for the poor quality of Negro housing. If the Negro had more to spend for housing, so it is frequently held, then his housing would not be in such bad condition. The data, however, indicates that Negroes obtain less housing and worse facilities than whites for equivalent expenditures. If income were the sole factor responsible for disparity in housing quality, it would be logical that within each economic class, the percent of whites and nonwhites occupying standard dwellings would be comparable. The reality is that the white, non-white housing differential exists in all income categories. At every income level, Negroes occupy a significantly smaller percent of standard dwellings than white families with similar incomes.

Id. at 116. In addition, ghetto residents pay more for food and credit than do non-slam dwellers. Id. at 108-09.

46. See Urban America: Goals & Problems, supra note 44, at 117-20; Comment, supra note 41, at 305-10.

47. Clough, supra note 5, at 590. See also Schoshinski, supra note 45, at 521. The tenant does have remedies. See notes 8-15 and accompanying text supra. To be effective, of course, the tenant must know that these remedies exist and how they operate, knowledge which cannot be readily assumed. Schoshinski, supra note 45, at 520. Perhaps the most obvious remedy to one untrained in the law is constructive eviction — if the dwelling is uninhabitable move out. Yet this alternative is a Hobbsian choice, for once the tenant is out, he may have no place to go.

48. Schoshinski, supra note 45, at 521. See Clough, supra note 5, at 590.

court reversed a decision for the landlord holding that a duty arose on his part to render safe the defective condition and that he was liable in tort for the physical harm caused to the tenant resulting from the breach.50 The holding was based upon the recognition of the fact that:

[C]ritical changes have taken place economically and socially . . . most frequently today the average prospective tenant vis-à-vis the prospective landlord occupies a disadvantageous position. Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair. The acute housing shortage mandates that the average prospective tenant accede to the demands of the prospective landlord as to conditions of rental, which under ordinary conditions, with housing available, the tenant would not and should not accept.

. . . .

If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-à-vis the landlord when it comes to negotiating a lease.51

It was this situation which engendered the enactment of the Pennsylvania Rent Withholding Act. The problems which existed were therefore most obvious. In light of the common law as it had developed relative to landlord-tenant law, the tenant was at a distinct disadvantage in the courts. Housing codes had, for the most part, failed to ameliorate the spreading urban dilemma.52 The legislature thus took it upon itself to

50. Id. at 289–90, 243 A.2d at 398.
51. Id.
52. For a comprehensive analysis of housing codes, see Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965). According to one recent commentator, the general failure of housing code officials to enforce comprehensively their provisions can be explained by a number of factors, including obsolete requirements, the lack of political reward for enforcement, the low calibre of the enforcement personnel, and the lack of political power among the poor. These factors, the author concludes, are merely symptomatic of a more deeply rooted problem: an unsureness about the viability of sustained enforcement. This uncertainty evolves from a fear that many landlords, if forced to improve their properties, would either pass the increased costs on to the tenant or simply opt to abandon the property entirely, thus aggravating the already acute housing shortage. Ackerman, Regulating Slum Housing Codes on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 Yale L.J. 1093–95 (1971). The author goes on to suggest a justification of housing codes as a method of redistributing income from the landlord class to the poor tenant class. To effectuate such a program the landlord would have to be prohibited from passing increased upkeep or improvement costs on to his tenants. Id. at 1096–97.

Furthermore, since many housing codes merely provide a minimal fine upon the landlord for a violation, courts could, and often do, limit the remedy to the fine. Since in many cases the fine would be less burdensome than would conformance, the landlord opts for the former, and the tenant realizes no gain from the enforcement action. Comment, Rent Withholding: The Tenant's Remedy Against Unfit Housing, 10 J. Family L. 481, 486 (1971).

It is likely that the failure of local governments to enforce housing codes may have ramifications which cut even deeper than the obvious failure to upgrade housing in the cities. For example, when a code enforcement agency cannot find a landlord to compel compliance, yet one of his tenants who is receiving public assistance is required to engage in the most strenuous search for relatives who might be able to support him, "the consumer comes to doubt that law means law." Gilhool,
provide a statutory scheme which would help the urban tenant more effectively combat the inexorable housing problems which he faced.

III. THE PENNSYLVANIA RENT WITHHOLDING ACT

A. The Act Itself

The problems which confronted urban tenants did not go unnoticed by the legislators, and on June 1, 1965, Senate Bill No. 813 was introduced into the Pennsylvania General Assembly. By providing for the suspension of the tenant's duty to pay rent if his dwelling were certified as unfit by the proper authorities, the bill purported to ameliorate the housing problem by encouraging the landlord to repair unfit dwellings in order to be entitled to the rent. This procedure attempted to forestall the modus operandi of landlords who milk their structures for quick profits and then abandon them. Since much of the urban dilemma in housing was caused by the sheer lack of units, the bill allowed the tenant of an unfit dwelling to remain there while his payments were placed into escrow. This is

Social Aspects of Housing Code Enforcement, 3 Urban Law. 546, 547 (1971). The author noted that:

One of the chief social values and social aspects of housing codes which must be accounted for is the question in the minds of the consumers of housing services of the legitimacy of legal institutions.

The question framed for housing code enforcement . . . is exactly that question that the Kerner Commission had reference to . . . that in the decision to enforce or not to enforce, among the other things that are at stake is the legitimacy of the legal and political system of which that decision is a part.

Id.

53. The bill provided that the inspection and certification be made by the Department of Licenses and Inspections of any first class city (over one million people, making Philadelphia the Commonwealth's only first class city. Comment, 30 U. Pitt. L. Rev. 148, 148 n.6 (1968)), the Department of Public Safety of any second class (between five-hundred thousand and one million people) or second class A city (between one hundred thirty-five thousand and five-hundred thousand people) (Pittsburgh is the Commonwealth's only second class city and Scranton is the only second class A city. Id.) or by any public health department of any such city or of the county in which such city is located. Pa. Stat. tit. 35, § 1700-1 (Supp. 1971).

54. See Comment, supra note 41, at 320–22 n.83, where the author observed:

This type of profitability . . . is bolstered by the opinions expressed in Vaughan, "Are Minimum Standard Apartment Houses A Good Investment?", The Apartment Journal, Dec. 1962, p. 6. The author, apparently a Los Angeles investor well acquainted with dealings in rental accommodations, states that rundown apartments sell for from four to five and one-half times the annual gross income, as compared to "pride of ownership" property selling for six to eight times its gross income. Ibid. The danger with the former, of course, is that the profits may be eaten up in forced repairs. However, he goes on to state that "if you want capital gain with quick turnover, areas with clunkers and high rent demand are hard to beat. I know operators who seek this type of property, depreciate it as fast as possible, sell it and get out and leave the next owner to face the music of the milked units. This type of operation takes nerve, judgment, time and knowledge and is not recommended for the ordinary investor." Id., at 15. The implication is clear that the "operator" who is impervious to the welfare of his tenants will profit handsomely from investment in slum apartments.

[A] primary reason for the profitability of slum property is that the purchase price can be retrieved through a rapid depreciation writeoff, precisely because it is old, poorly maintained, and thus has a short useful life.
significant in that it recognizes that much of the tenant’s problem evolves from the housing shortage and therefore any remedy which requires, in effect, that he abandon the premises (constructive eviction, for example) does little in the way of providing decent housing. The bill was passed on January 24, 1966, as Act No. 536 and was amended in 1967 and 1968.55

The procedure contemplated for the Act would appear to be as follows: (1) some type of routine departmental, or complaint-initiated, inspection of the subject dwelling; (2) a certification by the appropriate inspection unit of the dwelling as fit or unfit for human habitation; (3) the notification of the parties concerned as to the result of the inspection;56 (4) the payment of rental obligations by the tenant into an escrow account in the event of an unfit certification; (5) a reinspection at any time within the subsequent six months, and necessarily at the termination of the six month period;57 and (6) the distribution of the escrowed rents to the party entitled thereto with the exception of funds previously released by the escrow agent for repairs and necessary utilities.58

Like most statutes, the Pennsylvania Rent Withholding Act leaves questions unanswered. Unfortunately, many of the unanswered questions are fundamental to the effective implementation of the Act. Initially, while the Act contemplated a certification by the proper authorities as to the dwelling’s fitness for human habitation, this concept is nowhere defined

55. The Act as passed did not include third class cities within its purview, and the escrow period was one year. These provisions were amended to include third class cities and to reduce the escrow period to six months. Additionally, while the original Act did not provide for the use of escrowed rents to make the dwelling fit for human habitation and to pay utility services which the landlord refused or was unable to pay, these provisions were included in the Act as amended. Finally, the amended Act included the caveat (absent in the original) that “no tenant shall be evicted for any reason whatsoever while rent is deposited in escrow.” PA. STAT. tit. 35, § 1700-1 (Supp. 1971).

56. While this is not specified, it would be ludicrous to conduct such an inspection and certification without informing the directly affected parties of the result and meaning of such certification and of their rights and responsibilities pursuant thereto.

57. If the landlord renders the building fit prior to the end of the six month period he is thereby entitled to an inspection and lifting of the unfit certification at that time and the escrowed rents should be released to him. Since only by having the dwelling recertified as fit can the landlord obtain the rents, he will obviously initiate a reinspection immediately upon effectuating the repairs. If, however, the dwelling is not brought into compliance within the six month period, it would appear necessary for the equitable operation of the procedure that an inspection be made precisely at the end of the six month period. It should fall upon the inspection unit to initiate this reinspection itself in light of the statutory wording.

One problem that could arise absent the six month reinspection is that money could be paid over to the party who is not entitled to it. For example, if the landlord does nothing for six months and there is no inspection at that time, but then complies after seven or more months and an inspection and fit certification is then made, he could be paid funds deposited from the first month when in actuality he is only entitled to one month’s rent out of the total of seven deposited. The same type problem would not plague the landlord if he complied but failed to obtain an immediate inspection, since he would be entitled to all rents deposited during a particular period irrespective of the point during that period at which the certification as fit is made. At any rate, a landlord who does comply is almost certain to initiate a reinspection immediately.

in the Act. It might be argued that this absence is not a real problem since each department empowered by the Act maintains its own standards of fitness for human habitation. On the other hand, since each inspection agency could conceivably adhere to different standards of fitness, the Act could suffer from inconsistent application depending upon which department performed the inspection. One type of problem which could conceivably arise in this respect evolves from the Act's provision for concurrent jurisdiction of different inspection agencies.\textsuperscript{59} If, for example, the Health Department defined "unfit for human habitation" very stringently and the Department of Licenses and Inspections required a lesser showing of uninhabitability for an unfit certification, it would behoove the tenant who desired an inspection to contact the latter department, and the landlord, the former. Similarly, the Health Department may be assumed to be attuned particularly to health code violations in its inspections; if a tenant is living in an otherwise uninhabitable dwelling which is nevertheless clean and apparently not unhealthful, the dwelling may not receive an unfit certification which it otherwise deserves.\textsuperscript{60}

Secondly, if "unfit for human habitation" is defined in department regulations, it could be interpreted literally to encompass the situation which would exist where a dwelling was so dangerous to life and limb that a tenant should not be allowed to continue living there. Such an interpretation presents an obvious anomaly. The Act provides that the tenant of a dwelling may continue living there after it has been certified as "unfit for human habitation." If "unfit for human habitation" is interpreted literally, then a dwelling will not be certified as unfit until it is in a deplorable condition dangerous to life and limb. Thus, since the Act allows the tenant to remain in the dwelling subsequent to an unfit certification, the legislature would, in effect be sanctioning habitation of dwellings injurious to the tenant's well-being. Since this concept would appear to be antithetical to the public interest, it has been posited that the concept of "unfit for human habitation was intended to embrace deficiencies considerably less severe than the deficiencies that must exist before a dwelling is condemned and ordered vacated under present practice."\textsuperscript{61}

\textsuperscript{59} Id. The Act reads in pertinent part as follows:
Whenever the Department of Licenses and Inspections of any city of the first class, or the Department of Public Safety of any city of the second class, second class A, or third class as the case may be, or any Public Health Department of any such city, or of the county in which such city is located, certifies a dwelling as unfit for human habitation...  
\textit{Id.} (emphasis added). The obvious import of this language is that the Public Health Department has, at all times, jurisdiction concurrent with the other respectively enumerated inspection agencies.
\textsuperscript{60} See Comment, supra note 52, at 483–84.
\textsuperscript{61} Clough, supra note 5, at 591–92. The author goes on to suggest that: It necessarily follows that the legislative intent encompasses the idea that the rent withholding procedures should be invoked before a dwelling has deteriorated to the point of being unfit for human habitation within the meaning of existing condemnation legislation. As a result there are three basic classifications of deficiencies: (1) only minor repair and still fit for human habitation; (2) major repair and unfit for human habitation (rent withholding invoked); or (3)
While the Act's ultimate effectiveness would seem to depend in large measure upon the smooth working of its escrow procedure, the legislature has done little to clarify its actual machinations. The Act provides that “the rent withheld shall be deposited by the tenant in an escrow account in a bank or trust company approved by the city or county.”\textsuperscript{62} Clearly, the rent is ultimately to be deposited in a bank. It is unclear, however, whether in the first instance the tenant is to deposit the rent directly into a bank account or not. The wording of the Act does not seem to contemplate an independent escrow agent, yet in both Philadelphia and Pittsburgh, an escrow agent, acting on behalf of the tenant, receives his rent and then deposits it in a bank.\textsuperscript{63} While this does not appear to be a major shortcoming, it could present logistic problems with respect to the implementation of the Act.

Perhaps a more serious problem, and one which reaches the viability of the entire purpose of the Act concerns the proviso: “any funds deposited in escrow may be used for the purpose of making such dwelling fit for human habitation and for the payment of utility services for which the landlord is obligated but which he refuses or is unable to pay.”\textsuperscript{64} Clearly, this contemplates the release of funds. The problem arises over the question who is authorized to allow such release. In this regard, there is a conceptual issue left open by the Act with respect to whom the money “belongs” once it is placed into escrow. Since both the tenant and the landlord have contingent interests in the deposited funds, it is difficult to assign to either the actual ownership of the money.\textsuperscript{65} Problems could conceivably arise in either situation. If the tenant alone has the power to authorize the release of withheld rents, he could simply decide that he would prefer to live in an uninhabitable dwelling and have the rent money returned to be used for more immediately gratifying expenditures. This possibility would seem to grow more likely the longer the particular tenant has lived in squalor under the control of do-nothing absentee landlords. Moreover, a tenant would be unlikely to release “his” money to a landlord

\textsuperscript{62} PA. STAT. tit. 35, § 1700-1 (Supp. 1971).
\textsuperscript{63} In Pittsburgh, the Mellon National Bank acts as both escrow agent and depository, thus for appearance sake there is no independent escrow agent. Clough, supra note 5, at 596-97. In Philadelphia, the procedure is much more involved since there are at least twenty-five independent escrow agents and perhaps as many as one-hundred, which receive rent from eligible tenants and then deposit it into one of several depository banks. Interview with Tony Lewis, Director of the North Philadelphia Tenant's Union, in Philadelphia, January 20, 1972. This procedure is followed for the most part in Philadelphia, although some escrow agents have the tenant place the rent directly into the depository himself. For a more comprehensive analysis of the Philadelphia escrow procedure, see notes 265-85 and accompanying text infra.

\textsuperscript{64} Id. at 592, citing Pittsburgh, Pa., Revised Rent Withholding Procedure Pursuant to Act No. 536, January 24, 1966.

\textsuperscript{65} The supreme court of Pennsylvania has answered this question in favor of the tenant in DePaul v. Kaufman, 441 Pa. 386, 272 A.2d 500 (1971). For a discussion of this case, see notes 86-101 and accompanying text infra.
that has never done anything on his own initiative to improve the living conditions in his buildings.

The problem with giving the landlord sole releasing power is obviously the fact that he could expend the moneys on other buildings or, if on the subject building, could make repairs insufficient to bring the dwelling into compliance, thus depriving the tenant of money that would be rightfully his at the end of the escrow period.

It is submitted that the party which should have full control over the release of withheld rents is the escrow agent. Since both the tenant and the landlord have an interest in the funds, the escrow agent would appear to have a fiduciary duty toward both. Therefore, he would be answerable to either in the event of a breach of the duty owed to that party. The agent’s determination would seem to be easy enough in the case of a release for utility payments; but, in the case of a release for repairs, the determination would seem more difficult. If the repairs were not sufficient to bring the dwelling into compliance, the tenant would be deprived of monies to which he is legally entitled, and the agent might be liable for a breach of his duty to the tenant.66

B. Judicial Interpretation

Obviously, as in all broadly worded statutes, much of the interpretation has been left to the courts. Notwithstanding, only a very few cases dealing with the Act have reached the appellate level in Pennsylvania. The cases reaching this level have, however, contributed to the clarification of many of the questions which the Act left unanswered.

The first appellate case to consider the Act was National Council of Mechanics v. Roberson.67 In that case, the Robersons, as tenants, occupied a dwelling in Pittsburgh owned by the Council.68 The lease was entered into in October 1967 and the Robersons paid the rent for that month, November, and December 1967. As of January 25, 1968, the rent for January had not been paid. On that day, the Allegheny County Health Department certified the property as unfit for human habitation, therefore permitting the tenants to use rent withholding under the Act. Without

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66. It can of course be argued that any repairs would be beneficial, and since, absent the Act, the tenant would have to pay rent regardless of the condition of the premises, it is reasonable to release the funds for any repairs made.

However, such a release is not consistent with the Act’s purpose, for the monies are to be returned to the tenant at the end of six months if the dwelling is not brought into compliance. Secondly, even assuming the viability of such an argument, there is no assurance that the tenant will be benefited at all by the expenditure of the escrowed rents. If, for example, an entire multiple dwelling is certified unfit and several tenants use the escrow procedure, the released rents could be used for repairs to sections of the building which in no way benefit the person whose rents were released for the repairs.

For a discussion of the actual release procedure, see notes 272-88 and accompanying text infra.


68. The lease was from month to month at a rental of sixty-five dollars per month, payable on the first day of each month in advance. Id. at 10, 248 A.2d at 862.
knowledge of this action, however, the Robersons paid their January rent to the landlord’s agent on January 26, 1968. In February the Robersons received notice from the Department of its determination, and they commenced paying their rent into escrow. On June 24, 1968, when both the May and June rents had not yet been paid, the Council obtained a judgment in ejectment against the Robersons. The Robersons filed a petition to open the judgment and to stay execution on the writ of possession, which stay was granted on August 19, upon the condition that the Robersons pay each month’s rent on the first day of said month, either into escrow or to the landlord’s agent if the property were removed from rent withholding. This condition was not met and the common pleas court thereupon refused to grant another stay. Meanwhile, on October 22, the rent for the first six months had been ordered returned to the Robersons since the necessary repairs had not been made to their dwelling. On November 26, the Robersons paid their December rent into escrow and filed their appeal. The superior court granted a supersedeas until December 31, 1968.

On appeal, the Robersons contended that they were still protected from eviction by the Rent Withholding Act, since their rent was payable into the escrow account and had been so paid, and that, therefore, the order of November 25 refusing to grant a further stay was erroneous and should have been quashed.

Upon a review of the Act, the court affirmed the order and found:

[N]othing in the Act which provides for a continuation of the privilege of the tenant to pay his rent into the escrow account or to occupy the premises beyond the six month period set forth in the Act.

The court therefore felt that it was:

[O]nstrained to conclude that the final provision of the Act, “No tenant shall be evicted for any reason whatsoever while rent is deposited in escrow,” is applicable only during that six month period, and not thereafter.

69. For a discussion of the notification procedure employed by the Department of Licenses and Inspections, see notes 254–64 and accompanying text infra.

70. Having failed to comply with this order and faced with another eviction order, the Robersons applied again for a stay of execution. This was granted on October 2, and the initial order was modified to allow the rents to be paid between the first and twelfth of each month. The Council then petitioned to strike this second order and reinstate the order of August 19. The petition was granted on November 15 on the grounds, inter alia, that a common pleas judge does not possess the power to review the determination of a judge of the same court. 214 Pa. Super. at 14, 248 A.2d at 864.

71. The rent for July was paid on August 1; the August rent on August 20; the September rent on September 25; the October rent on October 9; and the November rent on November 5. On November 25, Judge Price who had entered the original order, refused a further stay. Id. at 13–16, 248 A.2d at 864–65.

72. Id. at 13, 248 A.2d at 864.

73. Id. at 15, 248 A.2d at 864.

74. Id.

75. Id. at 18, 248 A.2d at 866.

76. Id.
The court based its conclusion upon the assumption that statutes of this kind, being penal in nature, in that they deprive the landlord of a right to which he otherwise would be entitled, should be strictly construed so as not to grant to the tenant any right not expressly provided.\textsuperscript{77}

While the court's judicial restraint might have been commendable in another context, its strict construction of the Pennsylvania Rent Withholding Act was wholly misplaced. The obvious intent of the statute was remedial on behalf of the tenant, although its provisions may indeed work a penalty on the landlord. Therefore, it is submitted, a broad construction was called for in order to effectuate the obvious legislative purpose of the Act—improvement of urban housing conditions.\textsuperscript{78} In this light, the court's action in narrowly construing the statute because the landlord could forfeit his rental payments for noncompliance (the penalty) appears erroneous.

In a concurring opinion, Judge Hoffman observed that, since the tenants had been continually late in paying their rent into escrow, he would consider them beyond the Act's protection. He interpreted the last sentence of the Act—"No tenant shall be evicted for any reason whatsoever while rent is deposited in escrow"—to mean that, "the tenant is protected against eviction, under the Act, only if he pays his rent into the escrow account in the timely manner specified by the lease arrangement."\textsuperscript{79}

In \textit{Klein v. Allegheny County Health Department},\textsuperscript{80} a tenant paid her rent into escrow for six months subsequent to an unfit certification. The tenant occupied one of six apartments in a building owned by the appellee Klein. Despite the fact that the landlord made significant repairs,\textsuperscript{81} the premises were again certified as unfit at the end of the six month period and the tenant continued depositing rent into escrow.

The landlord then filed a petition in the common pleas court for a rule to show cause why the total amount on deposit should not be paid to him. The rule was discharged and the money in escrow was directed to be returned to the tenant. The landlord appealed to the superior court, claiming that he was entitled to: (1) the monies deposited during the initial six month period as reimbursement for repairs, the continued unfitness notwithstanding, and (2) the monies deposited subsequent to the end of the first six month period because the Act provided for payment into escrow for only one six month withholding period.\textsuperscript{82} The superior court reversed, \textit{holding} that there could be no reimbursement to the landlord

\textsuperscript{77} Id.

\textsuperscript{78} See notes 53-55 and accompanying text supra.

\textsuperscript{79} 214 Pa. Super. at 20, 249 A.2d at 828 (Hoffman, J., concurring) (emphasis added).


\textsuperscript{81} While the tenant of the apartment in question had paid $360 into escrow during the six month period, Klein had expended a total of $1700 during the same period on repairs to the whole building. \textit{Id.} at 3, 269 A.2d at 648.

until the premises were classified as fit for human habitation but also that
the Act did provide for only one six month withholding period.\textsuperscript{83}

The tenant appealed, alleging that the superior court erred in holding
that the escrow procedure could not be utilized after the initial six month
period. The supreme court reversed, holding that "under the clear wording
of the Act, there is to be not only one six month withholding period but
as many periods as are necessary until the dwelling is certified as fit for
human habitation."\textsuperscript{84} The court reasoned that to limit the availability of
escrow to one six month period would frustrate the purpose of the Act, for:

A landlord would have little incentive to improve a dwelling if the
costs of improvement exceeded the total of six months rent and he
knew that after those six months the dwelling would be insulated from
any further withholding.\textsuperscript{85}

The holding in \textit{Klein}, nullifying \textit{Roberson}, appears to be a much
more rational interpretation of the Act in light of the obvious legislative
intent. The strict holding in \textit{Roberson} would have rendered the Act a
virtual nullity in many situations and was therefore rightfully supplanted
by the supreme court in \textit{Klein}.

After more than five years of operation, the constitutionality of the
Pennsylvania Rent Withholding Act was finally challenged in \textit{DePaul v.\nKauffman}.\textsuperscript{86} The appellants therein were owners of a nine-unit apartment
building in Philadelphia which had been certified unfit by the city pursuant
to the Act. Rents had been paid to appellee, an escrow agent.\textsuperscript{87} Appellants
asserted that the Act: (1) was an unconstitutional delegation of legislative
authority; (2) suffered from a degree of vagueness offensive to the four-

\textsuperscript{83} \textit{Id.} at 53-54, 261 A.2d at 620-21. The court merely concluded that it would
be unreasonable to allow the use of escrow beyond the initial six month period.

\textsuperscript{84} 441 Pa. at 7, 269 A.2d at 651 (emphasis added). The court reached its
conclusion by noting that: (1) there was no time limit attached to the provision calling
for the suspension of rental payments until the dwelling was certified as fit; (2)
the six month period specified in the Act must not be interpreted so as to emasculate
the Act in effectuating its purpose, and therefore, it was not a limiting device; and
(3) the object of the legislature was to attempt to improve the severe housing
shortage and poor conditions which prevailed. \textit{Id.} at 6-7, 269 A.2d at 650-51.

\textsuperscript{85} \textit{Id.} at 8, 269 A.2d at 651. The court noted that:
\begin{quote}
[W]hen the legislature amended the Act in 1967 to reduce the length of the
periods from one year to six months, it did so not to decrease the pressure that
could be put on landlords but rather to increase the incentive to repair by cutting
in half the time within which a landlord could make the necessary repairs and
still recover the escrow fund. We will not interpret the Act so as to frustrate
the obvious legislative purpose.
\end{quote}

\textit{Id.} The court answered the argument that, since the statute was penal in nature
it must be strictly construed (\textit{see note 82} and accompanying text \textit{supra}), by stating
that "strict construction does not require... that a statute be construed as narrowly
as possible, or that it be construed so literally and without common sense that
its obvious intent is frustrated." \textit{Id.} at 8, 269 A.2d at 651.

\textsuperscript{86} 441 Pa. 386, 272 A.2d 500 (1971).

\textsuperscript{87} On October 17, 1968, appellants filed a complaint seeking a declaration that
the Act was unconstitutional and an injunction restraining appellee from returning
any escrow funds to the depositing tenants. Appellants alleged that they had applied
for a loan to make repairs but that their application could not be processed prior
to the expiration of the six month period. A preliminary injunction issued, but
appellee's objections were sustained and the injunction dissolved. This appeal followed.
teenth amendment; (3) allowed the taking of property without due process of law; and (4) impaired the obligations of contracts in violation of article I, section 17 of the Pennsylvania Constitution and article I, section 10 of the United States Constitution.88

The court denied each of the challenges in turn. It first noted that, while the legislature cannot delegate the power to make law, it may confer discretion in connection with the execution of the law as long as the legislation contains adequate standards to guide and restrain the exercise of the delegated administrative functions.89 The court concluded that the terms "fit for human habitation" and "unfit for human habitation" met the requisite degree of specificity of the delegation doctrine.90

Since the Philadelphia Housing Code defined "unfit for human habitation" as any dwelling which "constitutes a serious hazard to the health or safety of the occupants or to the public because it is dilapidated, unsanitary, vermin-infested or lacking in the facilities and equipment required by this Title,"91 the court determined that the terms "fit" and "unfit for human habitation" were not lacking in specificity as to render them void for vagueness under the fourteenth amendment.92

As to appellant's contention that the Act offended due process, the court noted that property rights are "subject to valid police regulation, made, and to be made, for the health and comfort of the people . . ."93 This applies as long as the means employed "have a real and substantial relation to the objects sought to be attained."94 Since the objective of the Act was to assure decent and habitable rental property, the court held that the sanctions imposed by the Act bore a substantial and reasonable relation to the realization of that goal.95 In answering what it felt to be appellant's real complaint — that the Act was too severe — the court made four important procedural clarifications. It held that the language,

88. 441 Pa. at 391, 272 A.2d at 503.
89. Id. at 391-92, 272 A.2d at 503.
90. The language of the Rent Withholding Act was considered by the court to compare favorably with the following judicially approved delegation standards:
   "the promotion of the health, safety, morals and general welfare;" . . . "detrimental to welfare, health, peace and morals of the inhabitants of the neighborhood;"
   . . . "adequacy or inadequacy of banking facilities;" . . . "excessive profits;" . . . "unfairly or inequitably;" . . . "public convenience or necessity;" . . . and "public interest" . . .
Id. at 392-93, 272 A.2d at 503-04 (citations omitted).
91. PHILADELPHIA, PA., HOUSING CODE § 7-506 (1) (1968).
92. 441 Pa. at 393, 272 A.2d at 504.
95. 441 Pa. at 394, 272 A.2d at 504. The court observed that:
   "It seems a matter of common sense that one in the business of renting real estate for profit who is faced with the temporary or permanent loss of rental income will, in some instances, take steps to avoid that loss."
Id.
“the rent money shall be deposited by the tenant in an escrow account,” made it “clear that a tenant may in no event remain in possession without paying the required rent to the escrowee.” 96 Secondly, it held that the Act “does not . . . require the renewal of a lease which is set to expire during the six month period of rent suspension . . . but [is] only an extension of the original lease so long as rent is in escrow.” 97 Thirdly, the court held that the Act permitted, but did not require, the use of the escrowed funds to make repairs. 98 Finally, it clarified the position of a landlord, in light of the non-eviction clause, when the tenant abused the leased property, by noting that the landlord could either sue for damages or, if monetary damages would be inadequate, seek an injunction against the misuse. 99

The court also rejected appellant’s final constitutional attack, the impairment of contracts. Dividing the leases into two categories — those entered into subsequent to the effective date of the Act and those pre-dating the Act, the court observed that there could be no impairment as to the first group since:

the laws in force when a contract is entered into become part of the obligation of contract “with the same effect as if expressly incorporated in its terms.”100

As to the latter group, the court observed that while:

the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as . . . are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected . . . a statute passed

96. Id. at 395, 272 A.2d at 505.

97. Id. at 395–96, 272 A.2d at 505. The court reasoned that this construction would serve those tenants who are renting at will or from month to month. Without an extension, the landlord could largely avoid the Act’s impact by giving notice to vacate as soon as the first rental payment was put into escrow. Similarly, such a construction would aid those landlords renting from year to year or longer, in which cases a renewal would be for a much longer time than would be needed to effectuate the six month escrow period.

98. Id. at 396, 272 A.2d at 505. Therefore, if the tenant does not consent to the release of the funds, the landlord must obtain necessary working capital elsewhere. The court did not feel that this was an unreasonable burden since landlords, being in the business of maintaining property, should have the knowledge of how to effectuate repairs with other funds or by other means. This rationale may be open to criticism in that it overlooks the fact that, while the buildings are in an uninhabitable condition, they may be considered as inadequate collateral for a loan. In viewing the release of funds for repairs as a tenant prerogative, the court obviously considered the escrowed rental payments as the tenant’s property. This is a theoretical concept which figures greatly in the interpretation and effective operation of the Act, and it is submitted that the court should have given the concept much greater consideration. Id. at 396–97, 272 A.2d at 505–06. See notes 64–66 and accompanying text supra.

99. Id. at 398, 272 A.2d at 506. This remedy has been criticized in that the typical tenant residing in an unfit dwelling would probably be unable to satisfy a money judgment. A solution in such a situation might be to allow a judgment to be satisfied out of the escrow fund. See Note, 32 U. Pa. L. Rev. 626, 631 (1971).

100. 441 Pa. at 398, 272 A.2d at 506, citing Beaver County Bldg. & Loan Ass’n v. Winowich, 323 Pa. 483, 489, 187 A. 481, 484 (1936).
in the legitimate exercise of the police power will be upheld by the courts, although it incidentally destroys existing contract rights.\footnote{441 Pa. at 398–99, 272 A.2d at 506–07, citing Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 437 (1934) and Zeuger Milk Co. v. Pittsburgh School Dist., 334 Pa. 277, 280, 5 A.2d 885, 886 (1939).}

The court’s opinion, for the most part well-reasoned and based on sound legal doctrine, should leave little doubt as to the constitutionality of the Pennsylvania Rent Withholding Act.

While the judicial interpretation of the Act has been somewhat less than frequent, it can be seen that it has significantly clarified certain machinations contemplated by the Act. There are, of course, other questions which have not been dealt with adequately, and which will be discussed at the close of this Project. Moreover, to fully appreciate the effectiveness of the Act as interpreted, it is necessary to compare it with other means employed in other jurisdictions to achieve the same objectives.

IV. Alternative Methods of Enforcement

On the basis of the foregoing, it can be seen that until relatively recent times the landlord was usually under no legal obligation to make repairs or to maintain the property in an habitable condition unless specifically provided in the lease agreement. Thus, the tenant bore the burden of paying rent for the entire term of the lease, regardless of whether or not the property was in an habitable condition. With the further emergence of blighted conditions in the urban areas, it became readily apparent that the burden of keeping the property in repair and, at the same time, fulfilling the obligation to pay rent was indeed an onerous one.

The demand for decent housing coupled with the mounting concern for the deterioration of cities has generated new interest in housing code enforcement.\footnote{Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254 (1966). See Comment, Housing Codes and the Prevention of Urban Blight — Administrative and Enforcement Problems and Proposals, 17 Vill. L. Rev. 490 (1972).} As a consequence, the roles played by the municipality, the owner, and the tenant in code enforcement have shifted.\footnote{103. The local government’s role in code enforcement has undergone change in response to social and legal movements toward a welfare state. The concern for new housing construction has become commingled with the concern for proper policing of existing housing. The demand on government is not only to police substandard housing conditions but also to facilitate the repair and maintenance of housing which an owner has failed to put in an habitable condition.

In addition, vociferous tenant groups have emerged to demand dwellings that are safe and free from health hazards. These groups have been responsible for convincing the proper authorities to insure that the owner meets his obligations. See Gribetz & Grad, supra note 102, at 1258.}

There have evolved two theories as to the function and purpose of housing codes.\footnote{104. Gilhool, Social Aspects of Housing Code Enforcement, 3 Urban Law. 546, 549 (1971).} One notion views housing codes as rules to be obeyed in the same light as criminal laws, the violation of which imposes sanctions on the offender. The other theory considers them as regulatory codes,
seeking to maximize the quality of housing.\textsuperscript{105} It is this latter view which has substantially altered the concept of the local government’s role. No longer does the city view itself as a policeman or sanitary inspector simply meting out punishment for violations, but rather it has taken unto itself the burden of putting dwellings into an habitable condition. It is primarily due to this change in the rationale for housing code enforcement that new sanctions and remedies have developed.\textsuperscript{106}

In the past decade, legislation has been developed to enforce housing codes by various methods of withholding rents from the landlords who are in violation of the codes.\textsuperscript{107} These statutes generally fall within the following categories:

A. The Municipally Initiated Remedy — Receivership\textsuperscript{108}

This method usually consists of some type of agency, generally court appointed, which takes control of the property placed in receivership and utilizes the rents to rehabilitate the premises.

B. Tenant Initiated Remedies

1. Rent Withholding — where the tenant utilizes some form of escrow arrangement or receivership for the collection of rents.\textsuperscript{109}

2. Rent Abatement — where the tenant’s duty to pay rent and the landlord’s right to recover the same are both abated.\textsuperscript{110}

3. Repair and Deduct — where the tenant performs the needed repairs, deducting the cost thereof from his rental payments.\textsuperscript{111}

This section of the Project will compare an analysis of the general elements of these methods with that of the Pennsylvania effort.

A. The Municipally Initiated Remedy — Receivership

1. Representative Statutory Enactments

Receivership is perhaps the most efficient means of causing the repair and upgrading of slum dwelling units. Under a specific statutory authorization,\textsuperscript{112} the receiver — a private party, social agency or municipality —

\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} The “new” tenant’s mind has turned to fundamentals of contract law — if one party fails to perform his part of the bargain, the other party’s performance is suspended. Rent withholding legislation in reacting to this attitude, strikes the landlord in his most vulnerable spot — his pocketbook. Comment, Rent Withholding: The Tenant’s Remedy Against Unfit Housing, 10 J. FAMILY L. 481 (1971).
\textsuperscript{110} N.Y. MULT. DWELL. LAW § 302-A (McKinney Supp. 1971).
\textsuperscript{111} CAL. CIV. CODE § 1942 (West Supp. 1971).
\textsuperscript{112} ILL. REV. STAT. ch. 24, § 11-31-2 (Supp. 1971); N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1971).
is appointed by the court. The receiver is given full control of the building and may initiate repairs or rehabilitation of the property. He is authorized to collect the rents and use the available funds in accordance with certain specified priorities.  

The early receivership statutes were enacted in New York and Illinois where the appointment of the receiver results from an action by the municipal authorities to enforce the housing codes.

New York's Multiple Dwelling Law, section 309, empowers the city to appoint a receiver to make the necessary repairs, recovering the expense incurred from the "accrued and accruing rents, issues and profits of the dwelling." The New York legislature had found:

That there exists in the cities . . . certain dwellings which are deteriorated or deteriorating and which contain certain conditions constituting a nuisance and which, unless immediately cured, may cause irreparable damage to the building or endanger the life, health or safety of its occupants. . . .

To effectuate this objective, the Department of Buildings is authorized to select certain units, certifying the existence of a nuisance which "constitutes a serious fire hazard or is a serious threat to life, health, or safety." Following the inspection by the department, the authorities may then issue an order to the owner directing the abatement of the nuisance within a specified period of time. The department may then apply to the court to have a receiver appointed to remove or remedy the condition. Notice of such application is then served on the owner, mortgagees, and lienholders. If, after notice to all the prospective parties, the court determines that a nuisance does exist, it appoints the New York

113. See, e.g., N.Y. MULT. DWELL. LAW § 309(5)(d)(1) (McKinney Supp. 1971). The New York statute sets up the priorities for expenditures by the receiver in this way:

(1) remedying the nuisance and removing all delinquent matters and deficiencies; (2) operation and management; (3) expenses of the receiver; (4) repayment of all loans advanced by the Department of Real Estate; (5) taxes and assessments; and (6) due to mortgagees and lienholders. Id.

114. Id.

115. Id. § 309. The intent of the legislature was to insure the equitable and effective elimination of slums and blighted areas "to remedy or remove conditions which are contrary to the public health, safety, and welfare." In re 1531 Brook Ave., 38 Misc. 2d 389, 236 N.Y.S.2d 853 (1962). See also 16 Vill. L. Rev. 383 (1970).


117. The period specified for removal of the nuisance is usually not less than 21 days unless the department should find that irreparable harm or danger may result, which then permits abatement to be had in less than 21 days. Id. § 309(1)(e).

118. Id. §§ 309(5)(a), (5)(c). The application for a receiver must be accompanied by: (1) proof that an order of the department has been issued and served on the owner, mortgagees, and lienholders; (2) proof that the nuisance continued to exist after the date for its removal had passed; and (3) a description of the dwelling, of the conditions constituting the nuisance, and of the nature and cost of the work required to remedy the conditions.

119. Id. § 309(5)(a).
City Commissioner of Real Estate as receiver of the rents, issues, and profits of the property. 120

The receiver is expressly vested with "all of the powers and duties of a receiver appointed in an action to foreclose a mortgage on real property." 121 The receiver is to remove the nuisance 122 and apply the rents which he is authorized to collect from the property to the cost of removing the nuisance, in addition to the payment of expenses reasonably necessary to the proper operation and management of the property. 123 Should the income from the property prove insufficient to cover the cost of remedying the nuisance, the Department of Real Estate is authorized to advance to the receiver sums required to cover such costs and expenses. The advance comes from a revolving fund into which all the receivers have deposited the incomes from the buildings under their control. 124 This loan by the city generates a lien against the property, which has priority over all other mortgages, liens, and encumbrances of record to secure payment of the loan. 125 Upon removal of the condition, the owner, mortgagee, or lienholder may apply for a discharge of the receiver upon payment to him of all expenditures not having been paid or reimbursed from the rents and income of the dwelling. 126 The receiver may also be discharged upon an accounting to the court when the condition is removed and the costs and expenses have been paid or reimbursed from the rents and income of the property. 127

120. Id. § 309(5) (c) (1). The owner, mortgagee, or lienholder of the property may apply to the court for permission to perform repairs in lieu of having a receiver appointed. However, if the repairs are not completed within a specified period, the receiver will be appointed. Id. § 309(5) (c) (3).

121. Id. § 309(5) (d) (1). The section providing for the appointment of a receiver to effectuate repairs was held constitutional as a valid exercise of the police power of the state, not infringing due process guarantees. In re 1531 Brook Ave., 38 Misc. 2d 589, 236 N.Y.S.2d 833 (1962).

122. N.Y. MULT. DWELL. LAW § 309(5) (d) (1). See note 112 and accompanying text supra.

123. Id.

124. Id. This "fund" was created with the hope that it would be replenished by the income generated from the buildings. If this fund is insufficient, the expenses incurred by the receiver may be reimbursed from the proceeds of the sale of bonds.

125. Id. § 309(5) (e). The top priority does not apply to taxes and other assessments levied pursuant to law. The constitutionality of this section was upheld in In re Department of Bldgs., 14 N.Y.S.2d 291, 251 N.Y.S.2d 441, 200 N.E.2d 432 (1964), which additionally held that the notice of the application for a receiver given to mortgagees and lienholders and the opportunity to be heard in the proceedings met the procedural requirements of due process.

Failing to serve proper notice on any mortgagee or lienholder will not affect the validity of the proceeding for the appointment of a receiver, but the rights of the Department of Real Estate will not be superior to such mortgagee or lienholder. Id. § 309(3) (f).

When the mortgagee is given notice, he has an opportunity to participate in all the proceedings. He may contest the finding that a nuisance actually exists, but, if the nuisance is determined to exist, he may perform the needed repairs himself (securing a lien against the rents) or, after the work is performed by the receiver, reimburse the receiver and obtain assignment of the receiver's lien. Id. § 309(5) (c) (3).

126. N.Y. MULT. DWELL. LAW § 309(5) (d) (4) (McKinney Supp. 1971). In the discharge proceeding the owner, mortgagee, or lienholder may question the reasonableness of the receiver's expenses.

127. Id.
The Illinois receivership technique differs from the New York statute in several respects. In Illinois, as in New York, only the municipality can institute the action for appointment of a receiver. The Illinois Supreme Court has upheld the appointment of a receiver stating:

We regard the appointment of a receiver to obtain compliance with the building codes, where because of continuing violations the property has become unsafe and a danger to the community, as within the inherent powers of an equity court. Too, the providing of adequate housing accommodations is a problem of first importance and urgency for the cities.

The appropriate official of the municipality is required to first determine that the building "fails to conform to the minimum standards of health and safety." The owner of the property is then given notice of this investigation and if he fails to bring the property into conformity, an injunction requiring compliance may be applied for by the municipality. The court may then appoint a receiver whose function is to upgrade the condition of the building by applying the rents and income of the property toward such repair and rehabilitation.

Once the receiver has been appointed, the court may also authorize the recovery of costs of repair through the issuance and sale of notes or certificates which bear interest. Unlike New York, the municipality plays no role in the financing of repairs, the financing being generated solely through the income derived from the buildings or the sale of certificates issued. In order to aid the marketing of these certificates, the lien for the costs incurred by the receiver is given priority over all other existing liens and encumbrances, except taxes. Upon payment of the face amount together with interest accrued to holder of the receiver's note, the lien of such certificate will be released after a payment statement is filed. This portion of the statute, which does not provide the stringent requirements

131. Id.
134. Id. The lienholder must file notice in the office of the recorder of deeds, setting forth: (1) a description of the real estate affected; (2) the face amount, including interest payable, of the receiver's note or certificate; and (3) the date when the note or certificate was sold.
135. Id. An argument may be made that the detriment suffered by the prior mortgagee through the imposition of a superior lien may be remedied ultimately as the result of the increased value of the real estate due to rehabilitation. See Note, Receiver's Certificates — Valid First Liens for Slum Rehabilitation, 1970 U. Ill. L.F. 379, 387. But see Central Sav. Bank v. New York, 279 N.Y. 266, 278, 18 N.E.2d 151, 155-56 (1938), where it was indicated that rehabilitation expenditures may not necessarily increase property values.
of notice to all interested parties as is found in New York, met with the same constitutional opposition as the New York statute.\textsuperscript{138} Notwithstanding, the statute was found to be constitutional as a valid exercise of police power and not an unconstitutional impairment of rights created under a contract between individuals.\textsuperscript{137}

2. Advantages of Receivership

"The goal of any effective code enforcement program is to achieve 'voluntary' compliance by owners, not to inflict punishment."\textsuperscript{138} Thus, if the goal of the housing code enforcement program is viewed as repair, receivership proves to be a useful tool. The two major thrusts of receivership which accomplish this goal are: (1) the serious threat to owners who allow their properties to fall below minimum standards;\textsuperscript{139} and (2) should the threat fail, the availability of a method to facilitate repair.\textsuperscript{140}

In Pennsylvania, the tenant, after payment of his rent into escrow, must, in a sense, await "action" by his landlord.\textsuperscript{141} During this period of time there exists a source of capital which is essentially lying unused. If the threat to the landlord of having his money placed into escrow does not coerce him into repairing the dwelling, there exists no real alternative to secure repairs.\textsuperscript{142} Therefore, one of the most important values of the

\begin{enumerate}
\item \textsuperscript{137} Community Renewal Foundation, Inc. v. Chicago Title & Trust Co., 44 Ill. 2d 284, 255 N.E.2d 908 (1970). The court found that the statute provided for the certificates to have first liens on the real estate only after a court had reviewed the case and authorized the issuance of certificates. A court of equity could properly safeguard the rights of the mortgagee or lienholder. \textit{Id.} at 294-95, 255 N.E.2d at 914-15.
\item \textsuperscript{138} The contract clause of the Federal constitution is not to be considered an absolute restriction or prohibition against the affecting of contracts and that the clause recognizes that they may be subject to the reasonable and legitimate exercise of the police power of the State. \ldots Where the State properly exercises this power for the general welfare, even though contracts and rights established by them are affected by its action, the exercise of this power is not an unconstitutional infringement of the contract clause. \textit{Id.} at 290, 255 N.E.2d at 912.
\item \textsuperscript{139} Rosen, \textit{supra} note 132, at 323.
\item \textsuperscript{140} \textit{Id.} at 323. It should be noted that the owner receives no income from his property and still must meet obligations such as property taxes. Not only may an owner be able to make repairs more cheaply than the receiver, but the owner may be motivated by the fact that, while he refuses to act, an outsider is spending "his money."
\item \textsuperscript{141} \textit{Id.} The interest of the municipality is focused on the prevention of the expansion of slum areas, which goal may be accomplished by repair and rehabilitation. \textit{Id.}
\item \textsuperscript{142} PA. STAT. tit. 35, § 1700 (Supp. 1971). This section provides in pertinent part: During any period when the duty to pay rent is suspended, and the tenant continues to occupy the dwelling, the rent withheld shall be deposited by the tenant in an escrow account \ldots and shall be paid to the landlord when the dwelling is certified as fit for human habitation at any time within six months \ldots If, at the end of six months \ldots such dwelling has not been certified as fit for human habitation, any moneys deposited in escrow on account of continued occupancy shall be payable to the depositor \ldots"
\item \textsuperscript{143} Flinton, \textit{Rent Withholding: Public and Private}, 2 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 179, 190 (1967). The ability to withhold rent may act as some induce-
receivership program lies in its ability to accomplish repairs in those situations where the landlord is not moved by threats.\textsuperscript{143}

In Pennsylvania a somewhat different situation presents itself where the landlord cannot or will not make the repairs himself. Although the rent placed into escrow is returned to the tenant if the dwelling is still in non-compliance with the housing code at the expiration of the statutory period, unless the tenant himself makes or causes the repairs to be made, the uninhabitable conditions existing in his leased premises are likely to remain unchanged.\textsuperscript{144}

Receivership also represents the only code enforcement program which can reach a mortgagee. When the mortgagee learns that his payments might very well cease in the event of the appointment of a receiver, he is more likely to attempt to exert some control over the premises — usually by requiring the mortgagor to keep the premises in a habitable condition.\textsuperscript{145}

It is also conceivable that the mortgagee may even be motivated to make the necessary repairs himself, charging the mortgagor for any such expenditures, since the building's value and the corresponding value of his security interest may be enhanced.

Generally, a receiver will usually possess certain qualifications and therefore more expertise in the area of repair than the individual tenant.\textsuperscript{146} Moreover, he may be able to rehabilitate a large area simultaneously, thereby bringing a measure of uniformity and aesthetics into the slum areas. Finally, a receiver, on the strength of his superior property lien, may be able to obtain financing at lower cost than both private owners and tenants alike.

3. \textit{Disadvantages of Receivership}

The use of the receivership technique may produce hardships for the tenant whom it is trying to aid. For example, the procedure in an action for receivership is such that appointment must usually be sought by the

\textsuperscript{143} In this situation, where the landlord refuses to make the repairs himself, the receiver will effectuate the repairs, thus carrying out the avowed purpose of the Act. The receiver is also not likely to cut corners or delay repairs, whereas a private owner may try to perform only the absolute minimum. It should also be remembered that receivership, as well as rent withholding, may force out private owners who cannot afford to make repairs.

\textsuperscript{144} Where the landlord refuses to make repairs, there is no alternative remedy in Pennsylvania. \textit{See} note 162 infra.

\textsuperscript{145} If the mortgagee can be convinced that the continuance of substandard conditions will result in his lien becoming subsequent to the receiver's lien, he might be able to encourage the mortgagor (owner) to make the needed repairs. Levi, \textit{Focal Leverage Points in Problems Relating to Real Property}, 66 \textit{Colum. L. Rev.} 275, 280 (1966).

\textsuperscript{146} This argument is particularly well-founded in New York where an arm of the municipality acts as the receiver. However, in Chicago, where private individuals may be appointed as receiver, it may not be unrealistic to assume that they will be more expert than either the tenant or the landlord which they replace.
municipality, which may result in serious delay due to the complicated statutory requirements.

Where the receiver is required to completely rehabilitate the property rather than simply repair it, the tenant will, in many cases, be forced to relocate. Cumulative of this problem is the fact that following rehabilitation, in order to secure a good return from the property, an increase in rent may have ensued, thereby precluding the poorer tenants from moving back to their old homes.147 Moreover, during the period of time that the receiver is accomplishing the repairs, the tenant remains under a duty to continue rental payments. This, it has been argued, produces an injustice by forcing the tenant to perform his obligation even though he is not receiving the benefit of his bargain as long as the violations continue to exist.148 The same problem exists in Pennsylvania wherein the tenant, while paying his rent into escrow, is forced to live under conditions certified as “unfit for human habitation.”149

The aforementioned problems are indicative of the need for the legislature to clearly establish their goals. If the goal of the legislature is primarily to improve the conditions of housing in urban areas, the receivership technique appears better suited to this purpose than is rent withholding as adopted in Pennsylvania. The argument focuses on the fact that receivership can effectuate repair and rehabilitation better than most other housing code enforcement programs. The public interest in repair and rehabilitation is said to outweigh the protection of the tenant.150 Conversely, if one views the intent of the legislature as aiding the indigent tenant, then rent withholding as adopted in Pennsylvania would seem to have certain aspects which are preferable to receivership.151

147 See Rosen, supra note 132, at 327.
148 Id. at 339. “Although it does not seem unfair to leave the tenant uncompensated, this interest must be balanced against the more important goal of getting the building repaired.” Id.
149 See note 61 supra.
150 See Rosen, supra note 132, at 339.
151 However, in both New York and Illinois, the indigent tenant receiving welfare payments is provided specific rent withholding protection.

In 1962, the New York legislature enacted Social Welfare Law, section 142-b, commonly referred to as the Spiegel Law. This law empowered welfare officials to withhold rental payments from the landlord if the welfare department learns that the prospective recipient (the tenant) of the rent allowances is living in premises deemed “dangerous, hazardous, or detrimental to life.” Moreover, these conditions could be asserted as a defense to any action brought by the landlord for the non-payment of rent. Upon completion of the necessary repairs the rent allowance withheld may be paid to the landlord. The decision to withhold the rent is under the sole discretion of the welfare department, judicial proceedings being unnecessary. See Simmons, Passion and Prudence: Rent Withholding Under New York’s Spiegel Law, 15 Buffalo L. Rev. 572 (1966). For an analysis of the case upholding the constitutionality of this law, see 13 VILL. L. REV. 205 (1967).

In Illinois the county welfare department may withhold rental payments to landlords if the premises are “in a condition dangerous, hazardous or detrimental to life or health.” ILL. ANN. STAT. ch. 23, § 11–23 (1972). The department must first procure an investigation of the premises by the appropriate municipal or county authority, giving notice of violations discovered to the owner of the premises. A failure to remedy the conditions within ten days of the notice permits the withholding of rent, and the tenant is protected from eviction during the rent withholding period. If the violations are corrected within ninety days of the notice, the total rent withheld...
Under the Pennsylvania Rent Withholding Act, the tenant is in a sense being "reimbursed" in the event that his dwelling remains in non-compliance beyond the statutory period. This may be viewed to ameliorate his position somewhat by "compensating" him for having to live in unhabitable conditions. Upon the rightful return to the tenant of his formerly escrowed rents, he may use the money for other purposes which he, as an indigent, sorely needs.

B. Tenant Initiated Remedies

1. Rent Withholding

New York appears to be one of the innovators with respect to rent withholding legislation. The earliest attempt to make the landlord's right to recover rental payments dependent upon a duty to repair the premises came with the enactment of Section 755 of The Real Property Actions and Proceedings Law.152 Under this section, if a landlord has failed to maintain his premises to the extent that a nuisance or a violation of the building codes is determined to exist by the proper city agency, and, in the court's opinion, is sufficient to constitute a constructive eviction or is likely to become dangerous to life, health, or safety, the court may stay any proceeding by the landlord against the tenant for the non-payment of rent.153 In order to obtain the benefit of the stay, the tenant must pay his rent into the court as it becomes due.164 The tenant is permitted to remain in possession of the premises during the stay, while the landlord is effectively deprived of his rental income. When the designated repairs have been made by the landlord, the stay will be vacated and the rents paid over to the landlord.165 However, upon a showing by the tenant that the landlord has not met his obligations, the court, upon notice to all parties, may release funds in the account to a contractor or materialman to effectuate repairs.166

The primary difference between the New York and Pennsylvania statutes is attributable to the circumstances under which the escrow procedure is utilized. Tenants in Pennsylvania may affirmatively initiate the
escrow procedure at any time following a certification of unfitness for human habitation by the appropriate certifying unit. In New York, however, the payment of rent into court exists as a prerequisite to taking advantage of the court order to stay the proceedings in a landlord’s action for non-payment of rent.

Another significant difference exists between the standards of habitability which trigger the statutory mechanisms. It will be remembered that the violations which are deemed to constitute a defense under the New York statute must amount to constructive eviction. This standard is necessarily vague and is therefore subject to varying interpretations by the courts. In comparison, in Pennsylvania the appropriate inspecting units have specified certain guidelines for certification. As a result, not only does the coverage of what constitutes non-compliance extend to situations which do not necessarily amount to constructive eviction, but the interpretation problem caused by the vagueness of other jurisdiction’s standards is substantially avoided.

Notwithstanding, the Pennsylvania statute does suffer from the inherent defect mentioned earlier — the inability to force the landlord to effectuate the repairs himself. It may be true that so long as the tenant is paying his rent into escrow, the landlord may lack sufficient funds with which to make the necessary repairs. Although the landlord is being “punished” by receiving no income, the tenant likewise is receiving no real benefits, and in this respect, the statute is self-defeating. In New York, the court, acting as an escrow agent, has the power to authorize repairs payable out of the income withheld from the landlord, the only requirement being that notice be given to all the parties.

Designed solely for multiple dwellings in New York City, article 7-A of the Real Property Actions and Proceedings Law provided a basis for collective tenant action in the form of a rent strike. The statute allowed

159. See text accompanying notes 51–52 supra.
160. Another possible consequence of this vague standard is that the tenant cannot be assured that he is entirely justified in withholding his rent. See Note, supra note 152, at 238.
161. In addition, these inspection units generally do not notify the tenant of his right to utilize the escrow procedure under the Act. See notes 258–60 and accompanying text infra.
162. Certain monies from escrow funds are released for repairs in Pennsylvania, as well; however, this action lacks specific authorization in the Act. See notes 98–99 and accompanying text supra.
164. In the mid–1960’s, tenants in New York City took matters into their hands by refusing to pay rent when their landlords failed to maintain the premises in a habitable condition. These actions were termed rent strikes; the tenant withheld the payment of rent until the landlord made the necessary repairs. See Note, supra note 31, at 253.
165. In 1965, the New York legislature passed what has since been dubbed the Rent Strike Law. N.Y. REAL PROP. ACTIONS §§ 769 to 782 (McKinney Supp. 1971). The legislative findings represented the recognition of the previous inadequate enforcement of building codes:

It is hereby found that there exists in the city of New York multiple dwellings which contain the conditions hereinafter described and which endanger the life,
a petition by one-third of the tenants of a multiple dwelling for an order that their rents be deposited into a court for the purpose of remedying conditions dangerous to life, health, or safety. The tenants' petition was permitted even though an administrative city agency did not determine that certain violations existed. The petition had to be based on the existence of a "lack of heat or running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which had existed for five days." Notice of the petition was required to be given to every owner, mortgagee, lienholder, and the non-petitioning tenants and it had to indicate the time and place of the hearing. The owner, mortgagee, or lienholder could establish a defense by proving that: (1) the conditions alleged in the petition did not exist or had been removed; (2) that such conditions had been caused by the petitioning tenants or their guests, or by other residents of the multiple dwelling and their guests; and (3) that any tenant of the dwelling had refused entry to the owner or his agents for the purpose of correcting the condition.

If the owner, mortgagee, or lienholder could not establish a defense, the tenants could apply to the court for permission to correct or remove the conditions on their own. The application would then be granted if the applicants could demonstrate the ability to promptly and properly undertake the work and post security for their performance. However, if the repairs were not performed with due diligence or within the time

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health, or safety of the occupants thereof. It is hereby further found that additional enforcement powers are necessary in order to compel the correction of such conditions and to increase the supply of adequate, safe and standard dwellings units, the shortage of which constitutes a public emergency and is contrary to the public welfare.


165. N.Y. REAL PROP. ACTIONS LAW § 770 (McKinney Supp. 1971). A multiple dwelling is defined as one containing six or more apartments. Id. § 782.

166. Id. § 770.

167. Id. This section was enacted to "judicially police any conditions dangerous to life, health, and safety of any occupants of any multiple dwelling in New York City." Pack v. Lorenday Realty Corp., 63 Misc. 2d 801, 803, 318 N.Y.S.2d 860, 863 (1971). The constitutionality of this section was upheld as a valid exercise of the police power of the state to curb a danger to the public welfare. Himmel v. Chase Manhattan Bank, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (1965).

The petition must contain (a) allegations of the existence of violative conditions, (b) an allegation that at least one-third of the tenants have signed the petition, (c) a brief description of work to be done and an estimate of its cost, (d) an allegation of the amount of rent due monthly from each petitioner, and (e) a statement of the relief sought. N.Y. REAL PROP. ACTIONS LAW § 771 (McKinney Supp. 1971).

168. N.Y. REAL PROP. ACTIONS LAW § 771 (McKinney Supp. 1971). Notice is to be served upon every owner, mortgagee, or lienholder on record at least five and not more than twelve days before the proceedings. Notice to the non-petitioning tenants is effectuated by affixation of a copy of the petition on a conspicuous part of the multiple dwelling.

169. Id.

170. Id. § 775.

171. Id. § 777(a).

172. Id.
specified by the court, a final judgment would be rendered appointing an administrator to effect the needed repairs.\footnote{178}

The administrator is authorized to manage the rental income or security deposited with the clerk subject to the court's direction.\footnote{174} If the party who sought permission to repair does not fulfill his obligation, the cost of repairs will be met by utilizing the security deposits posted, and if this proves insufficient, the court will order rents to be deposited to the extent of the deficiency.\footnote{176} Where no application of repair has been made, the court will order the costs of repairs to be met by the deposited rents of all tenants.\footnote{176}

One advantage New York's "rent strike" legislation has over the Pennsylvania act is that it too permits repairs in the event the owner, mortgagee, or lienholder does not remedy the condition.\footnote{177} Furthermore, the New York legislation applies even though there is only one violation within a dwelling, provided that the violative condition is dangerous to life, health, or safety.\footnote{178} Generally this is not the case under the Pennsylvania act, for a number of violations is needed to reach the appropriate non-compliance point.\footnote{179} For this reason the New York standard might prove less stringent for the tenant seeking relief in certain situations.\footnote{180}

Another benefit of New York legislation is that it encourages action by tenants against their negligent landlords. The requirement that one-third of the tenants sign the petition permits a "security in numbers" in an action inherently antagonizing to a landlord.\footnote{181} The tenant need not

\begin{footnotes}
\item 173. Id. § 777(c).
\item 174. Id. § 778. The person chosen as an administrator shall be an attorney, real estate broker, or certified public accountant. He may be compensated for his services by the court from the rent monies or security deposit.
\item 175. Id. § 777(e).
\item 176. Id. § 776(a). Where the allegations of the petition have been established, the court will enter final judgment and direct the petitioners to pay rents due as of the date of judgment. Non-petitioning tenants incur this rent obligation on the date of service of the judgment. The rents are to be paid into the clerk of the court as they become due, and will be utilized to remedy the condition in accordance with the court's direction. Upon completion of the work, all surplus, together with an accounting of the rents deposited and costs incurred, will be given to the owner.
\item 177. As noted previously, the inability to promote repair is the ultimate defect in the Pennsylvania Rent Withholding Act. Although article 7-A of the New York Real Property Actions and Proceedings Law does not grant a prior lien to the administrator, as in receiverships, the needed funds are present, but rehabilitation which would require extra financing is not intended.
\item 178. Should a tenant in a basement apartment of a fifteen-story dwelling find a condition endangering his life, health or safety, he may secure the necessary signatures of his fellow tenants and commence proceedings for repair. \textit{See} Note, supra note 152, at 260-61.
\item 179. \textit{See} notes 232-38 and accompanying text \textit{infra}.
\item 180. The building may even be a luxury, high rise apartment which due to faulty elevator service may not meet the New York standards. \textit{See} Note, supra note 152, at 261. The legislation applies to all multiple dwellings, whether in a slum or not. However, there are certain violations in Pennsylvania which also may generate immediate action resulting in a certification of "unfit." \textit{See} notes 232-39 and accompanying text \textit{infra}.
\item 181. As in Section 755 of the New York Real Property Actions and Proceedings Law, this standard, "dangerous to life, health, or safety," is ambiguous and subject
\end{footnotes}
fear individual retaliation from the action and therefore more violations may be reported. Yet, in this very instance, many tenants, apparently due to a lack of knowledge as to their rights or a fear of retribution by the landlord, refuse to sign the petition.\textsuperscript{182}

A significant disadvantage lies in the fact that the New York Rent Strike Law suffers the same delays found in most programs which utilize judicial proceedings. The tenant is forced to await an inspection of the premises following the filing of the petition. Due to the administrative red-tape involved, it may be months before an administrator\textsuperscript{183} is appointed to make repairs.\textsuperscript{184} In theory, Pennsylvania's effort provides for quick relief, provided no delay is caused by the agency authorized to inspect the premises.\textsuperscript{185}

2. \textit{Rent Abatement}

A statute closely resembling, in theory and in practice, Pennsylvania's Rent Withholding Act, is New York's Multiple Dwelling Law, section 302-a, popularly referred to as the "rent-impairing violations" law. This statute is applicable to all cities with a population of two million or more\textsuperscript{186} and defines a "rent-impairing violation" as one constituting a "fire-hazard, or a serious threat to life, health, or safety of the occupants thereof."\textsuperscript{187} The appropriate city department is authorized to inspect designated premises and, if it is determined that a violation exists, due notice must be afforded

to varying interpretation. The ambiguity may inhibit tenants from instituting their action for fear of retaliation by the landlord should the condition complained of not meet the standard.

\textsuperscript{182} Comment, \textit{Emerging Landlord Liability: A Judicial Re-evaluation of Tenant Remedies}, 37 \textit{Brooklyn L. Rev.} 387, 393 (1971). In Philadelphia, tenants are informed of their right to withhold rent from two sources. The Department of Licenses and Inspections notifies the tenant when the unfit notice is delivered. Also, the tenant unions play a large role in educating the tenants as to their rights and remedies. A good discussion on the "power" of the local tenant unions may be found in Davis & Schwartz, \textit{Tenant Unions: An Experiment in Private Law-Making}, 2 \textit{Harv. Civ. Rights-Civ. Lib. L. Rev.} 237 (1967).

\textsuperscript{183} The administrator appointed may be either an attorney, real estate broker, or certified public accountant. \textit{See} note 174 supra. It is submitted that these persons may not be the best qualified to perform the task, in that they are likely to have little familiarity with the problems of running a building and of supervising repairs. In the process of choosing the administrator, the court should be cognizant of that factor and insure that the person selected has some knowledge of the area with which he must deal.

\textsuperscript{184} \textit{See} Comment, \textit{supra} note 182, at 393.

\textsuperscript{185} \textit{See} notes 286-304 and accompanying text \textit{infra}. It should be remembered that, following the expiration of the six month escrow period, the non-complying landlord may not recover the rental payments. In this respect, Pennsylvania's effort provides a more extreme deterrent than programs that allow recovery of rent.

\textsuperscript{186} \textit{N.Y. Multiple Dwell. Law} § 302-a(1) (McKinney Supp. 1971).

\textsuperscript{187} \textit{Id.} § 302-a(2). The statute provides that the appropriate city department promulgate a list of conditions that constitute violations. The analogy may be drawn to the list of violations published by the Department of Licenses and Inspections under the Pennsylvania act.
the owner.\textsuperscript{188} If the violation is not corrected within six months of such notice, "then for the period that such violation remains uncorrected after the expiration of said six months, no rent shall be recovered by any owner of the premises."\textsuperscript{189}

If the landlord, during the period that rent is abated, brings an action for rent or recovery of possession, the statute operates as a defense, requiring the tenant to affirmatively plead and prove only the existence of a violation.\textsuperscript{190} During this proceeding, the rents sought to be recovered must be turned over to the court to be awarded eventually to the victorious party.\textsuperscript{191}

However, Multiple Dwelling Law section 302-a contains the same basic deficiency found in the Pennsylvania Rent Withholding Act — further decay of the premises and increased risk and inconvenience to the tenants due to the six month waiting period.\textsuperscript{192} In addition to this waiting period, there is nothing to guarantee repair of the property. The statute simply provides a serious deterrent to the landlords — non-recoverability of rental income. On the other hand, under the previously mentioned New York legislation, the owner could recover the rentals if the condition constituting a violation was remedied within a specific period of time.\textsuperscript{193}

Although the landlord receives no income from the property after a six month waiting period, without a provision to facilitate repair, the statute appears to be somewhat self-defeating. It is submitted that many landlords will not be ready, willing, or able to repair the property. Should this be the case, the condition of the property may continue to deteriorate, ultimately resulting in abandonment.

A comparison of New York's "rent abatement" and Pennsylvania's rent withholding reveals no real difference in their effects. Abatement signifies the cessation of the tenant's duty to pay rent, the ultimate effect of which prevents the landlord from ever recovering those payments. While rent withholding in Pennsylvania does not suspend the duty of the tenant to pay rent, if the dwelling should remain in non-compliance subsequent to the expiration of the six month period, the landlord is also pre-

\textsuperscript{188} Id. § 302-a(3) (a).

\textsuperscript{189} Id. § 302-a(3) (a) (ii). The landlord has a defense to this action by the tenant if: (a) the condition deemed a violation does not exist; (b) the condition has been corrected; (c) the violation was caused by the tenant; or (d) the tenant has refused the owner permission to enter to correct the violation. Id. § 302-a(3) (b).

\textsuperscript{190} Id. § 302-a(3) (c).

\textsuperscript{191} Id. If it is found that the tenant's complaint is brought in bad faith or that the landlord can establish one of the four defenses (see note 189 supra), the court may impose upon the tenant reasonable costs, including counsel fees, but not in excess of one hundred dollars. Id. § 302-a(3) (e).

\textsuperscript{192} See Comment, Abatement of Rent in New York, 17 Syr. L. Rev. 490, 500-01 (1966).

\textsuperscript{193} The procedure under section 302-a, in addition to alleviating delay, also lessens the amount of judicial intervention. Once the agency determines that a violation exists, the tenant need wait only six months and then abate rent. Thus, theoretically, the process would appear to be less time consuming, with the only chance of delay arising from the inspection procedure of the authorized agency.
vented from the recovery of the previous rental payments which are then returned to the tenant. Thus, when the landlord fails to comply with the statute, the ultimate effect is virtually identical whether the method utilized is rent abatement or rent withholding. 194

3. Repair and Deduct

With the recent incorporation of the warranty rule into lease agreements, court decisions have recognized the tenant's contractual remedy to withhold rent. 195 A California statute enacted in 1890 was the forerunner, permitting tenants to deduct portions of their monthly rental payments to pay for the cost of any repairs. 196 The statute remains in force to date and provides:

If within a reasonable time after notice to the lessor, of delapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions. 197

It should be readily apparent, however, that if the landlord places the duty of repair on the tenant in the lease agreement, the statute is inapplicable. 198 Also, the statute does not substantially aid the plight of the slum dweller whose repair bill usually exceeds one month's rental payment. 199

Louisiana, 200 Montana, 201 North Dakota, 202 South Dakota, 203 and Oklahoma have also implemented such a statutory program. However,


195. See note 15 and accompanying text supra.


197. Id. § 1942.1(a).


199. Id. at 108-09.

200. La. Civ. Code Ann. art. 2694 (West 1954) (provided the cost is "just and reasonable").


it is interesting to note that these states have primarily rural or agricultural regions suffering housing problems distinguishable from large urban areas like New York or Philadelphia.\textsuperscript{205}

New Jersey became the first northeastern state having large deteriorating urban areas to accept the "repair and deduct" method of tenant relief. In \textit{Marini v. Ireland},\textsuperscript{206} the New Jersey Supreme Court declared:

If, therefore a landlord fails to make repairs and replacements of vital facilities necessary to maintain the premises in a livable condition for a period of time adequate to accomplish such repairs and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents. The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make the necessary replacement or repair. If the tenant is unable to give such notice after a reasonable attempt, he may nonetheless proceed to repair or replace. This does not mean that the tenant is relieved from the payment of rent so long as the landlord fails to repair. The tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive eviction.\textsuperscript{207}

The \textit{Marini} decision sought to prevent the delay tenants encounter in other methods for relief. The tenant in New Jersey is not faced with labyrinthine bureaucracy in his quest for habitable living conditions. It was the further hope of the \textit{Marini} court to deter the considerable amount of abandonments that occur when a landlord cannot finance the cost of repairs.

Although repair and deduct may provide for repair of the dwelling, doubt exists as to how much rent may be applied for this purpose. In most slum dwellings the monthly rental payments do not exceed one hundred dollars. Should the tenant be faced with major repairs considerably in excess of his monthly rent, it is not established how much of his rent may be applied to that type of repair. Therefore, although this method of code enforcement does effectuate repair, it is plagued with limitations.

Whether one views the foregoing methods as simply regulatory, or as methods of imposing sanctions upon landlords who fail to comply with them, it should be fairly obvious that they all suffer from at least some deficiencies. The purpose for utilizing a particular method of withholding rent from a landlord should concentrate upon the rehabilitation of substandard housing and should not simply be a method whereby the tenant can live rent free. The next section demonstrates, in harsh realities, how the Pennsylvania Rent Withholding Act actually functions.

\textsuperscript{205} See Comment, \textit{supra} note 182, at 396.

\textsuperscript{206} 56 N.J. 130, 265 A.2d 526 (1970).

\textsuperscript{207} \textit{Id.} at 139, 265 A.2d at 535. For an analysis of the holding in \textit{Marini} and its ramifications, see \textit{16 Vill. L. Rev.} 395 (1970).
V. The Practical Application of the Act and the Use of the Escrow Procedure Pursuant Thereto

A. Introduction

The purpose of this section is to give a comprehensive analysis of the viability of the Pennsylvania Rent Withholding Act (the Act) by examining the administration of the Act within the City of Philadelphia. The study focuses upon the operations and procedures of (1) the Philadelphia Department of Licenses and Inspections (L & I) in certifying single and multiple family dwellings “unfit for human habitation” and (2) the independent escrow agents.

The scope of the investigation encompassed the adequacy of the present procedures, the areas of discontent, and an identification of the problems encountered. The purpose is not to question the validity of any particular viewpoint, but rather to present all of the aspects of the problem, with a view toward the clarification of the issues and posing solutions thereto. As previously mentioned, the north Philadelphia districts “3” and “K”

208. Much of the information contained in the following section is based upon the operations and procedures of the Philadelphia Department of Licenses and Inspections (L & I) prior to July 1, 1972. On that date, L & I changed their administrative procedures, eliminating the Central Unit Unit. City of Philadelphia, Dept of Licenses & Inspections, Unit Procedure for District Offices (July 1, 1972). They now utilize primarily the local district inspectors and inspections. This change in procedure has eliminated the necessity for two inspections before a unit may be certified unfit. Even though it is still too early to evaluate the effect of this procedural change, the only significant problem which has been solved appears to be the elimination of one step in the inspection procedure. Moreover, the other problems encountered during the study period apparently remain unaffected. L & I is following the same basic policies, but, rather than administering these policies from a central control unit, the administration is now being attempted on a more local level.


210. The Department of Licenses and Inspections is the city agency in Philadelphia authorized to designate dwellings as unfit for human habitation. The Philadelphia Housing Code provides in pertinent part that:

Whenever the Department finds that any dwelling constitutes a serious hazard to the health or safety of the occupants or to the public because it is dilapidated, insanitary, vermin-infested or lacking in the facilities and equipment required by this Title, it shall designate such dwelling as unfit for human habitation.

Philadelphia, Pa., Housing Code § 7-506(1) (1968). The Housing Code defines dwelling as a “building or structure, except temporary housing, which is wholly or partly used or intended to be used for living or sleeping by human occupants.” Id. § 7-102(7). A dwelling unit is defined as a “room or group of rooms located within a dwelling and forming a single habitable unit with facilities which are used or intended to be used for living, sleeping, cooking and eating.” Id. § 7-102(8). A multiple-family dwelling is defined as any “dwelling or part thereof containing three or more dwelling units.” Id. § 7-102(11).

211. The independent escrow agents are local community organizations such as community centers, religious organizations, and tenant unions. The escrow agents in Philadelphia should be viewed as “independent” since they act independently from depository banks. By contrast, in Pittsburgh, the Mellon Bank operates as both the escrow agent and the depository and, as such, is not considered “independent.” See note 63 supra. It appears from the language of the Act that the Pittsburgh procedure approximates that contemplated by the legislature. See Pa. Stat. tit. 35, § 1700-1 (Supp. 1971).

212. L & I has divided the City of Philadelphia into eight separate districts to facilitate administrative treatment. Within these districts, two sub-districts were created due to the federally-funded Neighborhood Renewal Project in Kensington.
were chosen as the target areas since they offered the combination of factors most conducive to the research. These districts are typical of other Philadelphia districts having heavy concentrations of substandard housing and therefore furnish a basis for an overall analysis of the Act in Philadelphia.\textsuperscript{213} District “K” is located almost entirely within the boundaries of district “3,”\textsuperscript{214} and the two districts are similar in both socioeconomic distribution\textsuperscript{215} and poor housing conditions.\textsuperscript{218} Another significant factor contributing to the selection of these districts was the presence of a federally-funded Neighborhood Renewal Project\textsuperscript{217} in district “K” which was not present in district “3.”\textsuperscript{218} This federal project represents the only significant distinction between the two districts. Theoretically, the use of the escrow procedure in the two target districts should have been substantially similar unless the impact of this federal project was meaningful. The data was compiled and then divided, by district, into four

(district “K”) and Germantown (district “G”) areas. For a geographical representation of the target areas, see Appendix, p. 885 infra.

\textsuperscript{213} This determination was made pursuant to the attitudes and opinions expressed in two interviews. The first was with Robert Taylor, Deputy Commissioner of L & I, and Dominic Sabatini, Administrative Assistant to the Commissioner. Interview with L & I, in Philadelphia, Dec. 13, 1971 [hereinafter cited as L & I Interview]. It was their opinion that either districts “3” and “K” or “G” and “8” would provide the best possible analysis for the study. It was felt that the overall condition of the housing was very poor and that the number of dwellings eligible for rent withholding was high. Since the basic procedure for rent withholding is very similar in all areas of the city, it appears that data for the study would be best gathered from areas with a potentially high use of rent withholding (namely, a district having a high number of dwellings certified unfit). By examining L & I records, it was found that in the period July 1970 to March 1972, 1045 dwellings were certified unfit in districts “3” and “K.” Since this figure seemed manageable, the investigation proceeded into those areas.

The second interview which led to the choice of the target area was with the heads of the various escrow agencies. Among those present at that meeting were representatives of the following agencies: North Philadelphia Tenant Union (NPTU), Urban League, Lighthouse, Concilio, North West Tenants Council, OPEN, Inc. Interview with Escrow Association, in Philadelphia, Jan. 27, 1972 [hereinafter cited as Escrow Association Interview]. At this meeting the opinions expressed about the character of the target area were in agreement with the earlier interview with L & I. Therefore, it was concluded that districts “3” and “K” would be the areas of investigation.

\textsuperscript{214} See Appendix, p. 885 infra.

\textsuperscript{215} This information was also gathered from the interviews. See note 213 supra. The target areas are predominantly occupied by either low income Black or Puerto Rican families. The average monthly rental paid for an apartment is between $40 and $60.

\textsuperscript{216} See note 213 supra.

\textsuperscript{217} The Neighborhood Renewal Project was instituted in sections “3” & “K” in the spring of 1967. This federally-assisted code compliance program was considered to be one of the most important tools in national urban renewal legislation. The program was directed by the Managing Director’s Office through the Department of Licenses and Inspections of the City of Philadelphia. Its purpose was to prevent and eradicate blight in residential areas considered to be in a relatively good condition. This was theoretically to be accomplished by making extensive public improvements in the program area and by assisting all owners of residential property to bring their properties, at the very least, within Philadelphia’s Housing Code standards. The total cost of the program for Philadelphia was set at approximately $14 million. The federal government was to pay two-thirds of the cost and the City of Philadelphia the other one-third. L & I Interview, supra note 213.

\textsuperscript{218} Id.
separate time periods, in order to facilitate a comparison of the Act's operation in the federally-funded, as opposed to the non-federally-funded, area.

In order to determine the effectiveness of the Act in the target areas, a thorough review of the files of the various escrow agents was undertaken. These files represent the only available source of information for a study of the escrow procedure, and therefore, any such study was necessarily limited by the completeness of the files. An attempt was made to ascertain the following information about every account: (1) the date the unit was originally certified "unfit for human habitation;" (2) the date the tenant entered into the escrow procedure; (3) the date of any and all reinspections; (4) the disposition of the escrowed funds; (5) the number of escrow periods the tenant entered, and (6) the final disposition of the unit.

The functioning of the Act in the target areas has been illustrated herein by utilizing a hypothetical case from a point prior to certification of the unit as unfit to the final disposition of the property. First, however, for purposes of clarity, the parties involved will be defined.

219. All escrow agents having accounts in the target area granted permission for a search of all their "open" and "closed" escrow files. The researchers examined a total of over 1100 closed and open files.

220. At the outset it must be noted that not all files had the exact date of the unfit certification. However, in almost 90 per cent of the files a date was obtained. Generally, a copy of the actual unfit letter appeared in the file, and this date was used. Sometimes no such letter appeared, but a subsequent notice of reinspection from L & I would include the date of the unfit certification. In a few instances the only available source for the unfit certification date was the escrow contract itself.

221. This date was obtained in most cases from the actual escrow contract or agreement between the agency and the tenant. In rare cases, no contract appeared, and the date of the first payment into escrow was used as the entering date.

222. Gathering this data provided the most difficulty in the examination of the files. Early in the study it became apparent that L & I did not have any uniform method of informing the escrow agents of the reinspections. Some of the form letters used showed the actual date the reinspection was made; however, in a significant number of situations, the date used as the reinspection date was in fact the date of the letter from L & I, the form letter giving no reinspection date at all. The problem was compounded when it was later determined that L & I did not always send out notices of the reinspections. See text accompanying note 314 infra.

223. This determination was almost always easily ascertainable. The agents were generally careful to include in the file any and all releases of the funds. While it was not always apparent on its face why the funds were released to the respective party, a careful examination of the entire file generally indicated the appropriate reason.

224. This information generally had to be determined by an analysis of each file in its entirety. It was not the usual practice for an agent to keep a record specifying which escrow period a particular tenant was utilizing. However, by carefully examining the records of payments into escrow, releases of funds, and certification and inspection dates, generally it was possible to determine which period a particular tenant was utilizing.

225. This information was not always readily available and considerable searching was necessary to discover it. If the tenant moved during escrow, the policy of the agents was to indicate the move. If some type of landlord-tenant agreement was made, this fact was also indicated. However, it was not readily apparent why a tenant did not utilize an additional escrow period, even though the dwelling remained in an unfit status. When a dwelling was no longer in an unfit status, it was usually apparent that the certification had been lifted, the money released, and the file closed.
B. The Hypothetical Case

1. The Parties

The tenant, generally, is either black or Spanish-speaking. He is normally in a low income bracket and paying a rental of between $45 to $80 per month for his dwelling. Generally he is unknowledgeable as to the existence of the Act or its legal operation. His awareness, if any, comes from the local community association or tenant union in his neighborhood. These associations generally work in the tenant's behalf in an attempt to secure adequate housing for both the individual and the community as a whole.

The escrow agents in Philadelphia, for the most part, are comprised of the various community associations and tenant unions scattered throughout the city and employ people on either a full or part time basis to handle the escrow accounts and correspondence. The number of people employed and the depth of involvement with the Act varies among the differing organizations. One of the larger escrow agents has two full time employees who deal exclusively with escrow accounts, along with a legal staff which is concerned primarily with landlord-tenant litigation. At the other end of the spectrum are the smaller escrow agents which, because of inadequate funding, can devote only a minimal amount of time and effort to the escrow accounts. Such a situation has sometimes led to confusion and misunderstanding as to the operation of the Act and to the handling of the escrowed funds.

The landlord may be either the typical white slumlord who owns numerous slum dwellings throughout the city while he himself lives comfortably in the suburbs or the individual black slum resident who owns one or two dwellings in the proximity where he himself lives. Irrespective of under which category the owner comes, he generally views the Act as a penalty that deprives the property owner of any opportunity to make a profit. The operation of the Act, as viewed by the landlord, translates into a simple, harsh, economic reality — an individual cannot make a profit by investing in real estate in depressed neighborhoods of Philadelphia. As a result, the individual real estate owner feels constrained to abandon his property which, in turn, contributes significantly to discouragement of private ownership of housing within the city.

Under the Act, the Department of Licenses and Inspections of any city of the first class is delegated the responsibility of certifying dwellings as "unfit for human habitation." In Philadelphia, during the period of this investigation, there were two divisions of L & I which had the primary responsibility for this task. The first consisted of the various district offices located throughout the city. This division made the initial inspection of the property and, if found to be unfit, forwarded a report of such to the second division, known as the Central Audit Unit. This division then

227. L & I also refers interchangeably to this unit as the "Central Unfit Unit."
made a confirmation inspection and handled all further inspections and other administrative matters relating to the disposition of the property.\textsuperscript{228}

2. The Complaint

There are two methods frequently used by a tenant to commence the escrow procedure. First, the tenant himself may initiate the complaint by a telephone call, either to the district office of L & I for the district within which the property is located or to the main office in center city. Secondly, the tenant may present his complaint directly to the tenant unions or community associations acting as escrow agents to obtain their assistance in requesting an inspection of the property. This second approach is used when the tenant, for one reason or another, has difficulty in obtaining a commitment from L & I regarding an inspection date. The tenant unions contend that long delays between the requested inspection and the actual examination of the premises are experienced, especially when the complaint is tenant-initiated.\textsuperscript{229} This, they allege, is exemplary of the basic lack of cooperation which exists between the tenant and tenant unions on the one hand and L & I on the other. In opposition to this allegation, L & I asserts that they notify the escrow agents on a weekly basis of all dwellings which have been certified unfit.\textsuperscript{230} The effect of this notice is to inform the escrow agents which dwellings have recently become qualified to utilize the rent withholding procedure.\textsuperscript{231}

There are three types of complaints which a tenant can make to L & I:
(1) a complaint concerning the general unfitness of the dwelling which necessitates an inspection of the entire premises; (2) a complaint alleging a specific violation of the Housing Code and considered by L & I to be of an abatable nature, \textit{i.e.}, one which requires immediate correction; and (3) a complaint of specific violations of the Housing Code but which are not considered to be abatable. Each type of complaint requires a different procedure for inspection and a different method for enforcement.

\textsuperscript{228} In actuality, the district offices of L & I are not a separate division, but rather are under the control and authority of the Central Audit Unit of L & I. As previously indicated (see note 208 supra), L & I has changed its procedure as of July 1, 1972 and now relies exclusively upon these district offices. Therefore, at present, all administrative matters relating to the disposition of the property remain with these district offices and are not handled by any central unit. It is much too early to determine if this changeover will significantly effect the problems encountered by this study. However, in a discussion after the changeover with an L & I spokesman, it was indicated that the basic policies of L & I will remain unaffected. Interview with James Gavarone, former Supervisor of the Central Unit/Unit, Dep't of Licenses & Inspections, in Philadelphia, Mar. 10, 1972 [hereinafter cited as Gavarone Interview]. Therefore, it is probable that most of the problems presented herein will remain.

\textsuperscript{229} Interview with several Philadelphia escrow agents in Philadelphia (at North Philadelphia Tenant Union), Feb. 1, 1972 [hereinafter cited as NPTU Interview].

\textsuperscript{230} Gavarone Interview, supra note 228.

\textsuperscript{231} There is at least one escrow agent who actively solicits the occupants of these dwellings to enter into the escrow procedure. Escrow Association Interview, supra note 213.
3. The Inspection Procedure

After the complaint is received, L & I sets a date upon which the inspection is to take place and sends notification of such to the tenant. If the request was for a general inspection, the inspector from the district office makes a thorough examination of the entire premises, in an attempt to cite all of the Housing Code violations which presently exist. Each violation is designated to carry with it a specific number of points which are totaled at the end of the inspection. This total functions as an objective guideline to help L & I determine whether or not the dwelling is “unfit for human habitation.” Under the current procedure a total of sixty (60) points or more will result in the property being declared unfit. It should be noted that this inspection procedure necessarily involves varying degrees of subjectivity. The first instance in which it arises is in relation to the inspector’s determination of whether the alleged violation exists. This is to say that, when an inspector comes upon a potential violation, he first has to judge whether or not the condition is bad enough to merit citation at all. Once the conclusion has been made that the violation does in fact exist, the second area of subjectivity, the seriousness of the violation, arises. There are certain instances in which the inspector may within his discretion allocate any number of points, within a specified range, to the violation. The overall effect of this subjectivity is that the ultimate determination of unfitness comes to rest upon a very flexible standard. In one instance such a standard could operate to the benefit of the tenant; for example, if the inspector’s sense impression is that the dwelling is unfit, then such an impression could manifest itself through a tendency toward citation of more violations along with higher point scores where applicable. However, the antithesis could also be true if the general impression of the inspector is that the property should not be declared unfit. It is only to a limited extent then, that L & I is governed by the rigidity of the required total of 60 points for unfitness. It must also be noted that this point system serves only as an internal guideline for L & I. In isolated cases, a property can be declared unfit irrespective of the point total arrived at by the inspection, a situation which occurs when there are serious violations present but the point total does not equal the number required for unfitness.

232. Gavarone Interview, supra note 228.
233. The 60 point total required for unfitness only applies to one and two family dwellings. For a three to five family dwelling 80 points or more are required. A dwelling with six or more families requires 100 or more points. Id.
234. Certain violations, such as floor repairs, may be allocated anywhere from two to 20 points depending upon the judgment of the inspector. While there is a published guideline which the inspector may use, it promotes subjectivity merely by giving ranges of points for violations. These ranges or limits are simply suggestions, and there is no necessity for an inspector to specifically adhere to the list. Id.
235. An example of such a situation might be defective floors, walls, or ceilings which create an unsafe or dangerous condition but when totaled under the point system do not add up to the requisite number for unfitness. Id.
As indicated earlier, if a dwelling is certified as unfit by the district inspector, a report is sent to the Central Unfit Unit of L & I and a confirmation inspection of the premises is scheduled. This inspection usually takes place within two weeks after the district office inspection. While making this examination, the Central Unfit inspector, not only confirms the original violations discovered by the district inspector but, may cite additional violations which he discovers. If the district inspector’s finding of unfitness is confirmed by Central Unfit, the jacket listing the violations is sent to the Central Clerical Unit of L & I for a registered owner search in order to notify the responsible party. In cases where the dwelling has been cited for 90 points or more, or at the discretion of the inspector, a postcard is sent to Relocation Referral Services to permit the tenant to be placed on a waiting list to qualify for federal housing.

If the requested inspection is for a specific complaint concerning a non-abatable violation, then an inspector, usually a general inspector from the district office, examines the premises. Before this inspection takes place, an investigation of the prior history of the property is made by L & I to determine the existence of any previous inspections and the respective dates thereof. If the property has been inspected within six months prior to the immediate request, L & I inspects only for the violations alleged in the complaint. If the property has not been inspected within the past six months, L & I makes a general inspection of the entire premises. If violations are found to exist but are not of sufficient magnitude to render the dwelling unfit, then the case is forwarded to the legal department of L & I for prosecution in the Municipal Court of Philadelphia.

236. City of Philadelphia, Dep’t of Licenses & Inspections, Unfit Procedure: District Office 1 (July 1, 1970). Borderline cases (i.e., any dwelling with a point score of 54 points or more) are also sent to Central Unfit for further disposition.
237. Gavarone Interview, supra note 228.
239. Id. at 2. A “jacket” is the name given by L & I to the list which contains all the cited violations found by the inspector.
240. Id. Central Relocation Services is a unit of the Managing Director’s office whose primary task is to locate housing for sale or rent. This housing is then made available to people who have been displaced by either federal, state, or city programs. The nature of the programs may concern highway construction, urban renewal housing programs, or any other program which results in a taking of housing. When tenants are forced to vacate because of an unfit certification for the property, they are placed on the top of the waiting list to enter public housing. However, due to the current backlog at Central Relocation Services, there is usually a long wait before a tenant can get into public housing. Gavarone Interview, supra note 228.
242. Id.
243. Id.
244. Gavarone Interview, supra note 228. Under the Housing Code, “any person who violates any provision of this Title shall be subject to any premises to a fine of not less than $10.00 nor more than $50.00 for the first offense, $100.00 for
There are certain major violations which if found to exist are listed on a separate jacket\textsuperscript{246} and not counted toward the total point score for unfitness\textsuperscript{246} — for example, violations such as heat, drainage, plumbing, or major electrical malfunctions. The reason for this special treatment during a general inspection is twofold. First, these types of violations are not handled by the district inspector, but are referred to the special assignment squad of L & I and its inspectors who possess more expertise in the investigation of these types of violations.\textsuperscript{247} These special inspectors then make their own examination to determine if there is a violation which should be cited. The second reason for the special treatment is that L & I considers these violations to be "abatable;" that is, they are of such a nature as to require immediate correction. After the violations are determined to exist, the landlord is given notice to correct them within a stated period of time.\textsuperscript{248} If the landlord fails to correct them, then the city itself will remedy the violations and bill the landlord. In the event the landlord fails to pay, the city obtains a lien against the property. Due to the rationale of immediate correction, these abatable violations are treated as temporary and consequently are not included in the total point score for determining a property as unfit for human habitation. However, the escrow agents argued that this separate jacket treatment of abatable violations was inequitable for the reason that, by having two or more "jackets" on a property with the point values of each seldom cumulated or even correlated, a property might never achieve unfit status, although it could have a total of well over 60 points between the two jackets.\textsuperscript{249}

It is submitted that this may be a misconception on the part of the escrow agent, since the unit need not even be unfit to have L & I require that an abatable violation be corrected. Moreover, even where the property is not "unfit," but contains some violations of a non-abatable nature, the landlord, nevertheless, must correct them, although he is permitted a longer period of time for correction.\textsuperscript{250} Unfortunately, a practical problem the second offense and $300.00 for any subsequent offense, or imprisonment for not more than ninety days or both." \textit{Philadelphia, PA., Housing Code} § 7-104 (1968).

Moreover, the effectiveness of this method of enforcement is at best questionable. See \textit{The (Philadelphia) Evening Bulletin}, Mar. 14, 1972, at 11, col. 2 (two landlords each fined only $16 and costs for housing code violations). Another problem arises in that prosecutions of landlords are, in reality, ineffective since there is a current court backlog for these cases of almost one year. Gavarone Interview, supra note 228. This problem could possibly be alleviated by the implementation of a recent proposal suggested by Municipal Court President Judge Joseph R. Glancy to establish a special housing court in cases of code violations by landlords to protect the rights of tenants living in unfit dwellings. \textit{The (Philadelphia) Evening Bulletin}, Mar. 1, 1972, at 16, col. 1.

\textsuperscript{245} See note 239 supra.

\textsuperscript{246} Gavarone Interview, supra note 228.

\textsuperscript{247} This special assignment squad is divided into three groups: (1) heat, (2) drainage and plumbing, and (3) major electrical. All three of these groups are under the auspices of the Central Unfit Unit. \textit{Id.}

\textsuperscript{248} For example, when a heating violation is found, the landlord is given 48 hours within which to correct it. If the landlord fails to comply with this order, then the heat abatement unit of L & I will remedy the problem, charging the costs to the landlord. \textit{Id.}

\textsuperscript{249} NPTU Interview, supra note 229.

\textsuperscript{250} Gavarone Interview, supra note 228.
arises in that tenants generally do not understand this administrative procedure and are befuddled by the need for different inspectors examining different alleged violations.251

The procedure is varied slightly if the requested inspection results from a complaint specifying only abatable violations. For such a request the entire process is handled by the special assignment squad of L & I. The appropriate special inspector will examine the premises and cite the landlord for any violations found to exist. Following the inspection, the above procedure is observed. Notice is given to the landlord to rectify the situation, a failure of which will necessitate the abatement of the condition by L & I and the prosecution of the delinquent landlord. The district inspectors do not become involved in this process,252 and the case is closed when the violation is abated.253

4. The Posting of the Property

After the general inspection has transpired and the dwelling has been determined unfit, the Central Unfit Unit of L & I prepares an unfit poster to be placed outside the dwelling. The property is posted by the inspector as being “Unfit for Human Habitation” and a notification letter is delivered to each individual tenant.254 At this time the inspector also attempts to notify the owner in reference to the posting of the unfit notice.255 The policy of Central Unfit has been to notify the owner or landlord either prior to or contemporaneously with the posting of the property.256 This L & I policy is based on the rationale that the owner should have six months from the time of the notification of unfitness to bring the violative conditions into compliance. However, it clearly appears from the statute that the six month escrow period is to commence from the time of the unfit certification, irrespective of the date of notice to the owner.257 The obvious problem with following Central Unfit’s policy is that, if the owner cannot be readily located, a long delay may result in the posting of the

251. One case study undertaken is illustrative of this point. The heater in the dwelling had broken and repeated attempts by the tenant to have the landlord fix the violation had failed. As a result of the lack of heat, the water pipes froze and burst, leaving the tenant without plumbing or heating facilities. At this point the tenant contacted L & I and requested an inspection. When the general inspector examined the premises, he informed the tenant that she would have to notify the heat abatement unit in order to have the heating condition cited as a violation of the Housing Code. When the heating inspector examined the dwelling, he told the tenant that an inspector from the drainage and plumbing unit would have to examine the plumbing facilities. The requirement for three different inspectors only confused and exasperated the tenant. If the tenant had had a better understanding of the L & I procedures in relation to these abatable situations, the violation might have been alleviated somewhat sooner. Escrow Association Interview, supra note 213.

252. Gavarone Interview, supra note 228.
253. Id.
255. Id.
256. Gavarone Interview, supra note 228.
property, thereby denying the tenant his statutory right to place his rent in escrow. It is submitted that such a policy has no foundation either in the language of the Act or in case law.

It is at this point in the administrative procedure that a tenant may first realize the existence of the opportunity to use rent withholding. The notification given the tenant at the time the property is posted as unfit contains a printed paragraph which informs him that he is now qualified to place his rental payments into escrow.258 Notwithstanding the fact of notification, a practical problem arises when the tenant cannot read. Aggravating this situation is L & I's policy that inspectors are not to inform the tenant as to the opportunity to use rent withholding nor as to the location of the nearest escrow agent.259 According to the allegations of the escrow agents, this policy is indicative of the basic lack of cooperation from L & I.260 It is submitted that such a policy is also in opposition to the spirit of the Act. The legislature, in adopting the rent withholding statute, conferred upon the tenant a remedy not formerly granted under the common law and to this extent, the Act can be viewed as tenant-oriented. Under such a rationale, the legislative purpose of the Act is frustrated whenever the tenant, because of a lack of understanding, is unable to utilize the statutory remedy. Viewing the problem in this light, it appears reasonable to require L & I, the only administrative agency with which the tenant has initial contact, to conform to the legislative purpose. Conforming the procedure to the purpose could be accomplished, if to a limited extent, simply by telling the tenant that he has a right to withhold rent pursuant to the Act and by giving him the location of the nearest escrow agent to contact for further information.

Another objection voiced by the escrow agents is that L & I does not allow the tenant to see the jacket which contains the cited violations.261 Although this is not crucial to the functioning of the Act, it can be of importance in at least one situation; if the tenant is unaware of the nature of the violations which were cited, when the unfit designation is subsequently lifted, he is unable to know whether the cited violations have been brought into compliance and, therefore, whether or not he has a sound basis for appealing the lifting of the unfit certification. It is submitted that there is no valid reason for not allowing the tenant to know which violations were cited in the inspection jacket. It does not appear to be too onerous a task to require that a copy of the cited violations accompany the letter of notification of unfitness.262

If the landlord believes that the certification of his property as unfit was not justified, he has the right to appeal the order to the L & I Review

258. A notification letter is on file at the Villanova Law Review office.
259. Gavarone Interview, supra note 228.
261. NPTU Interview, supra note 229.
262. Another alternative would be for the Central Unfit inspector to give the tenant a copy of the cited violations at the time of the confirmation inspection.
Board within ten days of the certification of unfitness. This review proceeding is between L & I, which certified the property unfit, and the landlord, who is challenging the unfit designation. Since the tenant does not receive any notice of this appeal and, therefore, usually has no knowledge of the proceeding, it is submitted that this appeal procedure is inadequate and should be changed to a three-party proceeding to include the tenant.

C. The Escrow Procedure

1. The Escrow Contract

Ideally, the time for tenant to enter into the escrow contract with the agent is immediately after the property is posted. In the north Philadelphia area, the tenant pays rent directly to the escrow agent who in turn assumes the responsibility of handling the funds. Such funds are deposited in a non-interest-bearing bank account. This procedure is to be contrasted with that of other areas of Philadelphia, where the tenant pays the rent directly to the designated bank which acts as the depository. In the latter situation the bank places the money into an interest-bearing account and renders monthly accounting statements to the escrow agent. A cogent argument can be made for a city-wide adoption of the latter method for two reasons. First, any possibility of mishandling or misappropriation of funds is eliminated by requiring the tenant to pay rent directly to the depository. Secondly, these accounts are credited with the current rate of interest on the money deposited during the escrow periods as opposed to accounts in north Philadelphia which receive no interest at all. However, it must be noted that potential problems arise as to the party entitled to receive this interest. Arguably, the escrow agent should receive it since, under the current statute, there is no provision for the agent to receive compensation for his services. By such a disposition, the expenses incurred in the handling of the escrow accounts could be defrayed. However, depending upon how the ownership of the escrowed rent is viewed, arguments can also be made in favor of either the landlord or the tenant receiving the interest. It is logical that the interest should go to the party who is entitled to receive the escrowed funds at the expiration of the six month period.

263. Gavarone Interview, supra note 228.

264. One reason for such notice would be in the situation where the landlord appeals a reinspection in which the property was determined to still be in non-compliance with the Housing Code. If there were no notice to the tenant or escrow agent, a premature release of funds to the tenant might occur.


266. Escrow Association Interview, supra note 213. This procedure is similar to the method used in Pittsburgh where the money is also paid directly to the escrow agent, who is also the escrow depository. Clough, supra note 5, at 596-97.

267. This refers to mismanagement by the escrow agent. Under the described procedure the escrow agent is no longer a "middle man."
Once the contract is signed the escrow agent should notify the landlord of the new account. The necessity for this notice is significant since, under the Act, the only reason for which the tenant can be evicted during the escrow period is for non-payment of rent. The landlord, therefore, must know of the existence of the account in order to determine whether the tenant's delinquency in rental payments is due to some reason other than payments into escrow. Since the escrow agents presently give such an accounting only upon request of the landlord, it is necessary that the landlord know the identity of the escrow agent in order to obtain this information. However, in practice, evictions for non-payment of rent have little effect upon the operation of the Act, due in part to the treatment such cases receive in the courts. If an eviction proceeding is commenced, it usually will be dismissed because the back rent, although unpaid and thus the stimulus for the proceeding, is shown to have been paid from mysterious sources previous to the case being heard. Moreover, the landlord is often unaware of the delinquency because he has not asked for an accounting or otherwise has not been notified or, even if he has knowledge of the delinquency, he may be past the point of caring.

Also upon signing the contract the escrow agent should notify L & I that it is functioning as agent on the particular property in the event that any correspondence is required between them. By following such a procedure, the escrow agent could be notified of any subsequent inspections made by L & I or of any appeal filed by the landlord.

2. Release of Money During the Escrow Period

The Act provides that the escrowed funds “may be used . . . for the purpose of making such dwelling fit for human habitation and for the payment of utility services for which the landlord is obligated but which he refuses or is unable to pay.” The use of the word “may” in the foregoing language implies that the funds do not have to be released. The interpretation of most escrow agents, therefore, is to deny all releases of the escrowed funds absent tenant authorization. Consequently, a landlord’s request to use the money in order to make the necessary repairs, is ordinarily denied. The resulting problems become particularly acute if the owner of the property is dependent upon the rental income.

268. This procedure is utilized by the North Philadelphia Tenant Union. NPTU Interview, supra note 229.
270. This procedure appears to be used by most of the escrow agents located in districts “J” and “K.” NPTU Interview, supra note 229.
271. Gavaroni Interview, supra note 228.
273. All of the escrow agents were questioned concerning the interpretation of this portion of the Act. All believed that a release of funds during an escrow period and before compliance could be done only with tenant authorization. One agent, however, was so uncertain about the correct interpretation that he permitted no releases for any reason whatsoever until there was a compliance or non-compliance at the end of the period. Escrow Association Interview, supra note 213.
from the dwellings to earn a living.\textsuperscript{274} Such an owner is usually short of working capital and unable to initiate the necessary repairs without the use of the escrowed funds. A potential solution to alleviate this problem would be to permit the landlord to present proof of his financial need and, upon such proof, release the funds to make the repairs. The implementation of this proposal, however, raises other serious problems. There would have to be a clear articulation of what would constitute sufficient proof of the landlord's financial need. It would also have to be determined who would review the evidence and make the decision to release the funds. The most important issue would focus upon whether the completed repairs would be sufficient to bring the dwelling into compliance. The solutions to both the present and potential problems depend upon an interpretation of the Act. Unfortunately, the Act does not explain whose authorization, if indeed any, is needed to obtain a release of the escrowed funds during the escrow period. It is clear, however, that a tenant will receive the money at the end of each escrow period if the dwelling remains unfit.\textsuperscript{275} The tenant and escrow agent interpretation, therefore, is to regard the funds as the property of the tenant until the landlord meets his responsibility by bringing the dwelling into compliance. The validity of this viewpoint is supported by data collected from the escrow agents' files — only 31.4 per cent of the dwellings entering escrow reached compliance status.\textsuperscript{276} Therefore, it appears that, in most cases, the funds eventually do vest in the tenant. Since the duty to make repairs is that of the landlord, it can be logically concluded that the tenant has no duty to authorize the release of any funds. Therefore, whether wise or unwise, the policy of some escrow agents is to counsel the tenant to refuse to authorize any release for repairs.\textsuperscript{277}

\textsuperscript{274} It was not determined what per cent of dwellings in an unfit status were owned by this type of owner. However, if the percentage is significant, there is a corollary issue which must be addressed. Generally the amount of money placed into escrow is insufficient to cover the costs of making the necessary repairs. Absent some guarantee that the completed repairs would indeed be sufficient to bring the dwelling into compliance, it would be unwise for a tenant to authorize a release of the funds. Since these funds become the tenant's upon non-compliance after six months, the tenant might authorize a release of money which, in the event of non-compliance, not only would have become his own but also would have been used for an obligation that he did not owe. It is not hard to understand a tenant's desire to use the funds for personal uses rather than expending them upon a building which does not even belong to him.

A possible solution might be to allow the release of the funds but to apply them toward future rent in the event of non-compliance at the end of the escrow period. This might facilitate some repairs and yet not be too onerous a burden upon the tenant. An argument posted against this solution, however, is that the tenant, as a result, is virtually \textit{required} to remain in the dwelling for at least one additional escrow period in order to take advantage of any fruits from this proposal. As such, it might be advisable to combine the above proposal with some form of lien on the landlord's property, which lien would be actionable if the tenant decided to move rather than to enter a subsequent escrow period. Such a development would require an articulation of the priority which the lien might have vis-à-vis other liens but, given sufficient priority, the proposal appears feasible.

\textsuperscript{275} \textsc{Pa. Stat.} tit. 35, § 1700–1 (Supp. 1971). \textit{See} note 141 \textit{supra}.

\textsuperscript{276} \textit{See} Appendix, p. 882 \textit{infra}.

\textsuperscript{277} Escrow Association Interview, \textit{supra} note 213.
It can even be argued that a tenant who moves during the escrow period, as long as the dwelling remains unfit at the end of the period, has a right to the funds. There is no requirement, either in the Act or in court interpretations of the Act, which would require a tenant to remain in possession for the full six month period. An extension of this argument is that, even if the tenant were to remain in possession but were to stop paying rent into escrow, a non-compliance at the end of the period would give him a right, nevertheless, to any funds which were paid into escrow, provided that the landlord had never initiated any eviction proceeding prior to the expiration of the escrow period.

The Act can also be interpreted, however, to imply that the right to the escrowed money inures in the landlord. The Act states that "[n]o tenant shall be evicted for any reason whatsoever while rent is deposited in escrow." This has been construed to mean that the tenant may be evicted if he does not actually pay his rent into escrow. Thus, if a tenant has paid money into escrow but then defaults, the landlord, after proper eviction procedures, should be able to obtain the money already escrowed. The rationale of such an argument is that the tenant is surrendering his rights under the Act by failing to use the required procedure. The Act operates as a suspension of the normal landlord-tenant relationship, and a failure to comply with the Act, arguably, should reinstate this relationship. Therefore, a right to the money remains with the landlord until he fails to meet compliance.

Under the present system there is uncertainty as to the role of the escrow agent vis-à-vis in the release of funds during the escrow period. From a legal viewpoint, the escrow agent should be an independent, impartial fiduciary for both the landlord and the tenant. The agent is

278. The landlord may receive the funds for unrestricted use only as follows:

[The escrowed funds] shall be paid to the landlord when the dwelling is certified as fit for human habitation at any time within six months from the date on which the dwelling was certified as unfit for human habitation.

PA. STAT. tit. 35, § 1700-1 (Supp. 1971). Since this is the only procedure articulated by which the landlord may directly receive the funds, it does not appear to be relevant whether the tenant has remained in possession, so long as the dwelling remains unfit at the end of the six month period.

279. Id.


281. It is also possible to argue from an interpretation of the Act that the tenant may receive the funds only if the dwelling is in an unfit status at the end of the period. In this regard, if there is no dwelling existing at the end of the six month period, which could occur if the owner were to destroy the building, the dwelling could hardly be said to be in an unfit status. Similarly, if a landlord chooses to board up his building and not to use it for human habitation, it is arguable that he no longer has the duty to make the repairs (unless, of course, the building is determined to be a public nuisance).

282. Since the escrow agent is merely the vehicle by which the funds are held until they are released to the proper party and since that proper party is unascertainable until after the six month period, the agent must stand in a fiduciary relationship to both the landlord and tenant. This situation clearly indicates that the agent should be independent and impartial.

It could be argued, however, that since the landlord is in a much stronger bargaining position than the tenant, an agent which looks sympathetically upon the plight of the tenant, while not breaching its duty to the landlord, is desirable. The inherent problem is the difficulty in having sympathy for one party and not be,
the only interested party who clearly has no claim to the escrow funds, and thus, he should operate merely as a liaison between the landlord and the tenant. A possible role for the agent would arise in a procedure in which authorization for release of the funds could come from any two of the three parties involved: escrow agent and landlord, escrow agent and tenant, or tenant and landlord. Although this approach is potentially subject to abuse, it does circumvent one aspect of the release problem — specifying which of the three parties has the singular power to release the funds — by requiring the consent of two parties rather than one. Therefore, necessary and proper releases could possibly be accomplished. Also the procedure provides for participation by the landlord, a non-occurrence under the present system. If one purpose of the Act is to initiate and facilitate repair, a procedure whereby those funds could be made available during the escrow period would be more in keeping with that purpose. In any event, it is apparent that the role of the parties must be more clearly defined. If the intent of the legislature is to grant sole authorization to the tenant, such intent must be stated. The vagueness of the present statutory language has caused at least one escrow agent to deny all releases of funds, even if requested to pay for utilities. Such a policy, for which the legislature is to some degree responsible, places a harsh burden upon the tenant who must live in conditions dangerous to his health.

3. Subsequent Inspections by the Department of Licenses and Inspections

It is the procedure of the Central Unfit Unit to make reinspections of the unfit dwelling at defined intervals during the escrow period. The first reinspection is to take place 30 days after the date of posting the property. If, at this time, the violations have been corrected, the unfit designation is lifted. If the violations have not been corrected, the

in effect, in breach of one's duty to the other party. However, if the purpose of the Act is to provide the tenant with a remedy not available at common law, then the tenant's ability to use the Act is not only desirable but necessary. Therefore, if the present procedure facilitates the use of the Act, and it is submitted that it does, it should be maintained.

283. The obvious problem is the potential for graft. However, since the tenant is not usually in a financial position to offer any such graft and since the agents are generally sympathetic to the tenants anyway, it is possible that, in practice, the problem would not be present. However, the otherwise uncompensated escrow agents (see note 308 infra) might be severely tempted.

284. Since agents are subject to suits for improper release of the escrowed funds, apparently this escrow agent fears potential law suits against him and refuses to risk improperly interpreting the statute. Escrow Association Interview, supra note 213.

285. Refusing to release funds for utilities can be most serious when the landlord refuses to pay the oil or gas bill. Both refusals leave the tenant without relief. It is submitted that the refusal of the escrow agent in such a situation is erroneous. The Act clearly states that funds may be used for utilities, and such caution on the part of the escrow agent is unwarranted.


287. Id.

288. Id.
case continues through normal enforcement channels. The next scheduled reinspections are during the third and fifth months. The aim of these reinspections is to determine the occupancy status of the dwelling and to ascertain if the violations have been corrected. If the property is determined to be vacant, the case is turned over to the Vacant Building Control Unit and a vacant unfit letter is prepared. Further, if the reinspection was not at the initiation of the landlord, as would be the likely case if the repairs had been completed, it is L & I's policy to treat any dwelling found vacated as remaining in a non-compliance status.

If the third or fifth month reinspection shows that the property is still occupied and that the violations have been corrected, the unfit certification is lifted. Two types of compliance are deemed sufficient to warrant the lifting of the unfit designation — full compliance or substantial compliance. Full compliance means that all the violations have been corrected, whereas substantial compliance means that the point score has decreased to 20 points or less and no serious violations remain. In the event that a property is deemed to be in compliance, a tenant has the right to appeal the lifting of the unfit certification to the L & I Review Board, providing he is still in possession of the dwelling. This right to appeal is tenuous, however, if the tenant has moved before the "alleged" compliance. The L & I Review Board policy has been clearly stated in that it "will not accept appeals from tenants who are no longer living in a property and who wish to protest the 'lifting' of an unfit designation." In other words, the Review Board policy is that the tenant loses his standing when he vacates the property. Obviously, this policy is open to criticism. Even though a tenant has vacated the property during the escrow period, it can be argued that he is, nevertheless, entitled to receive the escrowed

289. Id.
290. Id. at 2-3.
291. Id. at 2.
292. Gavarone Interview, supra note 228.
294. See note 233 supra.
295. See City of Philadelphia, Dep't of Licenses & Inspections, Lifting of Unfit for Substantial Compliance 1 (Apr. 26, 1971), which lists serious violations that do not permit substantial compliance as follows:

1. Electrical
2. Plumbing
3. Heat
4. Water
5. Sewer
6. Roof
7. Windows
8. Fire
9. Drainage
10. Operative Cooking Facilities
11. Rodent or Insect Infestation
12. Sanitation Violations — Landlord

296. Letter from Martin M. Green, Dep't of Licenses & Inspections Board of Review, to the Philadelphia Urban League, May 26, 1971, on file at the Villanova Law Review office. This letter presents a statement of policy before a new mayor of Philadelphia took office in January 1972. However, in a telephone interview with a member of the review board on March 22, 1972, it was asserted that the earlier policy was still in effect. It was pointed out in that interview that a tenant, when challenging the lifting of the unfit, need not reveal that he has moved. Since the appeal is a two-party hearing involving only the tenant and the L & I Review Board, with the landlord not present, if the tenant does not reveal that he has moved, there is no reason for the board not to hear the appeal.
funds if, at the end of the escrow period, the property is not in compliance. 297 Further, and as previously stated, the Act has not yet been interpreted to require a tenant to remain in occupancy for the full six months in order to receive the money. Under these circumstances, therefore, this potential right to the funds should provide sufficient interest for a vacated tenant to have standing to challenge the lifting of the unfit designation.

In sharp contrast to the stated policy of L & I regarding the three and five month reinspections is the allegation by the escrow agents and tenants that those reinspections are not actually made. From an examination of the escrow files, little information was found to substantiate the stated L & I policy. However, the lack of documentation possibly may be explained by the failure of L & I to mail written notices of these re-inspections to the agents, 298 and therefore, tangible evidence of the policy would not appear in the escrow files.

The most critical reinspection is the final one which occurs six months after the certification of the dwelling as unfit. 299 According to L & I policy, the sixth month reinspection is made no later than five working days after the sixth month anniversary date. 300 The collected data, however, does not always bear out the policy. In approximately 25 per cent of the accounts examined, reinspections occurred at the sixth month anniversary. In 20 per cent, inspections occurred more than six months but less than seven months from the date of the unfit certification. In the remaining 55 per cent, the reinspections occurred either before the sixth month anniversary date or at least seven months after the certification. 301

The language of the Act, however, indicates that a reinspection is assumed to occur exactly on the sixth month anniversary date, 302 and a number of issues are raised by the failure to comply with the probable legislative intent. If a late reinspection is coupled with an alleged compliance, the issue is to ascertain the exact date on which the repairs were completed. The fact that the repairs could have been completed after the sixth month anniversary date, yet before the reinspection, presents problems of proof which are most acute when the landlord alleges that his own workmen made the repairs. 303 In order to avoid such problems, the better course is to require that the final reinspection of the period occur exactly on the sixth month anniversary date. When confronted with the

297. See notes 278–81 and accompanying text supra.
298. Gavarone Interview, supra note 228.
300. Id.
301. Graphs and supporting material for this data are on file at the Villanova Law Review office.
303. In such a situation, the landlord would not have any bills from a contractor to present as proof of the date the repairs were made. Therefore, evidence relating to the actual dates the repairs were completed would be difficult to gather. The issue would narrow to weighing the oral allegations of one party against those of the other.
proffered alternative, it was L & I’s belief that, in most situations, it had sufficient manpower to adhere to a policy of exactness. It is submitted that, unless such a procedure is undertaken, the present escrow system cannot function to its full extent.

4. Termination of the Escrow Period; Release of funds

If the property remains unfit at the “sixth month” reinspection, L & I continues to carry the property in its active case file until the violations meet compliance, the property is demolished, or other action, as may be deemed necessary, is taken by the City. It is L & I’s unofficial policy to send a notice of the non-compliance to the particular escrow agent. Upon receipt of this notice, the agent releases the funds to the tenant. Correspondingly, if the property has met compliance, upon notification of the compliance, the agent releases the funds to the landlord.

Under most circumstances there is usually no difficulty in distributing the funds to the proper party. Occasionally however, a tenant will have moved during the escrow period without leaving a forwarding address. Under present procedures it is not clear how these funds are to be treated. If the tenant is never located, such funds could become the property of the escrow agent to defray his costs. On the other hand, there is the potential conflict between the interests of the escrow agent and those of the tenant. If the agent is permitted to keep such funds, a workable program must be initiated to guarantee the agent’s good faith effort to locate the “lost” tenant.

Another problem is presented by a tenant who moves during the escrow period. As provided in the Housing Code, after a property

304. L & I has expressed the opinion that it has adequate manpower to cope with a policy of exactness. Only in unusual or emergency situations was it believed this policy might be subject to variation. Gavarone Interview, supra note 228; L & I Interview, supra note 213.


306. Gavarone Interview, supra note 228. This policy was also substantiated by the examination of the escrow files. In most instances the official notification of this reinspection appeared in the files. The problem, however, was that these notifications were sent as many as four months after the reinspection date.

307. For the results of the study which show the number of compliances (landlord releases) and non-compliances (tenant releases), see Appendix, p. 882 infra.

308. There is no provision in the Act nor has there been any legislative guidance beyond the Act for such a situation. Suggestions have been posited that these funds should go to the state, city, or municipality wherein the agent is located, treating these funds in a manner similar to dormant bank accounts. L & I Interview, supra note 213. See Pa. Stat. tit. 27, § 431 (1958); id. § 441 (Supp. 1972).

309. It was learned from interviews that the escrow agents, for the most part, receive no compensation for their services. Some receive aid in their capacity as religious or community groups, and some receive aid via the Model Cities Program. However, no direct compensation is given in their status as escrow agents. NPTU Interview, supra note 229. Therefore, in order to facilitate better and more uniform handling of escrow accounts, a provision in the Act for compensating the agents would be an appropriate means.

310. PHILADELPHIA, PA., HOUSING CODE § 7-506 (1968).
designated as unfit for human habitation has been vacated, the property shall not "be used for human habitation until the hazard has been eliminated and the Department has removed the designation and given written approval for occupancy." If a landlord again rents such a dwelling, it is unclear if the new tenant is permitted to use the escrow procedure. A new tenant who knows the property is unfit before moving in and who moves in with the express intent to utilize the escrow procedure presents an even more difficult case. However, certainly the landlord may be cited for a housing code violation and be subject to the penalties set forth in the code. Unfortunately, these penalties are neither sufficiently harsh nor adequately enforced to deter subsequent renting of an unfit dwelling. Moreover, since the language of the Housing Code states that the property may not be used for human habitation, the tenant is also in violation. It is submitted that, although a tenant may know he is moving into a dwelling in an unfit status, he should be permitted to use the escrow procedure. Otherwise, the low risk of fines and the fact that the rent paid the landlord would in most cases more than offset his fines would permit the landlord to profit from his failure to repair. Therefore, if a tenant is permitted to use the escrow procedure, the landlord may be discouraged from attempting to rent unfit dwellings.

The aforementioned issues are receiving increased attention in those districts of the city with large concentrations of substandard housing. Naturally, as more properties are certified unfit, the available supply of livable dwellings decreases. For this reason the housing market is rapidly reaching the point where a tenant, desiring to move out of an unfit dwelling, can rent only another unfit dwelling. However, it is submitted that a possible solution, having two basic approaches, is available in regard to this problem: (1) the implementation of a program to initiate repairs and to arrest the continued decline of the housing market, and (2) the development of new housing to replace the substandard housing.

5. Subsequent Procedures

A late sixth month reinspection causes additional problems. The date of this reinspection bears directly upon the time of entering a subsequent escrow period. If there has been a late reinspection or no reinspection, the escrow agent is often uncertain as to the proper date on which to begin the next escrow period. Even when there is a "proper" reinspection, there are complications. The study indicated that L & I often mailed the official notices of compliance or noncompliance as many as

311. Id. § 7-506(2).
312. Id.
313. Id. § 7-605.
314. See id. § 7-506(2). This section of the code makes no distinction between procuring occupants for, or the actual habitation of, the dwelling. It refers, instead, only to the use of the dwelling. Therefore, both the landlord and the tenant arguably would be in violation.
several months after the date of the reinspection. Further, L & I used a variety of form letters for notification, one of which forms gave no reinspection date and merely stated that, as of the last reinspection, the dwelling had not been in compliance. Such a letter could be in reference to any reinspection, even one made before the sixth month anniversary date. Another L & I form letter encountered gave both the actual reinspection date and the status of the dwelling. If the second form letter were the only one in use, the confusion could be lessened. One escrow agent has eliminated this problem entirely by initiating its own procedure. Its policy involves a reasonable waiting period after the sixth month anniversary date for receiving any notification of compliance. If no notification is received, the money is released to the tenant and a subsequent escrow period is begun retroactively from the day after the sixth month anniversary date of the previous period. The soundness of this policy is strengthened by the assumption that a landlord who has made the repairs will actively pursue a reinspection to obtain the resulting lifting of the unfit status. It is submitted that adherence to the aforementioned agent’s procedure does not conflict with the language of the Act.

Finally, at the termination of the first escrow period several events might occur: (1) the tenant may move, using the escrow money received to defray other expenses; (2) the tenant may enter into an agreement with the owner to purchase the property; or (3) the tenant may remain in possession and enter escrow for a subsequent period, encountering procedures and problems similar to those already presented.

Regardless of the tenant’s action, if the property remains unfit at the end of the escrow period, L & I carries the case in its active file. The dwelling is not recertified as unfit but rather continues in an unfit status. In order to recertify the property, under the present procedures, L & I would have to close the account. However, their stated policy is that no active account is closed until compliance, demolition, or other appropriate action is taken. This policy is sound but leads to some confusion. The L & I personnel, when referring to a particular property, are not always consistent in using the original certification date. They sometimes use a reinspection date as a “new” unfit designation. While

315. Examples of these forms can be found in the files of any escrow agent in the target areas.

316. Escrow Association Interview, supra note 213.

317. To date there has been no judicial interpretation of the Act which would require the escrow agent to await official notification before allowing a second escrow period to commence. The Act itself does not contain any express requirement that the escrow agent await official notification. See Pa. Stat. tit. 35, § 1700-1 (Supp. 1971).


319. Id.
this does not appear to pose many practical problems, a standard procedure would avoid any possible confusion in this one area.

VI. Conclusion

The foregoing section presented the most acute practical problems encountered in the implementation of the Pennsylvania Rent Withholding Act. In most instances an attempt was made to offer viable suggestions and proposals to alleviate those problems while keeping in mind the various interpretations of the nature and purpose of the Act.

It was determined, as a general proposition, that the Act does provide some benefit, especially when viewed as a supplemental tenant remedy. The Act is significantly instrumental in placing the tenant on more equal footing with the landlord than would be possible without such legislation. In light of this factor, the Philadelphia practice, whereby escrow agents are comprised of local community organizations and tenant unions, contributes to this equalization of position. Any attempted change, therefore, inconsistent with this part of the present procedure, would certainly not be beneficial.

The purpose of the Act, however, is not solely to provide the tenant with a heretofore unavailable remedy. Ideally, the Act is to encourage repairs of dwellings so that the general level of the housing market will, at a minimum, comply with the Philadelphia Housing Code. As a result of the study, this goal of the Act was determined to be largely unaccomplished. Only a minimal percentage of the dwellings entering escrow reached compliance, and this percentage is even more minimal were it to be compared with the number of dwellings eligible for escrow rather than those dwellings which entered escrow. Even though the Act has met limited success in this area, arguably, it is better than nothing at all, since it is obvious that the presence of the local housing code with its potential sanctions does little to provide any impetus toward repair. Some such additional stimulus is necessary and the Act, even if in small measure, provides this stimulus. Furthermore, it is submitted that any factor which increases the rate and level of repairs and improves code compliance can be said to have a positive effect in decreasing the frequency of vacancy and, thereby, retaining more dwellings as part of the usable housing market.

The overall effectiveness of the Act, or in fact any act of this nature, can only be as good as its administrative procedures will permit. Viewed in this context, it is apparent that the present Pennsylvania Rent Withholding Act is not the answer to the housing dilemma. It is too easy, however, to blame the bureaucracy for the failures of the Act — too easy

320. Even though L & I is somewhat inconsistent, the terminology is not crucial to the tenant or the escrow agent, since their interest is placed upon the continued status of unfitness. The only real practical problems presented by this inconsistency are for researchers who are attempting to trace the history of a property to determine when it was certified unfit and when it was reinspected.
and too unfair. The failure of the legislature to clearly articulate its purposes or to provide any guidelines within which the Act was to be administered must be considered when asking why the Act is not more successful. It is not surprising that the procedures of the Department of Licenses and Inspections were often inconsistent with a smooth and orderly functioning of the Act. Left to make their own determinations as to the appropriate procedural approach, L & I's paramount considerations, understandably, were toward their own administrative problems rather than toward any intended or supposed purpose of the legislature. Even the finest legislation can be vitiated through administrative confusion and uncertainty. Similarly, no matter how ideal the Act may be, if it is not brought to the attention of those who must implement it and, more importantly, those who ultimately benefit from it, the results must be dismal. It was determined from the study that the most successful use of the Act was obtained in district "K" during the peak period of the implementation of the Neighborhood Renewal Project — a period in which everyone concerned made a concerted effort to bring the knowledge of the Act to the residents and to assist them in utilizing its procedures. It is submitted that it is not sufficient to have simply a workable statute. There must be workable mechanisms supporting that statute. Whatever the final answer or answers to the housing dilemma are determined to be, admittedly, they will be complex and, as presented in the following article, will probably arise from an economic analysis of the housing market. For, unless it can be made economically feasible for some sector of the community to enter into this market, the burden will eventually rest with the government and the taxpayers. It is with all these aforementioned considerations in mind that the Pennsylvania legislature is urged to thoroughly examine the intended goals of such an Act, carefully consider the implementation of the Act along with the practical problems presently encountered, and quickly reach a proposal which will provide Pennsylvania with a truly viable approach.*

David F. Girard-diCarlo

James S. Green

Alan J. Hoffman

William F. Holsten

Jonathan L. Wesner

* The Villanova Law Review wishes to express its extreme gratitude to the Philadelphia Department of Licenses and Inspections whose kind cooperation substantially aided the formulation of this Project. Similarly, the Board of Editors wishes to thank the various escrow agents who graciously interrupted their normal activities and patiently assisted in the examination of the escrow files.
APPENDIX

TABLE I*
COMPARISON OF THE NUMBER OF DWELLINGS WHICH WERE CERTIFIED UNFIT WITH THE NUMBER OF DWELLINGS WHICH INITIATED THE ESCROW PROCEDURE DURING THE PERIOD 7/70 TO 2/72

<table>
<thead>
<tr>
<th></th>
<th>Total Number of Dwellings Entering Escrow from 7/70 to 2/72</th>
<th>Total Number of Dwellings Declared Unfit by L&amp;I from 7/70 to 2/72</th>
<th>Percentage of Dwellings Declared Unfit Which used Escrow Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Open Status</td>
<td>Closed Status</td>
<td>Total Open and Closed</td>
</tr>
<tr>
<td>District K</td>
<td>32</td>
<td>39</td>
<td>71</td>
</tr>
<tr>
<td>District 3</td>
<td>46</td>
<td>46</td>
<td>92</td>
</tr>
<tr>
<td>Totals for K &amp; 3</td>
<td>78</td>
<td>85</td>
<td>163</td>
</tr>
</tbody>
</table>

* Compiled from information obtained from the escrow agents' files and from a direct examination of L&I's files pertaining to the total number of dwellings certified unfit from 7/70 to 2/72 inclusive.

TABLE II*
PERCENTAGE OF CLOSED ACCOUNTS STUDIED IN WHICH THE RESULT WAS COMPLIANCE, NON-COMPLIANCE, OR INCONCLUSIVE DUE TO INSUFFICIENT DATA TO DETERMINE THE FINAL STATUS OF THE ACCOUNTS

<table>
<thead>
<tr>
<th></th>
<th>Percentage of Closed Accounts that Used Escrow and Resulted in Compliance</th>
<th>Percentage that Resulted in Non-Compliance</th>
<th>Percentage of Accounts Studied in Which Data was Insufficient to Determine the Final Status of Accounts</th>
</tr>
</thead>
<tbody>
<tr>
<td>District K</td>
<td>29.7%</td>
<td>62.5%</td>
<td>7.8%</td>
</tr>
<tr>
<td>District 3</td>
<td>37.5%</td>
<td>47.9%</td>
<td>14.4%</td>
</tr>
<tr>
<td>Totals for K &amp; 3</td>
<td>31.4%</td>
<td>59.1%</td>
<td>9.3%</td>
</tr>
</tbody>
</table>

* Compiled from information in the closed escrow files covering the period from 1/68 to 2/72 of the following escrow agents: Casa Del Carmen; Concillo; Hartranft Community Corp.; Holy Cross Lutheran Church; Lighthouse Inc.; Ludlow Community Center; Lutheran Settlement; North Phila. Tenant Union; O.P.E.N. Inc.; and St. Barnabas Church.

TABLE III*
NUMBER OF CLOSED ACCOUNTS STUDIED WHICH DID NOT ACHIEVE SUBSEQUENT COMPLIANCE

<table>
<thead>
<tr>
<th>Period of unfit Certification</th>
<th>Number of Dwellings Which Entered Escrow</th>
<th>Number of Dwellings Which Did Not Achieve Subsequent Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>District K</td>
<td>District 3</td>
</tr>
<tr>
<td>1968</td>
<td>192</td>
<td>7</td>
</tr>
<tr>
<td>1969</td>
<td>399</td>
<td>37</td>
</tr>
<tr>
<td>1/70 to 6/70</td>
<td>134</td>
<td>131</td>
</tr>
<tr>
<td>7/70 to 2/72</td>
<td>39</td>
<td>46</td>
</tr>
<tr>
<td>Totals</td>
<td>764</td>
<td>221</td>
</tr>
</tbody>
</table>

* Compiled from information found in the closed escrow files of the following escrow agents: Casa Del Carmen; Concillo; Hartranft Community Corp.; Holy Cross Lutheran Church; Lighthouse Inc.; Ludlow Community Center; Lutheran Settlement; North Phila. Tenant Union; O.P.E.N. Inc.; and St. Barnabas Church.
### TABLE IV*

**Number of Closed Accounts Studied Which Did Achieve Subsequent Compliance**

<table>
<thead>
<tr>
<th>Period of Unfit Certification</th>
<th>Number of Dwellings Which Entered Escrow</th>
<th>Number of Dwellings Achieving Subsequent Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>District</td>
<td>District</td>
</tr>
<tr>
<td>1968</td>
<td>192</td>
<td>7</td>
</tr>
<tr>
<td>1969</td>
<td>399</td>
<td>37</td>
</tr>
<tr>
<td>1/70 to 6/70</td>
<td>134</td>
<td>131</td>
</tr>
<tr>
<td>7/70 to 2/72</td>
<td>39</td>
<td>46</td>
</tr>
<tr>
<td>Totals</td>
<td>764</td>
<td>221</td>
</tr>
</tbody>
</table>

* Compiled from information found in the closed escrow files of the following escrow agents: Casa Del Carmen; Concilio; Hartranft Community Corp.; Holy Cross Lutheran Church; Lighthouse Inc.; Ludlow Community Center; Lutheran Settlement; North Phila. Tenant Union; O.P.E.N. Inc.; and St. Barnabas Church.

### TABLE V*

**Number of Closed Accounts in Which Data Was Insufficient to Determine the Final Status**

<table>
<thead>
<tr>
<th>Period of Unfit Certification</th>
<th>Number of Dwellings Which Entered Escrow</th>
<th>Number of Dwellings in Which There Was Insufficient Data to Determine the Final Status</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>District</td>
<td>District</td>
</tr>
<tr>
<td>1968</td>
<td>192</td>
<td>7</td>
</tr>
<tr>
<td>1969</td>
<td>399</td>
<td>37</td>
</tr>
<tr>
<td>1/70 to 6/70</td>
<td>134</td>
<td>131</td>
</tr>
<tr>
<td>7/70 to 2/72</td>
<td>39</td>
<td>46</td>
</tr>
<tr>
<td>Totals</td>
<td>764</td>
<td>221</td>
</tr>
</tbody>
</table>

* Compiled from information found in the closed escrow files of the following escrow agents: Casa Del Carmen; Concilio; Hartranft Community Corp.; Holy Cross Lutheran Church; Lighthouse Inc.; Ludlow Community Center; Lutheran Settlement; North Phila. Tenant Union; O.P.E.N. Inc.; and St. Barnabas Church.

### TABLE VI*

**Number of Dwellings Entering Escrow and Presently in a Vacant Status**

<table>
<thead>
<tr>
<th>Number of Dwellings Which Entered Escrow</th>
<th>Number of Dwellings Which Used Escrow and Are now in a Vacant Status</th>
<th>Percentage of Dwellings Which Used Escrow and Are now in a Vacant Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>District K</td>
<td>764</td>
<td>323</td>
</tr>
<tr>
<td>District 3</td>
<td>221</td>
<td>62</td>
</tr>
<tr>
<td>Totals for K &amp; 3</td>
<td>985</td>
<td>385</td>
</tr>
</tbody>
</table>

* Compiled from a computer print-out from the Department of Licenses and Inspections. In the latter part of 1971 and early part of 1972, L&I conducted mass inspections of all sections of the city to determine the present occupancy status of city dwellings. These print-out sheets were correlated with each property that went into escrow. This table reflects the results of that correlation.
### TABLE VII*

**Analysis of Escrow Periods Entered**

<table>
<thead>
<tr>
<th></th>
<th>Total Number Certified Unit</th>
<th>Number of Dwellings Using Only 1 Escrow Period</th>
<th>Number of Dwellings Using 2 Escrow Periods</th>
<th>Number of Dwellings Using 3 Escrow Periods</th>
<th>Number of Dwellings Using 4 or more Escrow Periods</th>
<th>Number of Dwellings in Which There Was Insufficient Data To Determine Number of Periods Used</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District K</strong></td>
<td>764</td>
<td>569</td>
<td>82</td>
<td>50</td>
<td>8</td>
<td>55</td>
</tr>
<tr>
<td><strong>District 3</strong></td>
<td>221</td>
<td>164</td>
<td>16</td>
<td>1</td>
<td>2</td>
<td>38</td>
</tr>
<tr>
<td><strong>Totals for K &amp; 3</strong></td>
<td>985</td>
<td>733</td>
<td>98</td>
<td>51</td>
<td>10</td>
<td>93</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th><strong>Number</strong></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District K</strong></td>
<td>764</td>
<td>74.4%</td>
<td>10.7%</td>
<td>6.5%</td>
<td>1.0%</td>
<td>7.4%</td>
</tr>
<tr>
<td><strong>District 3</strong></td>
<td>221</td>
<td>74.2%</td>
<td>7.3%</td>
<td>0.04%</td>
<td>0.09%</td>
<td>17.2%</td>
</tr>
<tr>
<td><strong>Totals for K &amp; 3</strong></td>
<td>985</td>
<td>74.4%</td>
<td>9.9%</td>
<td>5.1%</td>
<td>1.0%</td>
<td>9.3%</td>
</tr>
</tbody>
</table>

*Compiled from information found in the closed escrow files of the following escrow agents: Casa Del Carmen; Concilio; Hartranft Community Corp.; Holy Cross Lutheran Church; Lighthouse Inc.; Ludlow Community Center; Lutheran Settlement; North Phila. Tenant Union; O.P.E.N. Inc.; and St. Barnabus Church. The above totals reflect the number of closed escrow accounts from 1/68 to 2/72 inclusive. Open accounts were not incorporated in the figures, since their very status indicates that they may go into subsequent escrow periods.