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KETAL HAWAII
SUPREME COURT OF HAWAII—I

Syllabus

WINDWARD PARTNERS, a registered Hawaii partnership,
Plaintiff-Appellee, v. SARAH DELOS SANTOS,
HENRY OSHIRO, MACAPIO ADVERSALO,
KAZUYOSHI KAMIYAMA, KENNETH Y. KAMIYA,
MR. AND MRS. THOMAS P. ADOLPHO, MR. AND
MRS. SAMUEL KAKAZU, and EVERETT C. DAVIS,
Defendants-Appellants

NO. 6305

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE HAROLD Y. SHINTAKU, JUDGE

APRIL 6, 1978

RICHARDSON, C.J., KOBAYASHI, OGATA,
MENOR AND KIDWELL, JJ.

LANDLORD AND TENANT — summary possession — defenses — retaliatory
eviction.

The defense of retaliatory eviction does not rise to a constitutionally protected
right.

SAME — same — same — same.

Where a tenant asserts a statutory right, in the protection of his property
interest as a tenant, and as a result the landlord seeks to dispossess the tenant
through summary possession proceedings, the tenant can assert an affirmative
defense of retaliatory eviction.

SAME — same — same — same — landlord's motive — weight and sufficiency of
evidence.

Proof of a landlord's retaliatory motive, by a preponderance of evidence,
would support an affirmative defense of retaliatory eviction asserted by the
tenants.

SAME — same — same — same — same.

Subsequent dissipation of the landlord's illegal purpose and the landlord's
legitimate reason for terminating tenancy is a factual question to be decided by
the trier of fact.

SAME — same — same — same — non-residential tenants.

There is no reason to deny non-residential tenants the remedy of raising a
defense of retaliatory eviction where, as in this instance, the statutory right being
exercised pursuant to HRS § 205-4 is equally applicable to non-residential
tenants and the exercise of that right by these tenants is likewise to protect their
property interests in their tenancies.

SAME — same — same — same — same.

Where both residential and non-residential tenants fulfill both elements of the
two-prong test, there are no justifiable legal premises to distinguish between the
two classes of tenants.

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OPINION OF THE COURT BY KOBAYASHI, J.

This is an appeal by defendants-appellants, Sarah Delos Santos, Henry Oshiro, Macario Adversalo, Kazuyoshi Kamiyama, Kenneth Y. Kamiya, Mr. and Mrs. Thomas P. Adolpho, Mr. and Mrs. Samuel Kakazu, and Everett C. Davis (hereinafter referred to as tenants), from a summary judgment order granting plaintiff-appellee, Windward Partners, a Hawaii partnership (appellee), possession of certain rented premises situated at Waikane, in the District of Koolaula, Oahu, Hawaii. The trial court held that the tenants' defense of retaliatory eviction was insufficient as a matter of law as a defense in a summary possession proceeding, and that there was no genuine issue as to any material fact on appellee's claim for possession.

We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

ISSUES

I. Whether the trial court erred in concluding that retaliatory eviction is insufficient as a matter of law as a defense in a summary possession action.

II. Whether the trial court erred in finding that there was no genuine issue as to a material fact on the issue of the proper period for notice of termination of tenancy.

STATEMENT OF FACTS

The premises in dispute consists of eight parcels of primarily agricultural land situated in Waikane Valley and ranging in size from .172 acres to 15.5 acres. The premises were rented to the tenants by the prior owners of the land, Elizabeth Loy McCandless Marks, Elizabeth Marks Stack, Cynthia Marks Salley, and A. Lester Marks, Jr., tenants in common. Each of the tenants signed a "Short Term Tenancy Agreement" (agreement) with the prior owners. The agreements contained a description of the rented premises, the

tenure and term of the rental, certain covenants and agreements, and a "special clauses" section restricting the use of the premises. Although the agreements differed in certain respects, the covenants and agreements contained in each were essentially the same and each designated the tenancies as "month-to-month." The agreements signed by four of the eight tenants, tenants Delos Santos, Adolpho, Davis and Adversalo, restricted the use of the premises to "residential sites." The agreements signed by tenants Kamiyama, Oshiro, and Kamiya, restricted the use of the premises to "agricultural purposes" or "agricultural or horticultural uses only." The agreement signed by tenant Kakazu restricted the use of the premises to "agricultural purposes" and stated that "no more than one (1) single family dwelling . . . be maintained on said premises." The affidavits filed by the tenants show that four tenants, Delos Santos, Adolpho, Davis and Adversalo, qualify as residential tenants, whereas the remaining four, who are farming but not residing on the property, do not.

Appellee partnership was formed on June 25, 1975,¹ and consisted of twenty-nine to thirty partners. Joseph Rodrigues Pao was designated as executive managing partner, John Felix as managing partner, John Correa as partner-accountant and controller, Allen Hawkins as partner and house counsel, and Michael Scarfone as partner-project coordinator in construction. With the exception of these five members who constituted an "advisory committee" to the rest of the partnership, the other members were in the status of "investors" only. Although approval from the entire membership of partners was required for "major policy decisions", decisions not considered as such were made by Pao and Felix.

Some time in June or early July of 1975, appellee purchased 545 acres of land in Waikane Valley with the intent of

¹ Prior to June 25, 1975, Joseph Pao's discussions and negotiations for purchase of the Waikane Valley land were as the representative of Pao Investment Corporation.

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eventually purchasing the entire valley and developing a residential community.² In order to implement the development plans, however, the land first had to be redesignated from "agricultural" to "urban", a process requiring an application to and approval from the State Land Use Commission (Commission). A petition was submitted to the Commission requesting redesignation of the Waikane Valley lands, and as required by law, the Commission held a public hearing on the petition prior to its final decision. The tenants, active members and supporters of the Waiahole-Waikane Community Association, publicly and vigorously opposed the redesignation and testified against the petition at the Commission's public hearing. The Commission denied the petition in December, 1974.

Subsequent to the Commission's decision to deny redesignation of the Waikane Valley lands, appellee gave written notice to the tenants, dated August 11, 1975, that their tenancies were terminated effective as of September 30, 1975. The recommendation to evict the tenants was made by Pao to appellee at a general meeting, and it was approved. Partners Pao and Felix gave final approval on the termination.

STATEMENT OF THE CASE

The tenants refused to surrender possession of the premises, and appellee filed eight summary possession complaints in district court. The district court consolidated the eight summary possession complaints upon motion by the tenants and duly transferred the case to circuit court upon the tenants' demand for a jury trial. In answer to the consolidated complaints, the tenants (1) denied that proper notice of termination of tenancy was given by appellee, (2) asserted the defense that the possession proceedings were being initiated

² The deposition taken of Pao on March 4, 1976, indicates that Pao's idea for developing Waikane Valley into a residential community began some time in March, 1974. At that time, he began negotiating with Mrs. Marks (Elizabeth Loy McCandless Marks), 50% owner of the Valley, to purchase the land.

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in retaliation for the tenants' opposition to the redesignation, (3) asserted the doctrine of emblements. The tenants counterclaimed for damages allegedly caused by appellee's summary possession actions, and by appellee's unfair and unlawful business practices. In an amended complaint, appellee added claims for rent, costs, attorney's fees, and damages to its original complaints, and prayed for writs of possession to issue against the tenants.

On November 18, 1975, appellee moved for summary judgment on its complaints for possession, alleging that the tenants were given notice of termination as was required by law and the terms of the tenancy agreement.³ The trial court denied the motion when it determined that discovery proceedings were still being conducted, and that there was a dispute as to the proper notice period for termination of tenancy applicable in the case. The trial court also determined that the factual questions underlying the doctrine of emblements prevented the court from setting a date for an eviction order.

At a subsequent hearing on June 1, 1976, appellee orally renewed its motion for summary judgment and the court granted it. The summary judgment order stated in part, the following:

The Court . . . having found that there is no genuine issue as to any material fact as to Plaintiff's claim for possession, and since retaliatory eviction is insufficient as a matter of law as a defense in a summary possession proceeding, *Aluli v. Trusdell*, 54 Haw. 417 (1973), the Plaintiff is entitled to summary judgment and the issuance of writs of possession as a matter of law. . . .

The order provided that the tenants were to be permitted to cultivate all growing crops planted on or before June 1, 1975, and to continue such cultivation until such crops were fully harvested. The order dismissed appellee's claims for rent, costs, attorney's fees, and damages and the tenants'

³ The Short Term Tenancy Agreement specified that either party could terminate the tenancy upon 30 days notice.

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counterclaim for damages without prejudice. Tenants moved for a stay of judgment pending an appeal, and the motion was granted.

OPINION

- I. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT RETALIATORY EVICTION IS INSUFFICIENT AS A MATTER OF LAW AS A DEFENSE IN A SUMMARY POSSESSION ACTION.

The trial court's conclusion that retaliatory eviction was insufficient as a matter of law as a defense in a summary possession proceeding was premised on the holding in *Aluli v. Trusdell*, 54 Haw. 417, 508 P.2d 1217 (1973). We construe the word "insufficient" as used by the trial court to mean "invalid", and are of the opinion that *Aluli* is not apposite.

In *Aluli v. Trusdell*, *supra*, the tenant, on a month-to-month tenancy, appealed a district court ruling granting the landlord summary possession of an apartment. The appellant tenant therein contended that his First Amendment rights, made applicable to the states by the due process clause of the Fourteenth Amendment of the United States Constitution and by Article I, section 3 of the Hawaii Constitution, were violated by the appellee-landlord, because the landlord's summary possession proceedings were premised on appellant's action in encouraging his fellow tenants in forming a tenants' association. We held that the landlord's action did not violate appellant-tenant's First Amendment rights: in essence, we held that the defense of retaliatory eviction does not rise to a constitutionally protected right. In retrospect, however, we believe that the court, in *Aluli*, could have, on its motion, considered whether the facts of the case gave rise to a defense of retaliatory eviction, as stated in this opinion. In the event, however, that *Aluli* expressly or impliedly, forecloses the assertion, wherever appropriate, of an affirmative defense of retaliatory eviction, we modify or limit *Aluli* to that extent.

In the present case, tenants' defense of retaliatory eviction is based primarily on the contention that appellee's con-

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duct was in retaliation for the tenants' exercise of the statutory right, pursuant to HRS § 205-4, to appear and present testimony before the Commission on an application for redesignation of land in Waikane Valley. In our opinion, the tenants' basis for asserting the defense of retaliatory eviction is distinct from that asserted by the tenant in the *Aluli* case, and warrants independent consideration.

Appellee argues that the tenants' defense of retaliatory eviction must fail because: (1) the tenants whose rented premises are restricted to use as residential sites, do not qualify under HRS § 521-74(a) of the Residential Landlord-Tenant Code to assert the retaliatory defense and (2) on authority of *Aluli v. Trusdell*, *supra*, such a defense is not available to tenants whose rented premises are being used for commercial purposes only.

HRS § 521-74(a) provides in part:

[N]o action or proceeding to recover possession of the dwelling unit may be maintained against the tenant, nor shall the landlord otherwise cause the tenant to quit the dwelling unit involuntarily, nor demand an increase in rent from the tenant; nor decrease the services to which the tenant has been entitled, after:

(1) The tenant has complained in good faith to the department of health, landlord, building department, office of consumer protection, or any other governmental agency concerned with landlord-tenant disputes of conditions in or affecting his dwelling unit which constitutes a violation of a health law or regulation or of any provision of this chapter; or

(2) The department of health or other governmental agency has filed a notice or complaint of a violation of a health law or regulation or any provision of this chapter; or

(3) The tenant has in good faith requested repairs under section 521-63 or 521-64.

It is true that the conduct of the tenants herein does not fall within any of the enumerated subsections of HRS 521-74(a). But the Code does not purport to be the sole exclu-

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six: expression of the rights and remedies available to landlords and tenants. Section 3(a) of chapter 521 states:

Supplementary general principles of law, other laws, applicable. (a) Unless displaced by the particular provisions of this chapter, the principles of law and equity . . . supplement its provisions.

This jurisdiction has recognized the validity of equitable defenses in summary possession actions. *Island Holidays v. Fitzgerald*, 58 Haw. 552, P.2d (1978). For similar holdings in other jurisdictions, see *Bowles v. Blue Lake Development Corporation*, 504 F.2d 1094 (5th Cir. 1974); *Cornell v. Dimmick*, 73 Misc.2d 384, 342 N.Y.S.2d 275 (1973); *Markese v. Cooper*, 70 Misc.2d 478, 333 N.Y.S.2d 63 (1972); *Portnoy v. Hill*, 57 Misc.2d 1097, 294 N.Y.S.2d 278 (1968).

One such defense which has been recognized in other jurisdictions relative to residential tenants and incorporated into their common law is the doctrine of retaliatory eviction.⁴ *Dickhut v. Norton*, 45 Wis.2d 389, 173 N.W.2d 297 (1970); *Schweiger v. Superior Court of Alameda County*, 3 C.3d 507, 90 Cal. Rptr. 729, 476 P.2d 97 (1970); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); *Portnoy v. Hill*, supra. This doctrine was created by the courts to protect residential tenants from eviction procedures used by landlords to retaliate against tenants who reported building code violations and in other ways acted to protect their rights. *Edwards v. Habib*, supra; 2 Powell, Real Property, ¶ 225[2][b].

In the leading case of *Edwards v. Habib*, supra, the District of Columbia appellate court recognized the doctrine as a valid defense in an action for possession on the theory that to permit landlords to intimidate tenants for the reporting of sanitary code violations to the appropriate agencies would frustrate the intent of Congress in enacting the housing and sanitary codes. The legislative purpose behind the codes was to secure safe and sanitary places for the city's residential

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tenants to live. Since effective implementation and enforcement of the codes depended in part on the initiative of the public in reporting violations, much of the remedial effect of the codes would be lost if the court allowed the landlord to regain possession of the premises in this manner. In that case, the court held the D.C. statute permitting a landlord to terminate a month-to-month tenancy on 30 days notice, and the statute permitting a landlord to bring ejectment or summary proceedings against a holdover tenant inapplicable where a retaliatory motive was proven.

Although most courts since the decision in *Edwards v. Habib*, supra, have been concerned with protecting the rights and duties of residential tenants to report housing and health code violations, *Parkin v. Fitzgerald*, 240 N.W.2d 828 (Minn. 1976); *Clore v. Fredman*, 59 Ill.2d 20, 319 N.E.2d 18 (1974); *Cornell v. Dimmick*, supra; *Markese v. Cooper*, supra; *Dickhut v. Norton*, supra; *Schweiger v. Superior Court of Alameda County*, supra; the doctrine has been applied in instances where the tenants have asserted legal rights unrelated to housing conditions. A case in point is *Pohlman v. Metropolitan Trailer Park, Inc.*, 126 N.J. Super. 114, 312 A.2d 888 (1973). In that case, plaintiffs mobile home owners sued the owners and operators of a trailer park to recover damages for wrongful eviction under the state's Tenants' Reprisal Act.⁵ Plaintiffs had sought rezoning of the trailer park area from industrial use to residential use in an effort to protect them-

⁴ The court said at 701-02:

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself. . . .

⁵ The Tenants' Reprisal Act provided in part that no landlord could dispossess a tenant:

(a) As a reprisal for tenant's efforts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey or its governmental subdivisions, or of the United States or,

(b) As a reprisal for the tenant's being an organizer of, member of, or involved in any activities of any lawful organization. . . .

⁴ See Statutory and Reporter's Notes to Sections 14.8 and 14.9 of Restatement (Second) of Property (1977).

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selves from defendants' sale of the property. The defendants attempted to block the rezoning in order to preserve the value of the site for future sale as well as to prevent imposition of housing code and other requirements which the mobile homes could not meet. The New Jersey court construed the Tenants' Reprisal Act to apply to the case even though the statute did not expressly refer to the tenants' activities as conduct protected under the statute. Recognizing that the primary evil sought to be remedied by the Act was reprisals by landlords against tenants' exercise of "housing" rights, nevertheless, the court said that the significant elements in the statute were "rights and reprisal". The court held that the Act was applicable to the tenants' exercise of their right to petition the local government for zoning ordinance amendments which they reasonably considered affected their tenancy rights. The court found that the controversy over zoning matters were quite common in disputes between residential tenants and landlords, and hence, the tenants' conduct was "germane" to the tenant-landlord relationship. The court further said that the result in the case would have been the same even if the Act was found to be inapplicable to the tenants' conduct since the legislative intent as evidenced by both the Act and another New Jersey statute enacted to protect mobile home owners was to protect residential tenants who had long been recognized as having unequal bargaining power with landlords.

In the case of *S. P. Growers Association v. Rodriguez*, 17 C.3d 719, 131 Cal. Rptr. 761, 552 P.2d 721 (1976), the California appellate court held that the defense of retaliatory eviction was available to defendants-tenants in an unlawful detainer proceeding brought by the plaintiff-landlord. The tenants were lemon pickers who were quartered in company owned housing. In the wake of a dispute between the plaintiffs and the defendants about a work related matter, the tenants filed a suit against the landlord charging a violation of the Federal Farm Labor Contractor Registration Act. The landlord immediately served eviction notices on the tenants. The court held that the defense of retaliatory eviction was a valid defense assertable by the defendants-tenants. The

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court reasoned that if the landlord were permitted to evict the tenants in retaliation for the suit brought by the tenants under the federal statute, the enforcement of the federal act could be emasculated. The court said that the statutory public policy against violations of the federal statute must be protected.⁷

In *Robinson v. Diamond Housing Corporation*, 463 F.2d 853 (D.C.Cir. 1972), a residential tenant appealed from a summary judgment in favor of the landlord in the landlord's possessory action. The tenant, who had successfully defended against the landlord in a prior possession proceeding, alleged that the landlord was bringing eviction proceedings in retaliation for the tenant's defense in the prior suit. The landlord argued that since he was unwilling to make repairs to the rental unit as required under the housing code, and since the unit could not be rented in its present condition, he should be permitted to withdraw the unit from the rental market. The court held that the defense of retaliatory eviction was available to the tenant in this situation just as it had been held to be a valid defense in *Edwards v. Habib*, *supra*. The court said that if the landlord's actions were motivated by a desire to punish the tenant for exercising her rights or to chill the exercise of similar rights by other tenants, then the possessory action was impermissible.

In the case before this court, the tenants exercised their statutory right to appear before the Commission at a public hearing and present testimony relevant to amendments to district boundaries as provided for in HRS § 205-4. At the time of the Commission's hearing in 1974 to redesignate the lands of Waikane Valley, HRS § 205-4 read as follows:

After sixty days but within one hundred and twenty days of the original receipt of a petition, the commission shall advertise a public hearing to be held on the appropriate

⁷ The court said at 17 C.3d at 728:

In a retaliatory eviction proceeding, the crucial question is not whether the statute is designed to aid tenants, but whether it depends for its effectiveness on private initiative and would thus be emasculated by allowing punitive eviction. . .

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island in accordance with the requirements of section 205-3. The commission shall notify the persons and agencies that may have an interest in the subject matter of the time and place of the hearing. . . .

It is clear that the legislative objective of providing for public notice and for a public hearing before the Land Use Commission was to encourage public participation in agency decision-making. The legislature expressly stated that "lessees" were among those of the public whose views were pertinent to proposed land use changes.⁸ The tenants in this case are in a situation similar to that of lessees.

Recent amendments to chapter 205 reinforce such a conclusion. The 1975 amendment to HRS § 205-4 requires that the Commission conform to more stringent requirements in the area of notice to the public and the conduct of its public hearings.⁹ The present version of HRS § 205-4(e)(3) expressly states that all persons "who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately be affected by the proposed change that their interest in the proceeding is clearly distinguishable from that

⁸ Prior to the 1975 amendments to HRS chapter 205, § 205-3 mandated that a public hearing be held and notice thereof published prior to final adoption of district boundaries within each county. Paragraph two of this section stated:

At the hearing, interested owners, lessees, officials, agencies, and individuals may appear and be heard. They shall further be allowed at least fifteen days following the final public hearing held in the county to file with the commission a written protest or other comments and recommendations. (Emphasis added.)

⁹ *Amendments to district boundaries*

(b) [Conduct of the public hearing are to be in conformity with the provisions of the Hawaii Administrative Procedures Act relevant to "contested cases."]

(c) [Notice of the hearing together with a copy of the petition shall be served . . . (on) all persons with a property interest in the land recorded at the department of taxation. In addition, such notice shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and shall be published at least once in a newspaper in the county in which the land sought to be redistricted is situated as well as once in a newspaper of general circulation in the State at least thirty days in advance of the hearing. . . . (The notice must contain detailed information as required by HRS § 91-9.) (Emphasis added.)

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of the general public . . ." shall be permitted to intervene as parties, and that representatives of a citizen or community group who indicate a desire to express the views of the shall be permitted to testify at the hearing.¹⁰

We are of the opinion that the legislative intent of providing public hearings prior to amending district land use boundaries would be frustrated if the appellee were permitted to retaliate against the tenants for opposing land use changes in a public forum. In this case, as in *Edwards v. Habib, supra*, the effectiveness of the statutes, HRS § 205-4, depends primarily on private initiative. Furthermore, *Man v. Metropolitan Trailer Park, Inc., supra*, the tenants' conduct in exercising their right before the Commission was one which they reasonably considered affected their property interest as tenants. Thus, we are of the opinion that where a tenant asserts a statutory right, in the protection of his property interest as a tenant, and as a result the landlord seeks to dispossess the tenant through summary possession proceedings, the tenant can assert an affirmative defense of retaliatory eviction. Our willingness to so conclude is premised not only on safeguarding the effectiveness of the statutes involved, but substantially on the recognition of the salutary policy of protecting the property interests of the tenants from retaliating landlords.¹¹

¹⁰ *Amendments to district boundaries*

(e) [A]gencies and persons may intervene in the proceedings in accordance with this subsection.

(4) All other persons may apply to the commission for leave to intervene as parties. Leave to intervene shall be freely granted, ...

(f) Together with other witnesses that the commission may desire to hear at the hearing, it shall allow a representative of a citizen or a community group to testify who indicates a desire to express the view of such citizen or community group concerning the proposed boundary change. (Emphasis added.)

¹¹ The legislative history of HRS § 521-74 indicates that when the predecessor provision was first enacted as Act 41 and designated as HRS § 666-34, the primary purpose was to encourage the repair of substandard housing conditions and to provide tenants with protection from evictions and rent increases by landlords for actions taken by tenants to remedy unsafe or unsanitary conditions. Standing Committee Report Number 485-70, House Bill 43. In 1972, when the legislature

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The tenants' response to the motion for summary judgment created a genuine issue as to whether appellee's primary motive in terminating the tenancies was to retaliate for the opposition by the tenants to the proposed redesignation of the Waikane Valley lands. We hold that proof of these facts, by a preponderance of evidence, would support the affirmative defense of retaliatory eviction asserted by the tenants, and that the motion for summary judgment should have been denied. However, this does not mean that the tenants are entitled to remain in possession in perpetuity. Subsequent dissipation of the landlord's illegal purpose and the landlord's legitimate reasons for terminating tenancy is a factual question to be decided by the trier of fact.¹² *Edward v. Habib*, *supra* at 702.

We find no reason to deny non-residential tenants the remedy of raising a defense of retaliatory eviction where, as in this instance, the statutory right being exercised pursuant to HRS § 205-4 is equally applicable to non-residential tenants and the exercise of that right by these tenants is likewise to protect their property interests in their tenancies.

We note that the Restatement (Second) of Property, section 14.8, confines the definition of retaliatory conduct to situations involving residential housing, and that the American Law Institute takes no position on whether or not the definition should be extended to commercial or industrial

Footnote¹¹ Continued

enacted the Residential Landlord-Tenant Code, it removed the retaliatory provision from chapter 666 and enacted it as HRS § 521-74, amending the provision to include as protected conduct, complaints by tenants for other landlord-tenant disputes, in addition to health-related disputes.

¹² See comment i of section 14.8 of the Restatement (Second) of Property which states the following:

The primary motivation of the landlord in exercising his right may be retaliatory as of one particular time and not retaliatory at a later date. It is a question of fact each time the landlord acts whether that particular action is retaliatory. It is relevant evidence, but not conclusive, that the same action was found to be retaliatory at an earlier date. Factors relevant in determining whether a previous determination of retaliatory action has continued significance will be the length of time that has elapsed since the previous determination and whether the tenant has repeated the acts which previously caused the landlord to retaliate.

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property.¹³ The few appellate courts which have ruled on the question of permitting commercial tenants to raise the defense of retaliatory eviction have held that the issues raised by such tenants were collateral to the issue of the right to possession of the leased premises, and therefore, not a cognizable defense in summary possession proceedings. *Rossow Oil Co., Inc. v. Heiman*, 72 Wis.2d 696, 242 N.W.2d 176 (1976); *Mobil Oil Corporation v. Rubensfeld*, 48 A.D.2d 428, 370 N.Y.L.J. 943 (1975); *Clark Oil & Refining Corporation v. Leistikow*, 69 Wis.2d 226, 230 N.W.2d 736 (1975); *Clark Oil & Refining Corporation v. Thomas*, 25 Ill. App.3d 428, 323 N.E.2d 479 (1974). Cf. *William C. Cornitius, Inc. v. Wheeler*, 276 Or. 747, 556 P.2d 666 (1976), where the court refused to extend the defense of retaliatory eviction to a commercial setting, and recognized that the defendant-tenant had available other remedies for damages against the plaintiff-landlord for the plaintiff-landlord's violation of anti-trust laws and regulations of the Federal Energy Administration.

However, in our opinion, wherein as we have in this case applied a two-prong test, and both residential and non-residential tenants fulfill both of the tests, we perceive no justifiable legal premises to distinguish between the two classes of tenants. We, therefore, conclude that the affirmative defense of retaliatory eviction is available to both types of tenants, and the trial court erred in its conclusion of law.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE AS TO A MATERIAL FACT ON THE ISSUE OF THE PROPER PERIOD FOR NOTICE OF TERMINATION OF TENANCY.

We have held that the trial court erred in concluding that, as a matter of law, the defense of retaliatory eviction is not available to the tenants.

¹³ See n. 4, *supra*. The Restatement (Second) of Property § 14.8 confines the definition of retaliatory conduct to situations involving residential housing. The Restatement states:

The Institute takes no position at this time as to whether or not the definition of retaliatory action for the purposes of § 14.9 should be extended to . . . commercial or industrial property.

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In addition, a genuine issue as to a material fact exists in regards to the proper period for notice of termination of tenancy of the residential tenants herein.

HRS § 521-71 provides the following:

Termination of tenancy; landlord's remedies for hold-over tenants. (a) When the tenancy is month to month, the landlord or the tenant may terminate the rental agreement upon his notifying the other at least *twenty-eight days* in advance of the anticipated termination or in cases of voluntary demolition of the dwelling units, *ninety days in advance of the anticipated demolition . . .* (Emphasis added.) We find, taking the pleadings, depositions, interrogatories, and admissions on file, together with the affidavits, Rule 56(c), H.R.C.P., *Technicolor v. Traeger*, 57 Haw. 113, 551 P.2d 163 (1976); *Gum v. Nakamura*, 57 Haw. 39, 549 P.2d 471 (1976), and drawing inferences from the underlying facts contained in the materials in the light most favorable to the tenants, *Gum v. Nakamura*, *supra* at 42-43, that there existed a material fact in genuine issue on a procedural question, to wit: whether or not appellee intended to demolish the dwelling units.

Case is remanded for further proceeding in accordance with this opinion.

C. Michael Hare for defendants-appellants.

Allen R. Hawkins for plaintiff-appellee.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENA ROBINSON,

Appellant,

v.

No. 24,508

DIAMOND HOUSING CORP.,

Appellee.

APPEAL FROM THE DISTRICT OF
COLUMBIA COURT OF APPEALS

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REFERENCES TO RULINGS

1. Oral rulings of trial court denying motions for continuance, motion to amend answer, and granting motion for summary judgment. (Record, pp.1-47).
2. Opinion of District of Columbia Court of Appeals. 267 A.2d 833 (1970).

STATEMENT OF ISSUE PRESENTED

Did the trial court err in granting appellee summary judgment for possession and precluding appellant from raising her defenses based on appellee's retaliatory motive and violations of the District of Columbia Housing Regulations? .

This case has been before this Court in the following instances:

1. Motion for Stay Pending Appeal, denied, Order of Jan. 6, 1970 (Tamm, Leventhal, & Robb, JJ.).
2. Suggestion for Rehearing En Banc, denied, Order and Statement of April 14, 1970 (Wilkey, J., not participating).
3. Motion to Proceed In Forma Pauperis, granted, Order of July 31, 1970 (Wright, C.J.).
4. Petition for Allowance of Appeal, granted, Order of Sept. 25, 1970 (Fahy & McGowan, JJ.).

STATEMENT OF THE CASE

On May 2, 1968, Lena Robinson and her four children moved into the house owned by the Diamond Housing Corporation at 1716 Eighth Street, N.W. Eight days after, she failed to pay the rent falling due on July 2, she was sued by Diamond Housing for possession of the premises.^{1/} Mrs. Robinson successfully defended that suit by establishing to a jury that her lease was voided by the existence of substantial housing code violations at the commencement of her tenancy. On appeal, the District of Columbia Court of Appeals (DCCA) affirmed the judgment for Mrs. Robinson. Diamond Housing Corp. v. Robinson, 257 A.2d 492 (1969).^{2/}

The evidence which the jury ultimately accepted as reflecting the conditions of Mrs. Robinson's home included proof of the existence of the following serious housing defects: large pieces of plaster were missing throughout the house; a back bedroom wall was unattached to the ceiling; nails protruded along the side of the

^{1/} See Diamond Housing Corp. v. Robinson, LT 62391-68, Opinion and Order of Belson, J., Oct. 16, 1968, on file in the record of this appeal.

^{2/} A petition for review of this decision was denied. D.C. Cir. No. 23,891, Order of Sept. 25, 1970.

stairway; a pane of glass was missing from a living room window; a kitchen window frame was out of position leaving an opening in the wall to the outdoors; no front step to the porch existed; and the porch was so shakey that the ground could be seen through its boards.^{3/} Diamond Housing failed to prove that any of these defects were subsequently repaired; indeed, it admitted that they still existed when the instant suit was brought in December 1969, one and one-half years after Diamond Housing first knew of them.^{4/}

In an attempt to circumvent the adverse rulings of the DCCA and the trial court, Diamond Housing, on December 2, 1969, again filed suit against Mrs. Robinson. This suit sought possession of Mrs. Robinson's premises and was based on the alleged expiration of a thirty-day notice to quit to the tenant. (R-49). On December 16, Mrs. Robinson filed her answer and jury demand to this action. (R-51). She alleged, inter alia, that Diamond Housing's suit must fail because it was provoked by an

^{3/} See Diamond Housing Corp. v. Robinson, supra, note 1, Opinion of Belson, J., at 2-3.

^{4/} See Affidavit of Barry Mankowitz, Record at 64 (hereinafter cited R-64).

illicit retaliatory intent and was brought by a landlord who had knowingly continued to lease unsafe and unsanitary housing. The case was then certified to the jury calendar.

On December 17, Diamond Housing filed a motion for summary judgment. (R-60). This motion was supported by affidavits attesting that a thirty-day notice had been served on Mrs. Robinson and that the corporation was "unwilling to make any repairs to the premises involved herein and it [did] not presently desire to continue to rent the premises. . . ." (R-64):

The hearing on that motion was unilaterally set by counsel for Diamond Housing for December 23. On the morning of this date an appearance was made by Christopher Brown, Esq., for Mrs. Robinson in order to request a continuance of the summary judgment hearing due to the temporary absence from the District of the defendant's attorney, Richard B. Wolf, Esq. Landlord and Tenant Judge Hyde denied this motion, setting the hearing for later that same day.

At the hearing the Landlord and Tenant Court again denied Mrs. Robinson's motion for a continuance on account of her counsel's absence. It also denied her motion

to schedule the hearing at least in accord with the timing and notice provisions of General Sessions Rule 56(c). It denied Mrs. Robinson's motion to amend her answer while granting Diamond Housing the same relief regarding its complaint. (R-65). Finally, the judge ruled that summary judgment was appropriate because no material relevant facts were in dispute. It reached this conclusion by ruling as a matter of law that Diamond Housing's motives in seeking to evict Mrs. Robinson were irrelevant to this suit. The defense of retaliatory eviction was explicitly recognized as not being available to this tenant, nor was a defense based on housing code violations. The judge ruled that all Diamond Housing need establish to evict Mrs. Robinson was the service and expiration of a thirty-day notice to quit. Because this fact was not disputed, Judge Hyde granted summary judgment for possession for Diamond Housing.

Pending appeal of this decision, Mrs. Robinson sought a stay of her eviction from the premises. This was denied by the trial court, the DCCA, and a division of this Court. While Mrs. Robinson's suggestion for a rehearing en banc of this latter decision was pending before the full Court, she was forced to abandon her run-down

premises in order to safeguard the health and welfare of her family. As a consequence of this change of circumstances, Mrs. Robinson's suggestion for a rehearing en banc was denied. See Robinson v. Diamond Housing Corp., D.C. Cir. No. 23,850, Statement of April 14, 1970 (Robinson, J.).

Mrs. Robinson's appeal to the DCCA on the merits in this second possessory action resulted in an affirmance of the trial court. 267 A.2d 833 (1970). The instant appeal to this Court followed.

SUMMARY OF ARGUMENT

Appellant argues at the outset that she was prejudiced by two procedural-issue errors of the trial court. The court was wrong in refusing to continue the hearing date on appellee's motion for summary judgment which was unilaterally set by counsel for appellee. Because the rules of the Landlord and Tenant Branch required that appellant be given more time in which to respond to the motion, and because she should have been granted a short stay until her attorney returned from an out-of-town trip, the trial court erred in making appellant's substitute counsel go forth on the hearing date.

The second procedural error was the trial court's refusal to permit appellant to amend her answer to assert the added defense of inadequate service of process. In so ruling, the trial court failed to comply with D.C. Code § 13-101, which requires it to adopt as much as is practicable the Federal Rules of Civil Procedure, which would permit amendment as of right in this instance. The trial court also erred in ruling that actual receipt of process waived appellant's right to receive it in the statutorily required manner.

On the merits, the trial court was incorrect in ruling that appellee was entitled to a judgment for possession as a matter of law merely upon proof of having served appellant with a thirty-day notice to quit her premises. Appellant should have been permitted to go to trial on her defenses based on retaliatory eviction and existing housing code defects. The trial court was wrong in ruling that appellant was not entitled to rely on the defenses set forth in Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), and now in the District of Columbia Housing Regulations § 2910. It further erred in permitting appellee, who admittedly refused to make the needed repairs at appellant's premises, to use the court system before complying with the District of Columbia law. The District of Columbia Court of Appeals compounded this error by giving District of Columbia landlords a route with which to bypass the case law in this jurisdiction which was meant to bolster the Housing Regulations and by ruling in a manner so as to further deplete the housing stock in the District.

ARGUMENT

I. APPELLANT'S FAILURE TO FILE COUNTERING
AFFIDAVITS OF FACT IN THE TRIAL COURT
DOES NOT PRECLUDE HER FROM RAISING HER
LEGAL ISSUES ON APPEAL

The District of Columbia Court of Appeals in part based its affirmance of the trial court on the notion that, because Mrs. Robinson had not filed affidavits countering Diamond Housing's factual assertions, no material issues of fact were in dispute and summary judgment was appropriate. 267 A.2d at 835. The DCCA failed to appreciate, however, that (1) the trial judge accepted Mrs. Robinson's counter assertions, but deemed them legally irrelevant, and (2) the introduction of formal affidavits was precluded by the trial court's refusal to continue the summary judgment hearing.

The ruling of the trial court was in no way based on appellant's failure to meet the requirements of Gen. Sess. R. 56(e). See transcript passim; Robinson v. Diamond Housing Corp., D.C. Cir. No. 23,850, April 14, 1970 (en banc statement), slip opinion at 4 n.7. Instead, the trial judge took the view that the facts set forth by Diamond Housing were irrelevant to its suit for possession of Mrs. Robinson's home. Accordingly, Mrs. Robinson's

failure to specifically reiterate her assertions regarding Diamond Housing's purported illicit motives was of no consequence.

Second, even if it were crucial to Mrs. Robinson's case that countering affidavits be produced, she was unfairly denied an opportunity to assemble these documents because of the timing of the premature hearing in which she was forced to plead her case. See Gen. Sess. R. 56(f).

Mrs. Robinson was arbitrarily denied a brief continuance which could have enabled her to meet Rule 56(e).

The date for the summary judgment hearing was set unilaterally by counsel for plaintiff for December 23, 1969. However, General Sessions Rules 6(e) and 56(b) & (c) and Landlord and Tenant Rules 4(e) and 11, which govern the timing of the hearing, required that it be held no earlier than December 24, 1969.^{5/} Mrs. Robinson's substituted

^{5/} G.S. Rule 56(c); made applicable to this case by L&T Rule 11, requires that a motion for summary judgment "be served at least five days before the time fixed for hearing." When service is made by mail, as in this case, one additional day is added to the prescribed period. G.S. Rule 6(e); L&T Rule 11. Sundays (in this case December 21) are excluded from the computation: G.S. Rule 6(a). Thus, the motion having been mailed to defendant's counsel on December 17, it was not ripe for hearing until at least December 24. See Brief for Appellant, D.C.C.A. No. 5194, at 8-11, on file in record in this appeal.

counsel could surely have utilized that extra day. In a situation where the proper legal resolution is as complicated as it is in this case, twenty-four hours of preparation time serve much better than do two hours.

Appellant further contends that the trial court abused its discretion in not granting a two-week continuance of the summary judgment hearing until her counsel returned from a trip away from the District of Columbia. The denial of a continuance greatly hindered appellant's defense, denying her newly-found counsel of an opportunity for full preparation and the filing of opposing affidavits. ^{6/}

^{6/} See Brief for Appellant, D.C.C.A. No. 5194, at 5-8.

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO AMEND HER ANSWER TO ASSERT A JURISDICTIONAL DEFENSE

Appellant moved at the summary-judgment hearing to amend her answer to assert the additional defense of lack of adequate service of process (R-26). The trial judge denied this motion, stating as his grounds:

You can't come in, after you've asserted all your real defenses here, and think up that at the last minute after we are engaged here in a motion for summary judgment. (R-26).

He further stated that Mrs. Robinson must have obtained actual notice of the suit and therefore no prejudice would result from his denial of her motion to amend.

The DCCA elaborated on this reasoning, ruling that a landlord-and-tenant-court defendant, unlike any other civil litigant in the District of Columbia, can only challenge service of process by filing a motion to quash prior to filing his answer. 267 A.2d at 834 n.2, citing L&T Rule 4(d).

Under the rules of the Court of General Sessions, a defendant may amend his answer as of right "at any time within 10 days after it is served." G.S. Rule 15(a). See

also Fed. R. Civ. P. 15(a). Amendments relating to the defense of insufficiency of process are not waived when made by motion pursuant to Rule 15(a) and must be granted as a matter of course. See G.S. Rule 12(h)(1); 1A Barron & Holtzoff, Federal Practice & Procedure § 370 (1969 Supp.). Thus, a defendant has until ten days after the filing of his answer in which to object to the jurisdiction of the court.

As the record indicates, Mrs. Robinson's answer was filed on December 16, 1969. Her motion to amend was made on December 23, within ten days thereafter. She concludes that accordingly the trial court erred in denying her motion to amend because she should have been permitted to amend as of right.

Appellant contends that G.S. Rules 15(a) and 12(h)(1) govern this case even though they have not been made specifically applicable to Landlord and Tenant Branch cases by Landlord and Tenant Rule 11. Indeed, nowhere in the specific Landlord and Tenant Rules is there a provision permitting any party to amend its pleadings in any respect. Appellant argues that the absurd rigidity which would result from not allowing any party to amend

its pleadings compels a ruling that General Sessions Rule 15 be read into the Landlord and Tenant Rules. In fact, the trial judge must have reached such a conclusion because he did permit Diamond Housing to amend its complaint. (R-40).

Several lines of reasoning can lead this Court to this conclusion. First, Landlord and Tenant Rule 11 cannot reasonably be read as an exclusive listing of those General Sessions Rules which are operative in the Landlord and Tenant Branch. Nothing in Rule 11's language would require such a narrow reading. The adoption of this narrow construction would lead to harmfully restrictive results. The better view, it clearly seems, should be to apply to the Landlord and Tenant Branch all of those General Sessions procedures which, even though not listed in Rule 11, are nevertheless an intricate part of any fair and just court proceeding, albeit a summary proceeding. There can be no logical reason under which amendment of pleadings cannot and should not be permitted in the Landlord and Tenant Branch.

This result seems compelled by this Court's recent rulings in McKelton v. Brune, ____ U.S. App. D.C.

____, 428 F.2d 718 (1970) and Lee v. Habib, ____ U.S. App. D.C.____, 424 F.2d 718 (1970). Both pointed to D.C. Code § 13-101 (1967), which requires all General Sessions court rules to "conform as nearly as may be practicable to the forms, practice, and procedure proscribed by the Federal Rules of Civil Procedure. . . ." If local court in formi pauperis procedures, as in McKelton, and procedures for an indigent's receipt of a free trial transcript, as in Lee, are to be as similar as possible in each court system, there seems to be no ground for departing from this rule regarding a defendant's right to amend his answer.^{7/}

The second basis for the trial court's denial of Mrs. Robinson's motion to amend -- that timely actual knowledge of having been sued waives a defendant's right to challenge service -- is similarly without valid support, although it seems recently to have been bolstered by the DCCA's opinion in Gordan v. William J. Davis, Inc., ____ A.2d ____ (October 21, 1970). The statute regulating

^{7/} Constitutional requirements can also compel this same result. See Lee v. Habib, 424 F.2d at 904.

service of process in a landlord's suit for possession, D.C. Code § 16-1502 (1967), requires that a "diligent and conscientious" effort be made to effect personal service before the process server can resort to a substituted method of service, such as posting. Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950). Statistical information available from court records indicates that this statutory requirement is regularly being abused. See Bell v. Tsintolas Realty Co., ____ U.S. App. D.C. ____, ____ n.7, 430 F.2d 474, ____ n.7 (1970). If the trial court's view of the law were accurate, there would be no effective manner of enforcing this statute. Service of process could be made in any haphazard manner because the only group who could challenge service -- those who know how they were served -- would not be able to do so. Thus, the prophylactic nature of § 16-1502 would be destroyed.

If actual notice were a waiver of a defendant's right to receive process in the statutorily prescribed manner, there seems to be no reason why this Court in Dewey v. Clark, supra, would have gone into detail regarding the manner of service in that instance. If actual notice

constituted a waiver of the jurisdictional defense, such a discussion would have been unnecessary because that defendant had actual notice. Compare Morfessis v. Marvin's Credit, Inc., 77 A.2d 178 (D.C. Mun. App. 1950). Indeed, the DCCA seems on an earlier occasion to have recognized the error of the trial court's ruling. See Lynch v. Bernstein, 48 A.2d 467 (D.C. Mun. App. 1946) (actual receipt of notice to quit is no waiver of right to receive it as statutorily required).

For the reasons stated above, appellant contends that the trial court and the DCCA were incorrect in refusing to permit her to amend her answer in order to assert a jurisdictional defense.

III. APPELLANT WAS ENTITLED TO RAISE
THE DEFENSE OF RETALIATORY EVICTION

The trial court and the DCCA both ruled that Mrs. Robinson was legally unable to rely upon the defense of retaliatory eviction as set forth by this Court in Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1016 (1969). Edwards held that a landlord cannot oust his tenant with a suit for possession of his premises in order to punish the tenant for reporting housing regulation violations to governmental authorities. The Edwards doctrine has been reasserted in the recent amendments to the Housing Regulations for the District of Columbia, which were brought to the DCCA's attention at oral argument. The regulations now provide:

No action or proceeding to recover possession of a habitation may be brought against a tenant, nor shall an owner otherwise cause a tenant to quit habitation involuntarily, nor demand an increase in rent from the tenant, nor decrease services to which the tenant has been entitled, nor increase the obligations of a tenant, in retaliation against a tenant's:

(a) good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization.

(c) good faith assertion of rights under these Regulations, including rights under Sections 2901 or 2902.8/

Subsection (c) further broadens Edwards to prohibit retaliation for asserting in court or elsewhere the right to report housing violations.

The DCCA has attempted to carve out a large exception to this retaliatory eviction doctrine:

[W]e are of the opinion that the retaliatory defense of Edwards v. Habib . . . is not available to a tenant in a case such as this where she was successful in a prior Landlord and Tenant action and is being evicted after the expiration of a thirty-day notice because the landlord wishes to withdraw the property from the rental market. The Edwards case involved a situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities and it should be, we think, limited to its facts.

But even if Edwards were limited in the narrow manner of the DCCA's emasculated reading, Mrs. Robinson indeed fell within that rule. She sought to assert in defense that Diamond Housing's suit involved a "situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities." (R-30).

8/ Housing Regulations of the District of Columbia
§ 2910, D.C. Register, Aug. 1970.

Furthermore, the Edwards court made no exceptions in its ruling for those landlords, such as Diamond Housing, who have been precluded from recovering possession due to violations of District of Columbia law. If anything, the Edwards rule should be more readily applicable to such a landlord because its past actions have made its motives highly suspect. Diamond Housing is the party who has blatantly helped perpetuate what the Edwards court referred to as the "appalling housing conditions"^{9/} in Washington.

A logical basis might possibly exist for the lower courts' position if they had predicated their ruling on some type of evidentiary principle which regarded the possibility of a retaliatory motive in a case such as this to be exceedingly remote. In such a case the exclusion of a retaliatory-motive defense might perceivably be arguable. But in the instant case, the exact opposite tendency exists. As counsel for appellee admitted below: "Any jury is going to have to practically say that there is retaliation." (R-39). Similarly, the trial judge came to the conclusion that "there wouldn't be but

^{9/} 130 U.S. App. D.C. at 140, 397 F.2d at 701 (footnotes omitted).

one way this issue could be decided by the jury" (R-41). Thus, both parties and the trial court have been unanimous in concluding that Diamond Housing would be found to harbor a retaliatory intent if the issue were permitted to go to the jury.

The logic in precluding a tenant who has successfully defended a suit for possession from utilizing in a second suit a retaliatory eviction defense remains elusive. The public policy behind Edwards is no less compelling in this case: "To permit retaliatory evictions [still] . . . would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington."^{10/} Indeed, the need to protect an already victimized tenant takes on increased importance.

The trial judge's and the DCCA's defiant attitude toward Edwards may have partially been predicated upon a concern that the landlord will be unable to disprove the retaliatory nature of his motive. But this inherent difficulty has directly been acknowledged and dealt with in Edwards. This Court recognized that questions of

^{10/} Id. at 139-40, 397 F.2d at 700-01.

permissible or impermissible purpose will present the need for determinations that are "not easy." It noted, however, that the problem is not unique and courts must deal with it "in a host of other contexts."^{11/} The Court nevertheless sided with General Sessions Chief Judge Greene in concluding:

There is no reason why similar factual judgments cannot be made by courts and juries in the context of economic retaliation [against tenants by landlords] for providing information to the government.^{12/}

The Edwards court seems to have foreseen clearly a situation such as the present one. It made clear that a tenant who was successful on a first suit need not be "entitled to remain in possession in perpetuity."^{13/} The landlord can gain possession after his "illegal purpose is dissipated."^{14/} In the present case, Diamond Housing should

^{11/} Id. at 142, 397 F.2d at 703.

^{12/} Id.

^{13/} Id. at 141, 397 F.2d at 702.

^{14/} Id.

have no difficulty in establishing the sincerity of its motives if only it would conform to the law by correcting the wretched conditions existing in Mrs. Robinson's home. If Diamond Housing would begin to comply with the housing laws of the District of Columbia, its stature in the eyes of a jury would be greatly enhanced. It should only be after full repair has been accomplished that the courts of this jurisdiction can come to Diamond Housing's aid.

The instant suit for possession not only violates rights afforded by the Housing Regulations; it also threatens the very integrity of the judicial system. To permit a landlord to use the judicial process to evict a tenant because of that tenant's use of lawful defenses in a prior judicial action would make a mockery of the judicial system. The tenant's trial in the first case would be a futile gesture, serving as a means to undermine public policy, the judicial process, and those who seek relief in it. A defense of housing code violations would have no legal significance if a tenant who prevails in a suit for possession promptly be evicted in a second possessory action because of her reliance on those defenses. No tenant would be foolhardy enough to assert

housing code violations as a defense in a suit for possession when the certain and ironic result would be to prepare the landlord's easy way to an unchallenged eviction in a second summary action.

In addition to the right to challenge the notice to quit on the grounds that it is retaliatory, appellant must also have the right to challenge as retaliatory appellee's desire to remove the property from the rental market. If the Housing Regulations are to have meaning, the court cannot permit a corporation or individual landlord to close down a rental unit in order to retaliate against the tenant for his having exercised rights under the Housing Regulations.

This is not the first time a court has been asked to prevent the closing of a business, or to otherwise restrict business operations in order to safeguard basic statutory rights. A similar situation has been presented in the field of labor law. In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court refused to allow a corporation to close down one of its units in retaliation for protected activity. The

court held that the action of the corporation was impermissible because it would have a chilling effect upon the exercise of certain legislatively guaranteed rights. The specific facts and the statute involved in Darlington are of course different from the instant case, but the rationale of that decision is no less significant.

A legislative and regulatory scheme existed in both Darlington and the instant case to protect a special class of persons. The safeguards in Darlington were directed at members of labor organizations; here the protected class consists of tenants living in substandard housing. In both situations the protective scheme was silent on the specific question of whether a regulated party may close down one of its units in order to undercut the purposes which the safeguards were designed to afford. When faced with this question in Darlington, the Supreme Court realized that prevention of such action by the corporation was necessary if the labor act was to be meaningful; it accordingly read protection from such action into the statute.

This Court should make a similar ruling in the instant case and hold that this landlord may not close

down his rental unit if his purpose is retaliatory against a tenant for the tenant's reliance on housing violations. ^{15/} as a defense to a suit for possession. The issue is vital to the maintenance of an adequate supply of safe and sanitary housing in the District of Columbia and for the protection of rights guaranteed to tenants by the Housing Code.

The Court should furthermore establish guidelines similar to those adopted by the Supreme Court in analogous labor cases designed to assist the trier of fact in resolving the factual problems which will be presented. ^{16/} The Court should rule that, where a notice to quit is issued by a landlord after the tenant has successfully defended a prior suit for possession on the ground of housing code violations, the notice to quit be deemed "inherently destructive" of basic tenant rights, that no specific proof of retaliatory motive is needed, and that

^{15/} Public records on file with the District of Columbia Recorder of Deeds reflect that the appellee corporation is listed as the owner of approximately 290 lots in the District of Columbia.

^{16/} See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Lane v. NLRB, 135 U.S. App. D.C. 372, 418 F.2d 1208 (1969).

the trier of fact can find that the suit for possession is impermissibly motivated and hence barred, even if the landlord introduces evidence that the notice to quit was motivated by business considerations.^{17/} The notice to quit in the second action should be deemed to carry with it its "own indices of [retaliatory] intent",^{18/} making specific proof of retaliatory motive unnecessary to defeat a claim by the landlord of a legitimate business purpose.^{19/} Further, the burden of proof should be on the landlord to establish that he was motivated by overriding legitimate business considerations, since proof of motivation is most accessible to him.^{20/}

As the Supreme Court has noted in labor cases, situations such as the instant one may present a complex of motives calling for the trier of fact to weigh the interests of both sides and to reach a decision "preferring one motive to another" in light of the provisions of the legislation involved and its policy.^{21/} In Edwards v.

^{17/} Cf. NLRB v. Great Dane Trailers, Inc., supra.

^{18/} See NLRB v. Erie Resistor Corp., supra.

^{19/} Cf. Id.

^{20/} Cf. NLRB v. Great Dane Trailers, Inc., supra

^{21/} Cf. NLRB v. Erie Resistor Co., supra.

Habib, this Court ruled "that Congress, by directing the enactment of the housing code, impliedly directed the court to prefer the interests of the tenant who seeks to avail himself of the code's protection." The preceding rules regarding sufficiency of evidence and burden of proof will enable the courts to follow this directive of Congress requiring protection of tenant rights over the interests of a landlord who has flouted the housing laws.

Because the trial court erred in refusing, as a matter of law, to permit Mrs. Robinson to raise the defense of retaliation, the court's decision in granting Diamond Housing summary judgment should be reversed.

IV. APPELLEE SHOULD NOT BE ABLE
TO UTILIZE THE COURT SYSTEM
TO EVICT APPELLANT UNTIL IT
BRINGS ITS PREMISES INTO
COMPLIANCE WITH THE HOUSING
REGULATIONS.

The "clean hands" doctrine and the integrity of the judicial system require that appellee, who had been found to be in violation of the Housing Regulations, be precluded from using the courts to maintain a suit for possession until it complies with the requirements of the housing code. The directive of the DCCA in both of Mrs. Robinson's appeals, 257 A.2d at 495; 267 A.2d at 835, allowing the landlord to enforce a thirty-day notice to quit through a suit for possession without simultaneously requiring the landlord to correct the housing violations, has authorized the use of the courts by a party who is in clear violation of the law. Appellant urges that this unfortunate guideline be reversed.

It is not novel doctrine to assert that a party in Diamond Housing's position can only invoke a court's relief after it has complied with the law of this jurisdiction and brought its property up to housing code standards. This rule finds its roots

22/ This precondition has met with approval in Judge Belson's trial court opinion in Mrs. Robinson's first case (pp. 10-11) and in Note, Leases and the Illegal Contract Theory--Judicial Reinforcement of the Housing Code, 56 Geo. L.J. 920, 936 (1968).

in analogous legal precedent.

It has long been established in this jurisdiction that a court's powers cannot be invoked to assist a party who has previously committed an illegal act such as engaging in an illegal contract. Hunter v. Wheate, 53 App. D.C. 206, 239 F. 604 (1923)^{23/}. Diamond Housing has been found to have engaged in illicit conduct which resulted in the voiding of its contract with Mrs. Robinson. Mrs. Robinson sought to establish that Diamond Housing was still engaging in this illicit conduct at the time it filed the instant suit against her. Because it had failed to cease this illegal activity--which was within its power to do--the trial court was obliged not to let itself be used to aid Diamond Housing in its bid to eject her. The trial court should have refused relief at least until the housing code violations were remedied. Mrs. Robinson intended to show at trial that Diamond Housing was still a wrongdoer and therefore the court must refuse to be used as an affirmative instrumentality of injustice; it had no choice but to leave the wrongdoer to its own devices.^{24/}

^{23/} Hunter ruled that a woman who had consented to a contract to have performed on her an illegal abortion could not later sue the performing doctor for negligence in performing it. See also Wheeler v. Sage, 67 U.S. (1 Wall.) 518 (1864).

^{24/} See, e.g., Borden Co. v. Clearfield Cheese Co., Inc., 244 F. Supp 366 (1965), citing Shelley v. Kraemer, 334 U.S. 1 (1948).

Although appellant recognizes that courts will not refuse relief to a party when the wrong done is a thing of the past (cont'd.)

An analogous situation to the present one faced this Court in Olverson v. Olverson, 54 App. D.C. 48, 293 F. 1015 (1923). Mrs. Olverson's former husband had obtained a divorce from her based on adultery. The decree denied her the right to remarry while still a District of Columbia resident. To avoid this ruling she married Mr. Olverson in Baltimore. Mrs. Olverson later sought to obtain a divorce from Mr. Olverson in the District of Columbia courts. This Court refused relief:

We do not think that the courts of the District can be used for that purpose. The appellant deliberately set at naught a District statute, which she was bound to respect and obey, and she cannot now ask the courts of this jurisdiction to relieve her of the obligations of a relation which she willfully and wrongfully assumed, or to enforce the right to support which would have been hers had the relation been lawfully contracted in the District. 25/

24/ (cont'd.) and collateral to the present action, Brooks v. Martin, 68 U.S. (2 Wall.) 70, 79-80 (1864), appellant asserted below that Diamond Housing's past illegal act--maintaining housing in an unlawful condition--had continued to the present. It therefore cannot be said that the taint from a prior act has in any way dissipated. See Olverson v. Olverson, supra. As the United States Court of Appeals has declared:

Although most cases in which the clean hands doctrine has been applied are cases in which the cause of action has arisen out of or been the fruit of unconscionable conduct, we do not understand that it is a prerequisite to the application of the doctrine that the cause of action shall have so arisen. It is sufficient to bar relief that plaintiff has been guilty of unconscionable conduct directly related to the cause of action"

Brantley v. Skeens, 105 U.S. App. D.C. 246, 266 F.2d 447 (1959), citing Nas v. Coca-Cola Co., 163 F.2d 505, 508 (4th Cir. 1947).

25/ 54 App. D.C. at 49, 293 F. at 1016.

Diamond Housing has similarly been found to have entered into an unlawful contract--in its case by renting out substandard housing. It has flouted the District's laws and has challenged the integrity of the court. It has plainly stated it is unwilling to make required repairs. It should not be permitted now to ask the courts to relieve it of its obligations.

Diamond Housing is more fortunate than Mrs. Olverson, however, because it can unilaterally improve its status. By repair it can comply with the housing regulations. After taking this step it can then seek judicial relief.

Another situation of great similarity arose in Edwards v. Habib, supra. The question raised there was how a landlord, once found to harbor a retaliatory intent and therefore precluded from recovery of possession, could ever again gain possession.

Edwards solved this problem by stating that once he can prove that this illegal purpose is dissipated, the landlord can act to evict his tenant. 130 U.S. App. D.C. at 141, 397 F.2d at 402.

Diamond Housing should be held to no less a standard. Only when its illegal activity has been dissipated by its actions in repairing the premises, can it then go into court and seek to evict.

This same result is reinforced by that line of cases in

this jurisdiction which requires a court of equity to refuse^{26/} relief to a party who come into court with "unclean hands."^{27/} Having been shown to have deliberately flouted the District's housing laws, Diamond Housing should not be given relief until it rectifies its position and repairs the premises.^{28/}

To allow Diamond Housing to evict Mrs. Robinson without first complying with the housing regulations would undermine public policy.^{29/} The need in the District is for more, not less, suitable low-income housing. To permit Diamond Housing to avoid its responsibilities to Mrs. Robinson by taking her premises off the rental market would only tend to exacerbate the present housing shortage crisis.^{30/} It is against public policy for a

26/ The trial court exercises equity powers. See, e.g., Morrow v. District of Columbia, 135 U.S. App. D.C. 160, 417 F.2d 723 (1969), Cf. Edwards v. Habib, 130 U.S. App. D.C. at 140, 397 F.2d at 701.

27/ See, e.g., Cochran v. Burdick, 67 App. D.C. 87, 89 F.2d 831 (1937); Combs v. Snyder, 101 F. Supp. 531 (1951) (three-judge court), aff'd 342 U.S. 939 (1952).

28/ The three-judge court in Combs v. Snyder declared:
Few things are clearer than that one who comes seeking protection for conduct that he concedes to be criminal has unclean hands within the meaning of this principle.
101 F. Supp. at 532.

29/ Where a suit in equity concerns the public interest as well as the private interests of the litigants . . . [the 'clean hands'] doctrine assumes even larger and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815 (1945).

30/ Edwards v. Habib, *supra*, has judicially noted the "appalling condition and shortage of housing in Washington . . ."
130 U.S. App. D.C. at 140, 397 F.2d at 701.

house to stand empty in a city where adequate dwellings fall far short of the demand for them. An occupied house is financially unproductive to the landlord and of no help in housing a family in dire need of a home. Courts "may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest." Barber-Colman Co. v. National Tool Co., 136 F.2d 339, 344 (6th Cir. 1943). This Court's final resolution to the instant problem should not be one which will encourage a property owner to reduce this city's quantity of available decent housing.

It need not be feared that the resolution proposed by appellant will put the landlord in a straightjacket. Repairing the property is surely in its own best interests, for it is only in this way that it can realize a profit from it. Furthermore, there are other factors which might serve as bona fide reasons for it to terminate the current tenancy. It might prove that the tenant is committing waste on the remainder interest; an individual landlord might seek in good faith to inhabit the premises himself; or he may have been served with a condemnation ^{31/} order.

31/ Several of a landlord's bona fide reasons for recovering possession are listed at § 2-407 of the American Bar Foundation's Tentative Draft of its Model Residential Landlord-Tenant Code.

It is of profound importance that the integrity of this Court's decisions and the housing code not be undermined. Such would occur if this Court permitted a landlord who was leasing substandard housing to avoid the strictures of Javins v. First National Realty Co., ___ U.S. App. D.C. ___, 428 F.2d 1071 (1970), and Brown v. Southall Realty Co., 237 A.2d 834 (1968), cert. denied, 393 U.S. 1018 (1969), by seeking to expeditiously kick out a tenant who has raised or is planning to raise this defense.

The following situation is becoming increasingly common in the Court of General Sessions: A landlord sues a tenant for possession based on nonpayment of rent. If the tenant is fortunate enough to have a lawyer (only about 2% do) and responds by raising a defense based on housing code violations, the landlord immediately seeks to squelch this defense by suing again on the basis of a thirty-day notice to quit^{32/}. This move is designed to evict the "troublesome" tenant from the premises without having to upgrade the conditions of the premises so that they meet the housing code. It is an attempt to entirely skirt the public policy as set forth in the housing regulations and prior opinions of this Court.

The landlord should not be permitted to gain relief by one judicial device when he would be unable to do so by proceeding through the normal channels.

^{32/} See, Cooks v. Fowler, D.C. Cir. No. 24,546, Nov. 13, 1970, slip opinion at 6.

V. THE HOUSING REGULATIONS AND THE PUBLIC POLICY OF THE DISTRICT OF COLUMBIA SHOULD PRECLUDE A LANDLORD SUCH AS APPELLEE FROM REMOVING HIS PROPERTY FROM THE RENTAL MARKET BECAUSE HE IS UNWILLING TO COMPLY WITH THE HOUSING REGULATIONS

The directive which the DCCA gave to appellee and to all landlords in the District -- to avoid compliance with the Housing Regulations and to remove their property from the rental market if they are unwilling^{33/} to make it habitable -- will have a serious adverse affect upon both the quantity and quality of housing -- especially low-income housing -- in the District of Columbia. The removal of property from the rental market, irrespective of any retaliatory aspects, will thwart the aim of the Housing Regulations to provide a supply of safe and sanitary housing and will thwart the public policy of Congress and of the District of Columbia. This Court should therefore hold that regardless of the issue of retaliation, a landlord

^{33/} The DCCA's general guideline included landlords who are unable to repair their property as well as those who are unwilling to do so. In light, however, of appellee's affidavit supporting its motion for summary judgment in which it stated that it is unwilling to repair the premises, the court is not directly confronted in the instant case with the problems surrounding financial inability to repair.

such as appellee who is unwilling to repair his property and who wishes to remove it from the rental market in order to avoid compliance with the Housing Regulations may not be permitted to do so, and that a tenant may defend against a suit for possession on that basis.

The Housing Regulations evidence the desire of the District's Commissioner and City Council to force landlords to maintain their property in a habitable condition and to prevent the deterioration and decline of the existing housing supply.^{34/} The Regulations, especially in light of the explicit direction by Congress for their enactment, also "indicate a strong and pervasive congressional concern to secure for the City's slum dwellers decent, or at least safe and sanitary places to live."^{35/}

Indeed, Congress, in various housing acts, has clearly established a policy of eradicating substandard housing conditions and of increasing the supply of safe and sanitary dwellings. It has declared that the national housing policy requires "the elimination of substandard

^{34/} See D.C. Housing Regulations § 2101.

^{35/} Edwards v. Habib, supra, 397 F.2d at 700.

and other inadequate housing . . . and the realization . . . of a decent home and a suitable living environment for every American family."^{36/} To underline its concern, Congress has directed that all agencies of the Federal Government "having powers, functions, or duties with respect to housing . . . exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this [the above] Act. . . ."^{37/}

The Washington community "is confronted by a serious shortage of housing rentals its resident population

^{36/} Section 1 of the United States Housing Act of 1937, 50 Stat. 888, as amended by the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1401 (1964).

^{37/} Id. The significance which Congress attached to the full implementation of housing codes is further evidenced by such measures as its requirement that a local community have "workable" programs for community improvement, which specifically encompass the existence and enforcement of housing code designed to provide safe and sanitary buildings, as a condition for obtaining urban renewal funds. Housing Act of 1949, supra, 42 U.S.C. § 1450. The standards of what constitute a workable local housing program were specifically expanded in 1954 to place an even greater emphasis upon prevention of deterioration and rehabilitation of substandard dwellings. Housing Act of 1954, 42 U.S.C. 1451(c).

can afford in order to live in uncrowded, decent, safe and sanitary dwellings." ^{38/} In addition,

it is likely that Washington now is wasting -- that is, the city is physically depreciating -- much of its good housing stock by over-use and insufficient maintenance. ^{39/}

In the District, 41% of the population -- 299,000 people -- lives in inadequate housing, and "more than 100,000 children are growing up in Washington now under one or more housing conditions which create psychological, social, and medical impairments, and make satisfactory home life difficult or a practical impossibility." ^{40/}

38/ National Capital Planning Comm'n., Problems of Housing People in Washington, D.C., 53 (1966) (hereafter cited NCPC Report).

39/ Id. at 51.

40/ Id. at 6. The figure of 41% of the population living in inadequate housing was arrived at by the following calculations:

36,400 renter and homeowner households -- 15% of the total Washington population live in structurally sub-standard units or in structurally sound units that lack essential facilities;

21,800 renter and homeowner households -- 11% of Washington's total population live in overcrowded units which are structurally sound and have all essential facilities; and

45,100 renter households -- 16% of the total population live in uncrowded structurally sound housing units with all essential facilities. These households, however, pay more rent than they can afford. Id. at 5.

(Footnote cont'd)

The National Capital Planning Commission has reported that 17.9% of households which are rented in the District -- 31,700 households -- and 18.7% of persons living in rented households -- 85,500 persons -- live in housing units which are substandard.^{41/}

The Department of Regional Planning of the Metropolitan Council of Governments found that in 1960 (the last year for which census statistics were available), 27,000 or 10.3% of the housing units in the District were

(Footnote 40 cont'd)

Presumably the situations involved in the second and third categories have arisen because there is an insufficient number of low-rent units in the District which are structurally sound and which are within the financial reach of the resident population.

41/ NCPC Report at 45. This figure does not include persons living in overcrowded housing or housing which is financially beyond their means.

substandard and 31,100 or 11.9% of the households were overcrowded.^{42/} On the assumption that the rate of overcrowding and below-standard housing which existed in 1960 would continue in the future, the Council of Governments made a projection of the housing conditions in the District in the years 1968, 1985, and 2000. The results, set forth below, indicate that the number of overcrowded and substandard housing will increase significantly unless action is taken to prevent these conditions:^{43/}

I. Overcrowded Households (In Thousands)

<u>1960</u>	<u>1968</u>	<u>1985</u>	<u>2000</u>
31.1	46.9	56.3	60.2

42/ Metropolitan Washington Council of Governments, Housing Gap Quantification: A Methodology 34-35 (1968). The figures are based upon the 1960 Census of Population and Housing. Substandard housing, as used in the census reports, means those units which are deteriorating (i.e., units which need more repair than would be provided in the course of regular maintenance) and those which are dilapidated (i.e., units which do not provide safe and adequate housing). Overcrowded households are those with more than 1.01 persons per room. Id. at 32, 34.

The census figures on overcrowding and below-standard housing include home-owned dwellings as well as rental units. However, most of the units in the District which are inadequate are rental households. Only a small proportion of the figures represent home-owned dwellings. NCPC Report at 5.

43/ Id. at 34-35.

II. Substandard Housing Units (In Thousands)

<u>1960</u>	<u>1968</u>	<u>1985</u>	<u>2000</u>
27.0	37.3	38.6	41.3

The District of Columbia Court of Appeals ruling allowing landlords who are unwilling to put their substandard property into compliance with the Housing Regulations to close down rather than repair their units will exacerbate rather than ameliorate the housing problem for poor people. If the court's ruling, which is directed at all landlords in the District of Columbia, were implemented and all those who own below-standard housing chose to remove rather than repair their units, approximately 37,000 dwellings would be removed from the housing market.^{44/}

The National Capital Planning Commission has found that the poor are already being shifted geographically within the city mainly by private market displacements.^{45/}

If the District of Columbia Court of Appeals decision in this case is allowed to stand not only will the rate of

^{44/} Based on the Metropolitan Council of Government's estimate of substandard housing in 1968.

^{45/} NCPC Report at 51.

displacement of the poor by private landlords accelerate, but the ability of the poor to shift to other low-income housing will be severely limited by the accelerated rate of removal. "[B]oth physical and occupancy conditions of housing occupied by the poor are worsening,"^{46/} and the DCCA's decision will only serve to aggravate an already deplorable situation.

As Mr. Justice Holmes noted, "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present".^{47/}

The Congress, by authorizing, and the City Council, by enacting, the Housing Regulations for the District have recognized that decent, safe and sanitary housing is a basic necessity of a city. Both Congress and the Commissioners have also recognized that a degree of public control is necessary to ensure an adequate supply of such housing for the residents of the District of Columbia.

^{46/} NCPC Report, at 51.

^{47/} Block v. Hirsh, 256 U.S. 135, 156 (1921).

The gravity of the housing problem in the District of Columbia and the effect which the decision appealed from will have upon the housing situation requires that this Court reverse the DCCA's directive allowing unwilling landlords to remove rather than repair their substandard housing. The Court should rule that mere unwillingness to repair, as in the instant case, is not sufficient justification for the removal of property from the rental market, and that where a landlord asserts legitimate business considerations for the removal of the property, the burden of proving that the removal is justifiable be placed upon the landlord, for it is he who is most familiar with his own motivations and business considerations.

Appellant stresses that she is not urging the court to interfere with a man's dominion over his own home. At issue is rental property -- property which is operated by the landlord for business purposes.^{48/} Nor is she asking

^{48/} Appellee in the instant case is a corporation, licensed by the District of Columbia to operate a real estate business. The dwelling involved in the case is merely one of many hundreds of units owned and rented by appellee. See note 15 supra.

the Court to interfere in the absence of legislative action. All that is requested is the implementation of the Housing Regulations of the District of Columbia.

Furthermore, it is not suggested that a landlord may never close down one of his units or never go out of business. Appellant's position is only that he may not do so when his primary motivation is unwillingness to comply with the housing regulations.

CONCLUSION

For the reasons set forth above, the decision of the trial court should be reversed and the case remanded for an appropriate disposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed; postage prepaid, to Herman Miller, Esquire, Attorney for Appellee, 400 Fifth Street, N.W., Washington, D.C. 20001, on this 18th day of November, 1970.

C. Christopher Brown

C. CHRISTOPHER BROWN
Attorney for Appellant

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ORIGINAL.

1772 of vindicating statutory public policy. Some minor delay may be incurred in determining if plaintiff's motive was retaliatory; but as the Supreme Court has noted, "the delay, of course, is inherent in any law-minded system of justice."

Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home" (*Perrill v. Southall Realty* (1974) 416 U.S. 363, 383, 91 S.Ct. 1723, 1734, 40 L.Ed.2d 198). We therefore conclude that the defense presented in this case may be raised in an unlawful detainer proceeding.

[12] This conclusion is unaffected by the fact that in the present case the housing agreement between plaintiff and defendants specified that shelter was provided only for employees. To state that a landlord may evict a tenant who is not an employee adds little or nothing to the powers landlords already have. A landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason; here, retaliation for the tenant's efforts to vindicate an important statutory right.

The judgment is reversed.

WRIGHT, C. J., and McCOMB, TOBINER, SULLIVAN, CLARK and RICHARDSON, JJ., concur.

8. In addition to their valid claims based on the federal act, defendants and amici curiae have raised a number of additional contentions in support of the second affirmative defense: (1) the use of the judicial system to effect violations in this case constitutes state action violating defendants' direct Amendment right to litigation (see discussion in *Edwards v. Habib* (1984) supra, 130 U.S.App.111 120, 397 b.3d 477, 600-600); (2) even if no state action is found, the proposed violations amount to an impermissible systematic infringement on defendants' right to petition the government, a right that emanates from the very structure of the con-

Frank J. JAVOREK et al, Petitioners,
v.
The SUPERIOR COURT OF MONTEREY
COUNTY, Respondent;

Jack Bradford LARSON, Jr., et al.,
Real Parties in Interest.

S. F. 33334.

Supreme Court of California.

Aug. 2, 1978

Nonresident defendants in automobile accident case sought writ of mandate to quash service of summons for lack of jurisdiction. The Supreme Court, Sullivan, J., held that neither obligation of nonresident defendants' automobile liability insurer to indemnify the defendants nor its obligation to defend them was subject to attachment or garnishment so that those two obligations did not give rise to basis for establishing quasi in rem jurisdiction over the nonresident defendants; and that, since trial court had already determined that it lacked in personam jurisdiction over the nonresident defendants, defendants were entitled to have service of process quashed for lack of jurisdiction.

Writ of mandate issued.

Opinion, Cal App., 122 Cal Rptr. 18, vacated.

stitution (see *Id.* at pp. 630-634); (3) the violations would violate the Fourth Act (13 U.S.C. § 811, which prohibits arbitrary discrimination by a business establishment (see *Id.* at pp. 630-634) § 811(b)(1)(A) 200, 401 Cal Rptr. 21, 471 P.2d 902); (4) plaintiff's actions not only tend to frustrate the purposes of the federal act, but are in direct violation of § 811(c) § 200(b), which prohibits discrimination against a person in retaliation for filing suit for just cause under the act. As stated, suits prevail for the reasons already stated, we need not decide the validity of these additional contentions.

Citation, Sup., 121 Cal Rptr 108

1. Appeal and Error 4-20 Mandamus 4-24(3)

Order discharging or refusing to discharge a writ of attachment is appealable and would not be reviewed on petition for writ of mandamus. West's Ann.Code Civ. Proc. §§ 9011(c), 1086.

2. Courts 4-21

Theoretically and traditionally, exercise of "quasi in rem jurisdiction" depends entirely upon the presence of the property of the defendant in the forum; residence of the plaintiff is irrelevant; theory is that, because property is situated in the state, courts of the state have power over to determine the relative rights of the plaintiff and the defendant therein.

See publication Words and Phrases for other judicial constructions and definitions.

3. Garnishment 4-23

California law permits a garnishment of debts and once intangibles. West's Ann.Code Civ. Proc. § 543.

4. Garnishment 4-23

It is not necessary that garnishee have in his possession the actual money of the defendant; it is enough that he owe a debt to defendant; general test is whether the defendant has an enforceable claim against the garnishee. West's Ann.Code Civ. Proc. § 513.

5. Garnishment 4-23

For purposes of determining whether debt is too uncertain and continued to be subject to garnishment, distinction exists between situations in which the amount of liability is uncertain and those in which the fact of liability is uncertain, in the former situation the debt is not so contingent as to preclude garnishment whereas in the second situation it is too contingent to permit garnishment. V. it's Ann.Code Civ. Proc. §§ 517, 518, 519.

6. Garnishment 4-23

Automobile insurer's obligation to indemnify insured, who had not been held liable in court of law for any negligence in connection with the operation of their au-

tomobiles, was contingent upon more than just the determination of the amount of liability; it was in fact contingent upon the determination of the fact of liability and thus not subject to garnishment. West's Ann.Code Civ. Proc. §§ 537 et seq., 543.

7. Courts 4-21

There must be a determination of insured's liability before insurer's obligation to indemnify matures to the extent that it is subject to attachment for purposes of establishing quasi in rem jurisdiction over the nonresident insured; disapproving to the extent that it is inconsistent. Turner v. Evers, 31 Cal.App.3d Supp. 11, 107 Cal. Rptr. 390.

8. Courts 4-21

Insurer's obligation to indemnify and defend nonresident insureds was so contingent and uncertain prior to any judgment being rendered against the nonresident insureds as to render the obligation not subject to garnishment in California so that it could not be used to establish quasi in rem jurisdiction over the nonresident insureds in action arising out of automobile accident. West's Ann.Code Civ. Proc. § 537 et seq.

9. Courts 4-21

Implied covenant of good faith and fair dealing in automobile policy did not make insurer's obligation to indemnify the insureds certain prior to the filing of suit and determination of insureds' liability so as to permit attachment of that obligation and use of that attachment to establish quasi in rem jurisdiction over the nonresident insureds. West's Ann.Code Civ. Proc. § 537 et seq.

10. Courts 4-21

Implied covenant of good faith and fair dealing in automobile policy could not be itself attached as basis for establishing quasi in rem jurisdiction over nonresident insureds.

11. Insurance 4-2142

Although insurer, in discharging its duty of good faith to the insured may an-

...after he took delivery of package at post office and drove away in the vehicle in question was lawful and did not provide any basis for entrapment defense, and that forfeiture was not precluded on theory that the cocaine had ceased to be contraband when initially seized by the government or that government agents had failed to follow statute and regulations in failing to impound the unlawfully imported cocaine after initially finding it.

Affirmed.



FAIR LABOR STANDARDS: PUBLIC AGENCIES

*Bonville v. California Health
and Welfare Agency*
414 P.2d 217

Domestic workers employed to assist aged and disabled welfare recipients with basic daily chores brought action for wages, liquidated damages and declaratory relief against state and county agencies, seeking compliance with the minimum wage provisions of the Fair Labor Standards Act. On motions to dismiss for failure to state a claim on which relief could be granted, or for summary judgment, and on motion of one defendant for change of venue, the District Court, Oliver J. Carter, J., held that issues of fact precluding summary judgment existed as to who employed plaintiffs and whether they were within "companionship" exception of the Act; that defendants could be held as joint employers under the Act; that each defendant could be found to be an employer under the Act; that Congress did not exceed its power under the commerce clause in extending Act's coverage to domestic employees who work in households; that suit was not barred by

...of venue was not appropriate.
Motions denied.



CLASS ACTION

*Lau v. Standard Oil Company of
California* 70 F.R.D. 528

Action was brought to recover for alleged discrimination in employment. Cross motions for determination of class action were filed. The District Court, Swigert, J., held that suit would not be certified as class action since plaintiff failed to prosecute the action with reasonable diligence and, for such reason, would not fairly and adequately protect the class.

Defendant's motion granted; plaintiff's cross motion denied.



VIETNAMESE CHILDREN

Nguyen Da Yen v. Kissinger
70 F.R.D. 458

Action was brought on behalf of three Vietnamese children in United States who allegedly had not been legally released for adoption and who had families desiring their return. The District Court, Spencer Williams, J., held, inter alia, that the action could not be maintained as a class action on behalf of all Vietnamese children in United States who had not been legally released for adoption and who had families desiring their return since the necessary prerequisites had not been met, but that there was federal question jurisdiction with respect to the suit on behalf of the three named plaintiffs.

Action dismissed as to absent members of class.

Order modified, 9 Cir., 528 F.2d 1194.

B. P. HOWETT ASSOCIATION, Plaintiff and Respondent,

v.
*Ruthie BUDINICH et al., Defendants
and Appellants.*
1. A. 30505.

Supreme Court of California.
Aug. 10, 1978

Unlawful detainer proceeding was brought by farm labor contractor against farm workers who rented company owned housing. The Municipal Court, Ventura County, Albert T. Blanford, J., entered judgment for contractor, and appeal was taken. The Superior Court, Appellate Department, Ventura County, affirmed the judgment. The Supreme Court, Mosk, J., held that it was not defense to unlawful detainer action that farm labor contractor sought possession of premises because farm worker tenants were on strike; but that defense that farm labor contractor instituted unlawful detainer action in retaliation against farm workers because of their filing of suit in federal court charging violation by contractor of the Farm Labor Contractor Registration Act was available.

Reversed.

Opinion, 126 Cal Rptr. 818, vacated.

1. Labor Relations § 321

While right of employees to organize is expressly protected under the Labor Code, employers and unions alike are generally permitted to use any legitimate economic means at their disposal to achieve their ends, including replacement of striking employees. West's Ann. Labor Code, § 923; National Labor Relations Act, § 2(J) as amended 29 U.S.C.A. § 152(j).

2. Landlord and Tenant § 700(1)

Farm labor contractor had right to reserve company owned housing for non-striking farm workers; thus, denying that farm labor contractor sought possession of housing because farm workers who rented

housing were on strike was not available in unlawful detainer action. West's Ann. Code Civ. Proc. § 1161.

3. Landlord and Tenant § 700(3, 6)

General rule is that because an unlawful detainer action is a summary proceeding designed to facilitate owners in obtaining possession of their real property, counterclaims, cross complaints and affirmative defenses are inadmissible. West's Ann. Code Civ. Proc. § 1161.

4. Landlord and Tenant § 725

A landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of tenant.

5. Landlord and Tenant § 790(1)

In that a landlord has no right to possession when he seeks it for an invalid reason, a tenant may raise defense of retaliatory eviction in an unlawful detainer proceeding. West's Ann. Code Civ. Proc. § 1161.

6. Landlord and Tenant § 790(3)

In evaluating whether farm worker tenants raised valid defense of retaliatory eviction to unlawful detainer proceeding brought by farm labor contractor which leased company owned housing to farm worker tenants, court would engage in balancing process and determine whether public policies furthered by protecting farm worker tenants from eviction outweighed interests in preserving summary nature of unlawful detainer proceeding. West's Ann. Code Civ. Proc. § 1161.

7. Courts § 405(1)

State court has concurrent jurisdiction to enforce a right created by federal law unless law excludes concurrent jurisdiction or is incompatible with such jurisdiction.

8. Courts § 405(9)

State court has concurrent jurisdiction to enforce rights created pursuant to the Farm Labor Contractor Registration Act. Farm Labor Contractor Registration Act of 1963, §§ 2 et seq., 15 as amended 7 U.S.C.A. §§ 2012 et seq., 2051.

B. Courts (4000)

Although the Farm Labor Contractor Registration Act prohibits discrimination against a worker who invokes the Act and prescribes remedies for such discrimination, state courts may impose their own sanctions. Farm Labor Contractor Registration Act of 1963, §§ 2 et seq., 15 as amended 7 U.S.C.A. §§ 2012 et seq., 2051.

10. Statutes (100)

Statutory public policy must be protected whether policy is enunciated by the legislature or by Congress.

11. Landlord and Tenant (2000)

Defense that farm labor contractor which leased company-owned housing to farm workers instituted unlawful detainer action in retaliation against farm workers because of their filing of suit in federal court charging violation by contractor of the Farm Labor Contractor Registration Act was available in unlawful detainer proceeding. West's Ann.Cal.Civ.Proc. § 1161; Farm Labor Contractor Registration Act of 1963, §§ 2(a), 12, 13 as amended 7 U.S.C.A. §§ 2011(a), 2050a, 2050b.

12. Landlord and Tenant (2000)

A landlord may normally evict a tenant for any reason or for no reason at all but not evict for an improper reason such as retaliation for tenant's efforts to vindicate statutory right.

Stephen A. Harvey and Richard A. Weinstock for defendants and appellants.

David Lauter, Northridge, Cecily Nyomarkay, San Pedro, Richard A. Weiss, Long Beach, James Matzeich, Ceres, Richard Pearl, Delano, and Manuel Medeiros, Modesto, as amici curiae on behalf of defendants and appellants.

Hathaway, Clabaugh, Perrett & Webster and Paul D. Powers, Ventura, for plaintiff and respondent.

1. Defendants, in their petition for hearing before this court and in oral argument, have abandoned the first affirmative defense.

MOSK, Justice

At issue is the right of a corporate agricultural employer to evict farmworker tenants from company-owned housing in retaliation for their role in filing suit against the company under the federal Farm Labor Contractor Registration Act.

Defendants are lemon pickers who were employees of plaintiff, a farm labor contractor. Plaintiff, through affiliated companies, provides housing to many of its employees, including these defendants.

On February 25, 1975, defendants, members of a citrus pickers' association unaffiliated with any labor union, walked off their jobs in a dispute over implementation of a previous agreement with plaintiff. Three weeks later, defendants filed suit against plaintiff in federal district court, charging violation of the Farm Labor Contractor Registration Act. (7 U.S.C. § 2041 et seq.) Plaintiff immediately served defendants with eviction notices and, when defendants failed to leave the premises, filed unlawful detainer actions. (Code Civ.Proc., § 1161.)

In the consolidated unlawful detainer proceeding below, defendants sought to raise two affirmative defenses: (1) plaintiff was unlawfully seeking to evict them in retaliation for their strike; and (2) the evictions were in retaliation for the federal suit filed by defendants. The trial court granted plaintiff's motion to exclude evidence regarding both of the affirmative defenses and entered judgment against defendants.

[1, 2] We dispose summarily of defendants' contention that the first affirmative defense should not have been excluded. In the circumstances shown, it is no defense to an unlawful detainer action that plaintiff sought possession of the premises because defendants were on strike. While defendants have a right to strike, plaintiff

may hire replacements and, as a corollary, may reserve company housing for those who are working.

11

[3] The other proposed affirmative defense—that the unlawful detainer action was instituted in improper retaliation against defendants for filing the federal suit—presents a closer question. The starting point in evaluating the proposed defense is the general rule that because an unlawful detainer action is a summary proceeding designed to facilitate owners in obtaining possession of their real property, counterclaims, cross-complaints, and affirmative defenses are inadmissible. (*Union Oil Co. v. Chandler* (1970) 4 Cal App 3d 716, 721, 84 Cal Rptr. 756.)

However, several exceptions to this judicially created rule have been carved out, and tenants have been permitted to raise a number of defenses in unlawful detainer actions, ranging from promissory fraud (*id.* at pp. 727-729, 81 Cal Rptr. 756) to a landlord's failure to maintain an apartment in tenable condition (*Green v. Superior Court* (1974) 10 Cal 3d 616, 111 Cal Rptr. 704, 517 P.2d 1168). Various attempts have been made to categorize the exceptions, culminating in the declaration of this court in *Green* that in an unlawful detainer proceeding a tenant may interpose a defense that relates directly to the issue of possession. (*Id.* at pp. 632-633, 111 Cal Rptr. 704, 517 P.2d 1168.)

3. Until recently, the Legislature, except in a few limited areas, has maintained a strictly noninterventionist stance in labor relations. While the right of employees to organize is expressly protected under Labor Code section 804, employers and unions alike are generally permitted to use any legitimate economic means at their disposal to achieve their ends. (*Haglund v. Chavez* (1972) 6 Cal 3d 672, 381 P.2d 865, 105 Cal Rptr. 621, 804 P.2d 467; *Pend Chavers, Inc. v. Automotive Employees, etc., Local No. 68* (1964) 61 Cal 2d 155, 394 P.2d 470, 310 P.2d 701.) Thus, although the public policy behind section 925 prevents an employer from discharging his workers in retaliation for union organizing efforts,

[4, 5] One such recognized defense is a plea that an unlawful detainer action amounts to a "retaliatory eviction." It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding. (*Schwinger v. Superior Court* (1970) 3 Cal 3d 507, 90 Cal Rptr. 729, 476 P.2d 97; see also *Abstract Investment Co. v. Hutchinson* (1962) 204 Cal. App 2d 242, 22 Cal Rptr. 309.)

[6] In evaluating whether defendants have raised a valid defense of retaliatory eviction, we must engage in a balancing process. We must determine whether the public policies furthered by protecting defendants from eviction outweigh the interests in preserving the summary nature of unlawful detainer proceedings. (*Union Oil*, supra, 4 Cal App 3d at p. 726, 81 Cal Rptr. 756.)

Defendants assert that to allow plaintiff to evict them in retaliation for filing suit under the federal Farm Labor Contractor Registration Act would frustrate the purposes of that act. An analysis of the history behind the measure lends support to defendants' contention. The act was enacted in 1963 in response to a Congressional finding that "the channels and instrumentalities of interstate commerce are being used by certain irresponsible contrac-

Charmen's *Union Oak Inn* (1961) 192 Cal App 2d 703, 18 Cal Rptr. 789), no California law prevents an employer from replacing striking employees. Even under the comprehensive administrative scheme embodied in the National Labor Relations Act, which expressly exempts farmworkers from its coverage (29 U.S.C. § 162(3)), an employer may lawfully replace workers who are striking for economic reasons. (*N. L. R. B. v. Apker, Inc.*, 1964, 1965) 402 U.S. 170, 181.) The Agricultural Labor Relations Act (Cal.Civ.C. § 1140 et seq.), patterned after the NLRB, was not yet in effect at the time the current dispute arose.

lors who exploit migrant agricultural laborers, and the public generally. . . . (7 U.S.C. § 201(a)) The statute requires farm labor contractors to disclose to each worker all relevant information about his prospective employment and to obtain a certificate from the Secretary of Labor. The secretary is empowered to refuse to renew a certificate if he finds, inter alia, that a contractor has given false information to workers or has failed to comply with his agreements. In the original version of the act, the only penalty for violation was a fine of \$500.

But after a decade of experience with the law, testimony before Congress demonstrated that its original objectives had not been achieved. A report of the Senate Labor and Public Welfare Committee declared, "It has become clear that the provisions of the Act cannot be effectively enforced. Non-compliance by those who administer the Act was intended to regulate has become the rule rather than the exception" (Sen Rep No 91-1295, 1974 U.S. Code Cong. & Admin News, at p. 644. (hereinafter cited as Senate Report)). "It is quite evident," the report continued, "that the Act in its present form provides no real deterrent to violations." (Id.) Accordingly, the act was considerably strengthened by 1974 amendments, including a section providing for a private civil remedy (7 U.S.C. § 209(a)) and another prohibiting discrimination against a worker in retaliation for filing suit under the act (7 U.S.C. § 209(b)).

Thus, it appears that the federal act relies in large part on the initiation of private litigation for its effectiveness. If employer-landlords are permitted to evict farmworker tenants from company-controlled housing in retaliation for such litigation, it can be anticipated that the enforcement of the federal act in this state may rapidly become frustrated. Migrant workers, who often must rely on their employers for housing, will be understandably reluctant to risk losing possession of their homes by taking their landlords to court,

regardless of how egregious the latter's violation of the federal law may be.

The injustice inherent in this not uncommon scenario has been increasingly recognized by courts in recent years. In the leading case of *Edwards v. Habb* (1968) 130 U.S. App.D.C. 126, 397 F.2d 687, the federal Court of Appeals held that a landlord was not empowered to evict in retaliation for his tenant's reporting of housing code violations to the authorities. The court reasoned that the housing codes could not effectively be enforced unless tenants could report violations by landlords without fear of reprisals.

Edwards was followed by *Robinson v. Diamond Housing Corporation* (1972) 150 U.S. App.D.C. 17, 463 F.2d 851, in which a landlord brought a suit for possession against a tenant who, in a separate proceeding, had successfully invoked her right to refuse to pay rent on the ground that her apartment was uninhabitable. The court ruled in favor of the tenant, concluding that her right "would be shallow indeed if the landlord were free to penalize its exercise by eviction." (Id. at p. 861.)

In *Schweiger v. Superior Court* (1970) supra, 3 Cal 3d 507, 90 Cal Rptr. 729, 476 P.2d 97, this court held that a landlord may not raise rent in retaliation for a tenant's exercise of his right under Civil Code section 1942 to make repairs and deduct their costs from his rent payments. We declared, "Whatever salutary legislative purpose induced the passage of section 1942, it cannot be achieved if tenants exercising the rights granted by the section may be punished with judicial appropriation." (Id. at p. 513, 90 Cal Rptr. at p. 712, 476 P.2d at 100.)

While the *Edwards-Schweiger* line of authority lends considerable support to defendants' position it is arguable that the present case is distinguishable in two respects. First, in each of the former cases a court sought to reconcile an unlawful defendant statute with another statute of the same jurisdiction, while here a state court is called upon to recognize policy underlying

ing federal law. Plaintiff asserts that defendants are powerless to invoke the federal law in state court because exclusive jurisdiction to enforce the act rests in the federal courts and because the power to deal with an eviction in retaliation for invoking the act lies exclusively in the act itself.

[7-9] Plaintiff's contentions are both inaccurate and inapplicable to the present proceeding. It is well established that a state court has concurrent jurisdiction to enforce a right created by federal law unless the law excludes concurrent jurisdiction or is incompatible with such jurisdiction. (*Dawson Co. v. Courtney* (1962) 368 U.S. 502, 507-508, 82 S.Ct. 519, 77 L. Ed.2d 443; *Williams v. Horvath* (1976) 16 Cal.3d 634, 817, 129 Cal Rptr. 453, 548 P.2d 1125; *McCulloch v. L. A. County etc. Carpenters* (1957) 49 Cal.2d 45, 59, 315 P.2d 122.) The federal act herein neither expressly nor impliedly excludes a state court from enforcing its provisions, and there is nothing inherent in the nature of the act, such as a comprehensive federal administrative scheme, which militates against concurrent jurisdiction. As for the provision of the act prohibiting discrimination against a worker who invokes the act and prescribing remedies for such discrimination, there is no indication that Congress intended state courts to refrain from imposing their own sanctions. To the contrary, section 2051 of the act provides, "This chapter and the provisions contained herein are intended to supplement state action and compliance with this chapter shall not excuse anyone from compliance with appropriate state law and regulation."

3 It is significant that the remedy protected by the high court in *Nash* (filing an unfair labor practice charge) lies exclusively within the federal system. I.e., the National Labor Relations Board. (*Nash v. United Brotherhood of Carpenters* (1953) 359 U.S. 240, 248, 78 S.Ct. 375, 3 F. Ed.2d 375.) But even though the state courts had no jurisdiction to entertain the employee's unfair labor practice charge, the Supreme Court held that the courts could

More relevantly, no state court in this proceeding is being called on to interpret or enforce federal law. All defendants ask is that state law be construed so as not to thwart the express purposes of a federal statute. The supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2) commands no less, as was demonstrated by the Supreme Court in *Nash v. Florida Industrial Comm.* (1967) 389 U.S. 235, 88 S.Ct. 362, 19 L. Ed.2d 438. There a state unemployment compensation act had been applied to benefits to an employee solely because she filed an unfair labor practice charge with the National Labor Relations Board. The high court held the state act unconstitutional as applied, reasoning that its enforcement under the circumstances of the case tended to frustrate the purpose of the National Labor Relations Act: "Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges." (Id. at p. 240, 88 S.Ct. at p. 365.) The applicability of the foregoing rationale to this case is apparent. As in *Nash*, an attempt has allegedly been made to retaliate against persons under state law for seeking to invoke a remedial federal statute.³ Also as in *Nash*, Congress has expressly declared that it desires to encourage persons to

not hinder the functioning of the NLRB by enforcing penalties against an employee for invoking the act. Similarly, in the present case, even if plaintiff were correct in asserting that the federal courts have exclusive jurisdiction over the "Unfair Labor Practice" Act, state courts would still be charged with the duty of ensuring that implementation of the act is not frustrated.

Chicago, Sep. 13, 1971 Cal Rptr. 161

come forward with complaints charging violations of the federal act; not only do the 1974 amendments provide for a private civil remedy, but they also prohibit discrimination against a person in retaliation for filing suit under the act. Our duty to enforce the will of the state Legislature is equaled by our responsibility to insure that the intent of Congress is not ignored.

A second factor that arguably sets the present case apart from *Schweiger* and *Edwards* is that the statute which defendants claim they are being evicted for violating was enacted primarily to protect them as employees, not as tenants. It can readily be seen, however, that under these circumstances this is not a meaningful distinction. To begin with, the federal act recognizes housing as one of the major problems confronting a migrant farmworker. One of the motivating factors behind the act was the failure of many contractors to provide their workers with promised housing or to furnish them with sanitary residences. (Senate Report, supra, at p. 6142.) Accordingly, the act requires a contractor to disclose to prospective workers the housing to be provided to them, and, in the event a contractor controls the housing, he must post the terms and conditions of occupancy. As the framers of the act recognized, it is difficult to separate the rule of employer from that of landlord and the rule of farmworker from that of tenant.

Also, the holding of *Schweiger* cannot be limited to the narrow proposition that tenants are protected from retaliation only when they take action concerning the conditions of their tenancy. California case law has not been so restricted. In *Abstract Investment Co. v. Harrison* (1962) supra, 204 Cal App2d 246, 22 Cal Rptr 309, cited with approval in *Schweiger* and *Edwards*, a tenant contended that he was being evicted for racial reasons. Although such a complaint did not relate directly to the conditions of tenancy, the Court of Appeal held that a landlord may not promissi-

bly invoke the power of a court to evict a person because of his color.

In a related area, a similarly broad conclusion was reached by the court in *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal App2d 184, 341 P2d 25. There an employee was discharged after he refused to testify falsely before an assembly committee. Even though the statutes prohibiting perjury did not affect conditions of employment, the court reasoned that "in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury." (Id. at p. 189, 341 P2d at p. 37.)

[10] As we said in *Schweiger*, such cases "instruct us that one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy." (*Schweiger*, supra, 3 Cal3d at p. 516, 90 Cal Rptr. at p. 731, 476 P2d at p. 102.) At a minimum, *Schweiger* stands for the proposition that "the right not to be deprived in court of home and shelter because of the exercise of statutory rights is a 'broad equitable principle' as deserving of protection as the right to equal protection under the law." (Id. at p. 515, 90 Cal Rptr. at p. 733, 476 P2d at p. 101.) Statutory public policy must be protected, whether that policy is enumerated by the Legislature or by Congress. In a retaliatory eviction proceeding, the critical question is not whether the statute is designed to aid tenants, but whether it depends for its effectiveness on private initiative and would thus be emasculated by allowing punitive eviction. In the present circumstances that question must be answered affirmatively. Unless it can be shown that the interests in preserving the summary nature of the unlawful detainer proceeding outweigh the interests in furthering con-

gressional policy, defendants have raised a legitimate retaliatory eviction defense.⁴

In arguing that preserving the summary nature of unlawful detainer proceedings should control our determination, plaintiff relies exclusively on *Union Oil Co. v. Chandler* (1970) supra, 4 Cal App3d 716, 81 Cal Rptr. 756, which involved an unlawful detainer action instituted by an oil company against a service station operator. In resisting that action, the lessee sought to demonstrate that the company was terminating the lease in retaliation for his refusal to accede to a gasoline price-fixing scheme that violated federal antitrust laws. The Court of Appeal held in favor of the company on this point, reasoning that, "When we weigh the complex and protracted nature of antitrust cases in the light of the adequate remedies and damages afforded an aggrieved party in such cases against the interest in preserving the summary nature of an unlawful detainer action, we believe the latter to be of paramount importance." (Id. at p. 726, 81 Cal Rptr. at p. 763.)

But the present case differs from *Union Oil* in two major respects. The first is the burden that allowing an affirmative defense to be heard would place on the trial court. In *Union Oil* in order to decide whether the eviction was unlawfully retaliatory the trial court would have been compelled to undertake the weighty task of determining whether the company had in fact violated federal antitrust laws. In con-

trast, the trial court here has not been asked to construe federal law; its only duty is to determine whether plaintiff is seeking to evict defendants in retaliation for filing a suit under the federal act, a function that does not involve considering the merits of the prior suit and is thus no more burdensome than the task imposed on the courts in *Abstract Investment* and *Schweiger*.

Moreover, it must be remembered that *Union Oil* involved a commercial lease, while the present case concerns eviction from a residential dwelling. Like the lessee in *Union Oil*, defendants may file a separate suit to vindicate their business rights, but the existence of such an alternative provides small comfort to a residential tenant. As Justice Douglas puts it, "the home, even though it be in the slums, is where man's roots are. To put him into the street . . . deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic questions in the case." (*Lindsay v. Norman* (1972) 405 U.S. 56, 90, 92 S.Ct. 862, 892, 31 L.Ed.2d 36 (Douglas, J., dissenting).)

[11] In short, the present threat to the summary nature of unlawful detainer proceedings is no greater than that we faced in *Schweiger*, and, as in *Schweiger*, it must be balanced against the more important in-

4. Defendants do not invoke Civil Code section 1042.6, which prohibits retaliation against a tenant "because of the exercise by the tenant of his rights under this chapter or because of his complaint to an appropriate governmental agency or to the accountability of a dwelling . . ." At least one commentator has maintained that under section 1042.6, which was enacted prior to *Schweiger* but went into effect after the opinion issued, a court may protect from retaliation only the tenant conduct specified in the statute. (Note, *Retaliatory Eviction in California: The Legislature Blame the Door and Blame Up the Wind*—

(1972) 16 Nat'l B. Rev. 114.) Another author has taken a contrary position, reasoning that section 1042.6 emphasizes, rather than precludes, the retaliatory eviction defense developed by the case law. (Note, *Retaliatory Eviction as a Defense to Unlawful Detainer—Alternative Approaches* (1971) 23 Hastings L.J. 1315.) We need not decide that issue because defendants herein rely on the public law ban on federal statute, rather than those under existing state law. Under the supremacy clause, a state statute cannot be applied to dismember the will of Congress.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-527-71

TROY HILLS VILLAGE, INC.,
a corporation of the
State of New Jersey

Plaintiff-Appellant,

vs.

BRUCE FISCHLER and BETH
FISCHLER, his wife, and
GEORGE F. RUGLER, JR.,
Attorney General of New Jersey,

Defendants-Respondents.
.....

Civil Action

On Appeal from
Order for
Summary
Judgment
of the
Superior Court
of New Jersey,
Law Division,
Morris County

Sat Below:
Collins, J.C.C.
T/A

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For the past several years, judicial and legislative recognition of a critical housing shortage in New Jersey and the nation has produced judicial and statutory support for the doctrine of retaliatory eviction. The general acceptance of the prohibition against tenant reprisals makes the instant appeal challenging the constitutionality of N.J.S.A. 2A:42-10.10 et seq. surprising, for the questioned statute seems more constitutionally compelled than impermissible, as a protection of tenants' rights to freedom of speech and of assembly under the First and Fourteenth Amendments of the United States Constitution. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Robinson v. Diamond Housing Corp., F.2d (D.C. Cir. 1972); Engler v. Capital Management Corp., 192 N.J. Super. 445 (Ch. 1970); E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220 (App. 1971).

The disparity of bargaining power between landlord and tenant coupled with the short supply and overwhelming demand for adequate housing has created a need for an equalizing of positions to afford tenants greater leverage in enforcing their demands for better housing. Javins v. First National Realty Corp., 438 F.2d 1071 (D.C. Cir. 1970). New Jersey's Legislature and judiciary have responded to that need by consistently affirming the protections afforded tenants' activities in organizing and in reporting housing code violations by N.J.S.A. 2A:42-10.10 et seq. and its predecessor, N.J.S.A. 2A:170-92.1. Newman, supra;

Whaley, 107 N.J. Super. 89 (D.C. Hudson Cty. 1969); State v. Field, 107 N.J. Super. 107 (App. 1969).

Although landlords may chafe under legislative regulation of their retaliatory acts against tenants whom they may view as troublesome either for their membership and activities in tenants' organizations, or their reports of housing code violations to appropriate authorities, such regulation must be accepted as a reasonable exercise of the police power of the State. The attempt of a landlord to retain his favored economic status at the expense of his tenant must fall before the State's more compelling interest to promote the general health and welfare for the benefit of all its citizens. That interest cannot be served by restoring a less equitable relationship between landlord and tenant or by allowing the landlord a freer rein in intimidating his tenants, who may endure unhealthy, unsafe housing conditions in preference to no housing at all. Enforcement of remedial housing legislation will be made more difficult if landlords are no longer bound by the proscriptions of N.J.S.A. 2A:42-10.10 et seq., for tenants will be predictably reluctant to report housing code violations to appropriate enforcement agencies or to join tenant organizations in the face of a possible retaliatory eviction.

The following brief rebuts the appellant's constitutional challenge of N.J.S.A. 2A:42-10.10 et seq. and attempts to provide the Court with an overview of the status of the doctrine of retaliatory eviction throughout the United States.

The New Jersey "Landlord-Tenant--Reprisal Against Tenant Act"¹ is in tune with the many recent statutes, ordinances, regulations and cases which have begun to reform landlord-tenant law to conform to the needs of modern society. An increasing urbanization and an expanding population have multiplied the demand for city housing. More than 64 percent of America's 200 million citizens now live in metropolitan areas; an increase of 49 million city dwellers in twenty years.² Yet at the same time, the existing housing stock has dwindled at an alarming rate. Demolition for federal and federally assisted projects alone accounted for the destruction of 910,000 dwelling units during the same two decades, while the natural processes of deterioration, dilapidation and abandonment have eliminated hundreds of thousands more. ~~The shortage of decent housing has become a national crisis.~~ Almost 8 million American families--one in every eight--cannot now afford to pay the market price for standard housing.⁴ Exacerbating the housing problem has been the urban migration which has ripped families free from the well-defined social relations of smaller communities and thrust them wholesale into isolated, multi-storied and multi-unit apartment houses.⁵

The natural consequence of these trends has been the development of an overwhelming disparity in bargaining power between landlords and tenants. As the Court noted in Javins v. First National Realty Corp. 438 F.2d 1071, 1079 (D.C. Cir. 1970):

¹N.J.S.A. 2A:42-10.10.

²Report of the President's Comm. on Urban Housing, A Decent Home, 1968, p.40.

³National Commission on Urban Problems, Building the American City, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. (1968), p.82.

⁴Report, Op. Cit., p. 7.

⁵National Comm., Op. Cit., pp.2-5.

mented. Tenants have very little power to enforce demands for better housing.... The increasingly severe shortage of adequate housing further increases the landlords' bargaining power and escalates the need for maintaining and improving the existing stock.

Responding to these problems, government at all levels, and by legislative as well as judicial action, has begun to alter the landlord-tenant relationship to reinstate the natural and desired balance of interests. As the law is coming to recognize, the relationship between landlord and tenant is an unusually sensitive one in which the leased premises is seen by the landlord as his property and by the tenant as his home.

The old common law doctrines designed for another era have been found insufficient to meet the new needs of the urban society. Thus, legislatures and courts have started to readjust a proper balance by adopting doctrines of retaliatory eviction, warranty of habitability, as well as rent control, receivership, repair and deduct schemes, and protections for tenants' right to organize. But the linchpin of these developments is the retaliatory eviction defense. Without it, all the other enactments are meaningless paper reforms which can be undermined by the whim of the landlord--by his uncontrolled discretion to evict tenants.

Thus, it is not surprising to find that New Jersey is not the first state to adopt a retaliatory eviction statute. Indeed, thirteen other states, California¹, Connecticut², Delaware³, Hawaii⁴, Illinois⁵, Maine⁶, Maryland⁷, Massachusetts⁸, Michigan⁹, Minnesota¹⁰, New York¹¹, Pennsylvania¹², Rhode Island¹³ have already prohibited landlord reprisal

¹Calif. C.C. §1942.5 (Supp. 1971).

²Conn. Gen. St. Ann. §42-540a (Supp. 1969).

³Del. Ch. 25 §5917 (Supp. 1971).

⁴Haw. Ch. 666 §43 (Supp. 1971).

⁵Ill. Rev. St. Ch. 80 §71 (Supp. 1971).

Nor are legislatures alone in upholding tenants' rights against retaliatory evictions. The courts of New Jersey have repeatedly validated such limitations on the landlord's power, particularly in cases involving tenant organizing. Alexander Hamilton Savings & Loan Assn. v. Whaley, 107 N.J. Super. 89, 257 A.2d 7 (1969); Engler v. Capital Manag't Corp., 112 N.J. Super. 445, 271 A.2d 615 (1970); E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (1971); see also Silberg v. Lipscomb, 117 N.J. Super. 491, 285 A.2d 86 (1971).
State and Federal Courts in California, Florida, Massachusetts, New York, Wisconsin, and the District of Columbia are in accord.

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Me. Rev. St. Title 14 §6001, 6002.

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Md. Ch. 687 §9-10 (Supp. 1971)

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Mass. Gen. Laws Ann. Ch. 186 §18 (Supp. 1970).

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Mich. Comp. Laws Ann. Ch. 600 §5646 (Am'd p.s. 1969).

10

Minn. Stat. Ch. 240 §566.03 (Supp. 1971)

11

N.Y. Uncon'd Laws §8609, §8590 (Supp. 1971).

12

Purdons, Pa. St. Am. Ch. 35 §1700-1 (Supp. 1971)

13

R.I. Gen. Laws Ann. §34-20-10 (1968)

1

Seattle Muni. Code 27.40.010

2

D.C. Code §2910. D.C. Ordinance specifically protects tenant organizing.

3

Aweeka v. Bonds, 20 Cal.App.3d 278, 97 Cal.Rptr. 650 (1971);

Schweiger v. Bonds, 3 Cal.App.3d 507, 90 Cal.Rptr. 729 (1970).

4

Bowles v. Blue Lake Dev't Corp. (S.D. Fla. 1971) C.C.H. Pov. L. Rptr. ¶12,920

5

McQueen v. Druker, 317 F. Supp. 1122 (D.Mass. 1970)

6

Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969).

The occupant shall be given the right to renew the lease for an additional term, or continue in occupancy, unless he has been destructive of the building or has violated substantial obligations of the lease or occupancy, including chronic late payments, or if the Owner has had to resort to summary or legal proceedings on more than one occasion to collect rent. An Owner asserting the right to reject an occupant's election to renew the lease or occupancy for one or more of the above reasons, shall specify to the occupant, in writing, his specific reasons therefore at least two months in advance. Retaliatory action shall not be used as a basis for denial of lease or continued occupancy. (National Association of Home Builders, "Fair Practices Code Gets Committee Backing," Scope, Volume 9 No. 42 October 22, 1971.

The NAHB has recognized that prohibition of retaliation is not only morally justified, but also is compelled by strong economic factors.

The preamble to The Fair Practices Code states:

Conscious of our responsibility to provide the American people with an adequate supply of decent rental housing within our system of economy which recognizes the necessity ~~for a fair return on capital value to insure~~ high standards of maintenance of our buildings, as well as to encourage construction of new apartments,

And, at the same time, understanding the basic position our industry must take to help limit inflation, which threatens to engulf us,

We, the builders, owners and managers of rental housing, voluntarily pledge to abide by the following Code of Fair Practices for Tenants in Occupancy:

Thus, the New Jersey statute here under attack, while certainly commendable, can hardly be deemed a startling innovation. Rather it is one of a common series of responses which increasing numbers of state legislatures and courts are adopting to deal with the urgent

Cont.

Dickhut v. Norton, 45 W.2d 389, 173 N.W.2d 297 (1970).

Edwards v. Habib, 397 F.2d 687 (D.C.Cir. 1968); Robinson v. Diamond Housing Corp., _____ F.2d _____ (D.C. Cir. 1972)

RETALIATION IS CONSTITUTIONALLY PROSCRIBED

Protection against retaliatory evictions is essential to preservation of the tenant's interest in the enjoyment of his home and to the vindication of his other constitutional and statutory rights. Indeed, so fundamental is the objection to landlord reprisals that several courts have held that the First and Fourteenth Amendments of the United States Constitution compel the recognition of retaliation as a defense to an eviction action. In Hosey v. Club Van Cortlandt, 299 F. Supp. 501, 506 (S.D.N.Y. 1969), the court found that a retaliatory eviction defense was constitutionally required, stating:

A retaliatory eviction would be judicial enforcement of private discrimination; it would require the application of a rule of law that would penalize a person for the exercise of his constitutional rights.

Permitting retaliatory evictions would thus inhibit [the tenant] in the exercise of his constitutional rights or in the words of the Supreme Court have a 'chilling effect.'

McQueen v. Druker, 317 F. Supp. 1122 (D.Mass. 1970) specifically held that a tenant's right to organize was protected against landlord action under the First and Fourteenth Amendments. Under the principles enunciated in Hosey and McQueen this court should find that the Landlord-Tenant Reprisal Statute is not only constitutionally permissible, but indeed constitutionally compelled.

However, this court need not go so far to uphold the New Jersey act, for it is eminently clear that the rights protected by the law are of constitutional magnitude, requiring every possible interpretation in favor of the statute. In Edwards v. Habib, 397 F.2d 687, 690 (D.C.Cir. 1968) the court declined to reach the constitutional issue but read the retaliatory eviction defense into a housing

statutory construction." As the same court later explained in Robinson v. Diamond Housing Corp., ____ F.2d ____, ____, slip opinion, p. 15 (D.C. Cir. 1972):

The widespread adoption of the [retaliatory eviction] rule by both courts and legislatures stands as convincing testimony to the pervasive feeling that retaliatory evictions are inconsistent with a sensible and humane housing policy. Indeed, some courts have thought the rule so fundamental as to reach constitutional magnitude--a ground for decision suggested, but not relied upon, by the Edwards court itself.

The constitutional nature of the rights protected by the Landlord-Tenant Reprisal Statute should lead this court to make all inferences required to sustain the statute.

THE LANDLORD-TENANT REPRISAL ACT IS NOT

UNCONSTITUTIONALLY VAGUE

The New Jersey retaliatory eviction statute here under attack is neither so vague nor so ambiguous as to violate due process. No unreasonable ambiguity is introduced into the law by its failure to further define the terms "lawful organization" and "substantial alteration;" nor does the act's failure to set a termination date for the rebuttable presumption of reprisal render the statute constitutionally suspect.

In assessing the Landlord-Tenant Reprisal Statute against the standards of due process, it is well to remember that:

. . . few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. (Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952); cited in Pasachristou v. City of Jacksonville, _____ U.S. _____, 92 S.Ct. 839, 843 (1972)).

A. Lawful Organization

Appellant's argument that the term "lawful organization" is vague must be rejected. Not only is the meaning of the term reasonably certain, but Appellant lacks standing to attack the act on this ground since he falls well within the term's defined perimeters.

Nor is the New Jersey statute unusually broad in this respect. Rhode Island, for example, has by statute proscribed landlord retaliation for "any other justified lawful act."¹ Such prohibitions do not overly burden landlords. While they may not evict tenants solely for exercising their First Amendment rights, landlords still retain the power to evict tenants who disturb the quiet enjoyment of other tenants or who damage the property.

Whether "any lawful organization" is interpreted to mean any lawful tenant organization, or construed to include all organizations not prohibited by law, the phrase is not unreasonably vague or ambiguous.

B. Substantial Alteration.

Once again Appellant strangely pleads another's case. Whatever ambiguity may be contained in the words "substantial alteration" surely does not prejudice Appellant in this case. Appellant's refusal to renew Appellee's lease, and his attempt, by this lawsuit, to evict Appellees, unquestionably constitute a "substantial alteration" of the terms of Appellees' tenancy. The statute specifically states: "Substantial alteration shall include the refusal to renew a lease or continue a tenancy of the tenant without cause." (Sec. 1(d)). Where a litigant's activities fall squarely within the terms of a statute, he may not challenge it because in some other case it might be ambiguous. (Note, supra, 109 U.Pa.L.Rev. 66, 101.)

¹

R.I. Gen. Laws Ann. §34-20-10 (C),

Appellant's argument that the relief granted by the trial court did not impose a sufficient burden upon him is even further from the mark. If anyone were injured by the lower court's failure to require Appellant to renew the two year lease, it was Appellee, not Appellant. Furthermore, the words "substantial alteration" are used in the statute to judge the conduct of the landlord, not to restrict the court in fashioning an appropriate remedy. The act in no way limits the courts' discretion to suit the relief granted to the severity of the landlord's violation:

A landlord shall be subject to a civil action by the tenant for damages and other appropriate relief, including injunctive and other equitable remedies, as may be determined by a court of competent jurisdiction in every case in which the landlord has violated the provisions of this section.¹

~~C. Time Limit for Presumption~~

Appellant's argument that the Landlord-Tenant Reprisal Statute must set a specific time limit after which the presumption of retaliation ceases is similarly without merit:

First, the lack of a time limit creates no ambiguity in the act. The absence of a time limit is as clear as the presence of a time limit.

Second, by objecting to the lack of a time limit, Appellant demonstrates his failure to see the purpose of the statute. The statute

¹N.J.S.A. 2A:42-10.10. See also the Pennsylvania Supreme Court considering the constitutionality of the Pennsylvania Rent Withholding Act. DePaul v. Kaufman 441 Pa. 386, 272 A2d 500, 505 (1971). The court upheld the statute finding that it did not require renewing of the lease, an act which might be disproportionate to the landlord's original motive for eviction.

is directed toward the moti^on of the landlord which may or may not change over time. Nothing in the act prevents the landlord from evicting tenants the very day after a complaint has been registered with a public authority, if the eviction is not an act of reprisal. Nor does the statute permit the landlord to evict a tenant four years after the filing of such a complaint if the eviction is for a retaliatory purpose.

Third, the New Jersey act cannot possibly be construed as creating a "perpetual tenancy." The most the law does is to create a rebut¹ presumption of reprisal in certain narrowly defined circumstances. Even when the presumption operates, all the landlord need do is convince the court that his actions were not motivated by a retaliatory purpose. In considering whether the landlord has dispelled the presumption, courts will naturally consider the lapse of time after the act said to be the cause of retaliation, the landlord's knowledge of the act, or lack thereof, and all the other relevant circumstances of the case.

Finally, it is not a valid objection that the statute requires the landlord to cause to evict after certain enumerated suspect acts have occurred. As the Marcus Brown¹ case, discussed below clearly demonstrates, it is well within the power of the New Jersey legislature to provide that no landlord may evict any tenant without establishing just cause--or even more narrowly defined causes--for such action. Just cause to evict is not a new notion in the law. Since

¹Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921). See page 2 of this Brief.

the Middle Ages innkeepers have been required to have just cause before they can evict guests. (Beale, Boston, W.J. Nagel, The Law of Inn Keepers and Hotels, Ch. IX, pp. 70-74 (1906). As at the time of the Marcus Brown case, New York rent control legislation still prohibits evictions without just cause.² Recently, California has³ forbidden eviction of tenants from mobilehome parks without cause. The Supreme Court upheld similar requirements in relation to public housing. (Thorpe v. Housing Authority, 386 U.S. 670 (1966)). The New Jersey legislation pales by comparison with these laws which have been validated repeatedly by the Supreme Court. The Landlord-Tenant Reprisal Statute is a laudable step in the direction of a "just cause to evict" provision; it remains far from the precipice of unconstitutionality.

²Emergency Housing Rent Control Law, N.Y. Uncons'd. Title 23, Ch.3, §51 (Supp. 1971).

³C.C. §789.5.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT DOES NOT FREEZE LANDLORD-TENANT
LAW AS IT STOOD IN 1800: NOR DOES IT GRANT
A LANDLORD AN UNRESTRICTED RIGHT TO EVICT
HOLDOVER TENANTS

At pages 34-36 of his Opening Brief, Appellant argues, albeit somewhat incoherently, that New Jersey's Landlord-Tenant Reprisal Statute violates the due process clause of the Fourteenth Amendment because it abrogates rights formerly held by landlords under the common law and under the dispossession statutes of New Jersey and interferes with their "right to free enterprise."

This argument attempts to revive the long-buried notion of substantive due process.

The Court beginning at least as early as 1934. . . has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. [Citations] Under this constitutional doctrine the due process clause is no longer so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare. [Para.] Appellants now ask us to return, at least in part, to the due process philosophy which has been deliberately discarded. (Lincoln Federal Labor Union v. Northwestern L & M Co., 335 U.S. 525, 536-537 (1949)),

To argue, as Appellant does, that common law rules cannot be changed by state legislatures is to ignore half a century of constitutional litigation. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industry conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations]" (Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488(1955)). Indeed, as Judge J. Skelly Wright has written, "The Courts [and we would add the legislatures] have a duty to reappraise old doctrines in the light of the facts and values of contemporary life...." (Javins v. First National Realty Corp., 438 F.2d 1071, 1074 (D.C. Cir. 1970)).

The New Jersey Legislature has seen fit to regulate the landlord-tenant relationship--to alter the imbalance resulting from application of outmoded common law rules to urban reality. Even were the legislature's act unwise, as Plaintiff-Appellant appears to argue, the due process clause of the Fourteenth Amendment poses no barrier to effectuation of its will.

As Justice Holmes aptly stated in Lochner v. New York, 198 U.S. 45 (Holmes, dissenting) (1905):

[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (Id. at pp. 75-76).

* * *

The 14th Amendment does not enact Mr.
Herbert Spencer's Social Statics. (Id. at p. 75).

Moreover, far from being a dangerous move likely to cause violence and decay of a free and pluralist society as Plaintiff-Appellant suggests, the New Jersey Landlord-Tenant Reprisal Statute is a forward-looking response to the very serious problems of urban housing. As discussed in Part I of this Brief, New Jersey has joined an ever-growing phalanx of states in restricting landlords' powers to evict tenants for exercising their statutory and constitutional rights. Due process does not stand athwart the road to progress.

THE NINTH AMENDMENT DOES NOT BAR REGULATION OF LANDLORD REPRISALS

Realizing, perhaps, the weakness of his substantive due process argument, Appellant seeks to achieve the same result by investing the Ninth Amendment with a purported guarantee of the "right to free enterprise." Raising laissez faire economics to the level of "natural and inalienable retained rights . . . endowed on the individual by his Creator" (Appellant's Opening Brief, p. 27), Plaintiff-Appellant asserts that "the right to manage one's business affairs in such a manner as to earn a profit for his investment is 'older than the Bill of Rights - - older than our political parties, older than our school system.' [Citation.]" (Id. at p. 30).

Aside from being factually incorrect, Appellant's argument bucks the overwhelming trends of the past century and attempts to saddle the Ninth Amendment with a burden it has never been thought sturdy enough to hold. As a simple factual matter never in the history of this nation have businessmen been totally free to manage their own affairs.¹ The laissez faire theory which Appellant asserts is older than time is in actuality a relatively new development. From the colonization of America through the 18th century and well into the 19th, the prevailing economic doctrine was one of mercantilism. Only with the rise of capitalism and the machine age in the 1840's and 1850's did the notion of a "right to manage one's business affairs" fully develop.²

¹ First Inaugural Address of Thomas Jefferson, in the Inaugural Address of the Presidents, compiled and edited by Renzo D. Bowers, St. Louis, Thomas Law Book Co., 1929, pp. 50-55, and particularly p. 53.

² Sidney Fine, Laissez Faire and the General Welfare State, University Michigan Press, Ann Arbor, 1956, especially Chs. I, IV, V.

developing, it was quick in succumbing to the realities and necessities of the modern, complex society which has arisen in the twentieth century. From 1900 to the present day there has been an increasing trend toward regulation of all businesses to promote the common good.¹ Most recently this trend has begun to affect the nature of landlord-tenant affairs. Rent receivership, rent escrow and rent abatement schemes have blossomed in nine states.² Security deposits have been brought within the scope of regulation in eleven states.³ Rent control has been enacted repeatedly at federal (Economic Stabilization Act of 1970 as amended in 1971) and local levels (The Emergency Housing Rent Control Law, N.Y. Uncons'd., Title 23 (Supp. 1971)). And, as discussed above, at least 14 states now prohibit retaliatory evictions. Even the National Association of Home Builders agrees that some regulation of landlords' powers is essential to preservation of the common

¹ Thomas C. Cochran and William Miller, The Age of Enterprise, MacMil. Co., New York, 1949, especially Chs. IX-XII.

² (See Keating and Heskin, Rent Withholding, Recent Legislative Developments, 5 Clearinghouse Review 728 (1972)); Conn. Gen. Stat. §19-347(a)-(r) Ill. Ann. Stat. Ch. 23 §§11-23; Ind. Ann. Stat. §48-6144; Mass. Gen. Laws Ann. §§ Ch. 239 §8A and Ch. 111 §127 C-K; Mich. Comp. Laws Ann. §§125.530-536; Mo. Ann. Stat. §§441.570, et. seq.; N.Y. Real Prop. Actions Law §755 and §§769-782 and N.Y. Mult. Dwell. Law §302 and §309; Pa. Stat. Ann. Title 35 §1700-1; R.I. Gen. Laws Ann. §§45-24.2-11 and 45-24.3-19.

³ (See Keating and Heskin, State Security Deposit Legislation, National Housing and Economic Development Law Project Bulletin, Vol. II, Issue 3 (1972), pp. 7-8); West, Cal. Civ. Code §1950; Colo. Rev. Stat. Ann. Ch. 5 §§1-26-28; Del. Code Ann., Title 25 Ch. 51 §5912; Fla. Stat. Ann. Civil Practice and Procedure Ch. 83 §83.261; Ill. Stat. Ann. Ch. 74 §§91-93; Md. Ann. Code Art. 53 §§41-43; Mass. Gen. Laws Ann. Ch. 186 §15B; Minn. Stat. Ch. 504.19; N.J. Rev. Stat. §2A:46-8; N.Y. Gen. Obligation Laws §§7-103 and 7-105; Pa. Stat. Ann. Title 68 §210.517.

good. In the teeth of this onslaught of history, Appellant raises the slim reed of the Ninth Amendment, expecting that it will miraculously preserve the unrestricted power of landlords when it has failed to prevent regulation of every other variety of business in the United States.

Needless to say, the Ninth Amendment was not intended, and has never been thought, to protect "the right to free enterprise." The cases cited by Appellant, themselves, demonstrate that the Ninth Amendment has been thought to protect only the most basic personal rights--the right to marital privacy,¹ the right to use one's own body,² the right to engage in political activities.³ By contrast, courts have uniformly rejected assertions that the Ninth Amendment protects⁴ rights of businesses.

It is simply ludicrous to maintain, as Appellant does, that "the right to free enterprise" is "[s]imilar to the right to marital privacy." (Appellant's Opening Brief, p. 30). Mammon has not yet been elevated to such a position in the American pantheon.

¹ Griswold v. State of Connecticut, 381 U.S. 481 (1965); Loving v. Virginia, 388 U.S. 1 (1967).

² People v. Belows, 80 Cal. Rptr. 354, 458 P.2d 194 (1969); Reichenbach v. Nelson, 310 F. Supp. 248 (D. Nebraska 1970).

³ United Public Workers v. Mitchell, 330 U.S. 75 (1947).

⁴ Commonwealth and South Corp. v. Securities and Exchange Commission, 34 F. Supp. 747 (C.C.A.3d 1943), right of public utilities to control their common stock can be regulated; U.S. v. Painters Local Union No. 481, 79 F. Supp. 516 (D.Conn. 1948), right of people to keep control of government by free elections can be controlled; Brown v. N.J., 175 U.S. 172 (1899), state control through "struck jury" does not violate right to trial by jury; Velazquez v. Thompson, 321 F. Supp. 34 (S.D.N.Y. 1970), right to housing is not violated by N.Y. eviction procedure; U.S. v. Cco, 311 F. Supp. 618 (W.D.Pa. 1971), Military Selective Service Act does not violate right to one's own life.

THE LANDLORD-TENANT REPRISAL STATUTE DOES NOT
IMPAIR THE OBLIGATIONS OF CONTRACTS

As part of his attack upon New Jersey's Reprisal Act, Appellant urges that it interferes "with the exercise of the rights conferred upon the landlord by the contract voluntarily made by the parties" (Appellant's Opening Brief, p. 34), and thereby violates Article 1, Section 10 of the United States Constitution. This contention, like the rest of Appellant's attack, falls wide of the mark.

Contrary to Appellant's view, contracts between private parties are not sacred, immutable documents impervious to change by state legislation designed to deal with the exigencies of modern life. Rather, as the Supreme Court has reiterated:

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.

* * * * *

One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter.

* * * *

Similarly, where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of a business, it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices.

(Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 437-438 (1934), cited with approval in City of El Paso v. Simmons, 379 U.S. 497, 508-509 (1965)).

In conformity with these general pronouncements, the Supreme Court has repeatedly validated laws controlling the landlord-tenant relationship despite the argument that such statutes impaired the lease obligations. In Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), the Supreme Court dismissed a challenge to a New York rent control statute which forbade the maintenance of any action to recover possession of real property except one on the grounds that the person was an objectionable hold-over tenant, or for the purpose of recovering possession for the immediate occupancy of the owner and his family or for demolition and construction of a new building. (Id. at p. 197). Clearly, the New York statute placed a far greater burden upon the contractual rights of the landlord than does the present New Jersey retaliatory eviction law, yet the Supreme Court stated:

The chief objections to these acts have been dealt with in Block v. Hirsch [256 U.S. 135 (1921)]. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be. [Citations.] (Id. at p. 198; see also Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).)

by the housing crisis which is apparent to all and was judicially noticed by the court below. The above-quoted Supreme Court cases clearly demonstrate that Article I, Section 10 of the Federal Constitution does not immunize contract rights against interference by reasonable state regulations designed to deal with present crises and prohibit injurious practices. The emergency found to justify the statute in Marcus Brown, Block and Levy Leasing cases has been found by the trial court to be present in this case (Appellant's Opening Brief, p.8) and even the National Association of Home Builders admits that the practices prohibited by the New Jersey law are injurious. (National Association of Home Builders, "Fair Practices Code Gets Committee Backing," Scope, Volume 9, No. 42, October 22, 1971).

Recent attacks on landlord-tenant statutes affirm the Supreme Court rulings: De Paul v. Kaufman, 441 Pa. 386, 272 A.2d 500 (1971) (rent withholding statute); Department of Buildings of the City of New York, 14 N.Y. 2d 291, 200 N.E.2d 432 (1964) (receivership statute); Stoneridge Apartments Co. v. Lindsay, 303 F.Supp. 674 (D.N.Y. 1949) (rent control ordinance); Community Renewal Fd. Inc. v. Chicago Title and T. Co., 44 Ill. 2d 500, 255 N.E.2d 900 (1970) (receivership); Deary v. Keith, 326 N.Y.S.2d 823 (1971) (attorney fees for tenant implied).

In light of the clear precedent cited above, Appellant's claim of interference with his right to contract is wholly without foundation.

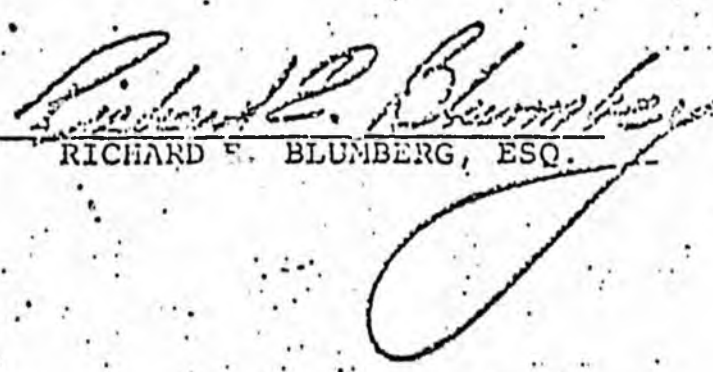
CONCLUSION

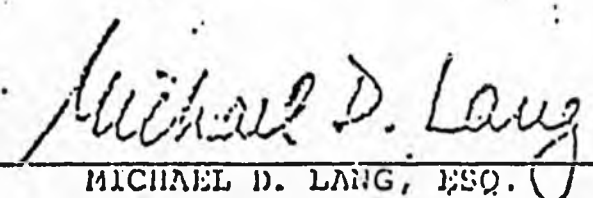
The prohibition against retaliatory eviction is a nationally accepted doctrine. The New Jersey Landlord-Tenant Reprisal Against Tenant Act is valid expression of that doctrine. The New Jersey Act protects the free exercise of tenants' constitutional rights and as such it should be given every favorable inference. It is not vague, particularly not so as against Appellant. The Act does not violate the Due Process Clause, the Ninth Amendment, nor Appellant's freedom of contract. The Constitution does not, as Appellant would have it, adopt an economic theory nor has it frozen the common law of landlord and tenant so as to prevent legislative change in light of modern conditions.

Respectfully submitted,

NEWARK-ESSEX JOINT LAW
REFORM PROJECT

By:


RICHARD E. BLUMBERG, ESQ.


MICHAEL D. LANG, ESQ.

BILLS PASSED IN THE HOUSE

Landlords &
Tenants
(termination
of tenancy)

CS FOR SS FOR HOUSE BILL NO. 1 (JUDICIARY), (see pages 25; 91;186;336;385). Reported back to the House April 20 by Rules recommending it be replaced with the Judiciary substitute (see page 336), and with a majority having no recommendation. Concurring: Fuller, (Chairman), M. M. Miller, Larson, Phillips, Koponen, and M. W. Miller. Not concurring: Barnes, Tischer, and Hayes recommend do pass.

On April 21 the Judiciary substitute was adopted and the bill passed the House, 26-10-4. Nays: Clocksin, Davis, Duncan, Goll, Malone, McBride, M. M. Miller, Szymanski, Vaska, Zharoff. Excused: Bettisworth, Cato, Flood, Wendte. Rep. Malone gave notice of reconsideration, but it was not taken up and the bill was sent to the Senate for its consideration.

Insurance Laws
(repeal of
certain)

HOUSE BILL NO. 48, (see pages 43;132;488;563). Passed the House April 18, 38-1-1. Nay: Malone. Excused: Cato.

Vital
Statistics
(disclosure
of records)

CS FOR HOUSE BILL NO. 91 (JUDICIARY), (see pages 57;299;542;563). On April 19 the Judiciary substitute was adopted (see page 542), and the bill passed the House, 38-1-1. Nay: McBride. Excused: Cato. The effective date clause was adopted.

Public Schools
(emergency
closure days)

HOUSE BILL NO. 125, (see pages 95;300;542;563). Passed the House April 21, 35-1-4. Nay: Martin. Excused: Cato, Bettisworth, Flood, Wendte.

Homesteads

CS FOR HOUSE BILL NO. 130 (FINANCE)(AM), (see pages 97; 426;542). On April 19 Rep. Tischer asked that her name be added as co-sponsor. On April 21 the Finance substitute was adopted. Amendment 1 was offered by Rep. Uehling, and subsequently withdrawn. Rep. Uehling offered amendment 2, and the bill and pending amendment were held one day.

Amendment 2 states that tentatively approved land located within the boundaries of an organized borough or city may not be designated for homestead entry.

On April 22 Amendment 2 by Uehling was withdrawn. 3 by Uehling was offered and it states:

"Sec. 38.09.080. LAND WITHIN MUNICIPALITIES. (a) If a municipality has filed a selection of state lands under AS 29.18.201 - 29.18.213 with the commissioner, the state lands selected may not be designated for homestead entry; if the commissioner determines that land selected by a municipality is not available for patent to the municipality under AS 29.18.210 - 29.18.213, the state land is available for designation by the commissioner for homestead entry under AS 38.09.010."

Amendment 3 was adopted by unanimous consent. The bill then passed the House, 21-13-5-1. Nays: Adams, Clocksin, Davis, Duncan, Goll, Grussendorf, Herrmann, Hurlbert, Koponen, Malone, McBride, M. M. Miller, Vaska. Excused: Bettisworth, Cato, Flood, Martin, Wendte.

Appropriations CS FOR SENATE BILL NO. 150 (FINANCE)(AMENDED), see pages
(special) 200;370;459;538). Reported back to the House April 20 by
(water, sewer Community & Regional Affairs with the committee recommending
& solid waste) it be replaced with Community & Regional Affairs Committee
Substitute and reported back as follows: Lacher (Chairman),
Phillips and Fritz recommend do pass; McBride, Szymanski and
Clocksin have no recommendation. To Finance.

The House C&RA substitute makes several changes in the bill:

--Deletes a \$161,600 water & sewer facility construction grant, through the Dept. of Environmental Conservation, to election district 1 for the Ketchikan Public Utility/Fairview-Jackson water project. Adds, under grants to municipalities for natural resource management, a \$354,950 appropriation for the Ketchikan - Jackson Utility Fairview - Jackson water project.

--adds, under grants to municipalities for natural resource management, a \$35 million appropriation to Anchorage for the Eklutna Water Project.

--deletes , under grants to municipalities for natural resource management, two appropriations to Wasilla: \$185,000 for septic treatment; and \$1,178,500 for a wastewater facility. Adds, under the same section, a \$3,121,500 appropriation to Wasilla for a wastewater facility.

--deletes a \$480,000 appropriation, under grants to municipalities for natural resource management, made to Delta Junction for land fill improvements.

--Adds, under grants to unincorporated communities for natural resource management, a \$225,000 appropriation for the Dot Lake water system.

--changes the amount of an appropriation to Igiugig, in the Bristol Bay - Aleutian Islands district, from \$838,000 to \$250,000 (also under grants to unincorporated communities).

--changes total amount of funding to \$103,083,650 (was \$66,975,300).

Landlords & SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1, (see pages 25;91;
Tenants 186;336;385). Reported back to the House April 20 by Rules
(term. of with the committee recommending it be replaced with Judiciary
tenancy) Committee Substitute and majority signed no recommendation.
Concurring: Fuller (Chairman), M.M.Miller, Larson, Phillips,
Koponen and M.W.Miller. Not concurring: Barnes, Tischer and Hayes
recommend do pass. To Rules.

Judicial HOUSE BILL NO. 8, (see page 27). Reported back to the
Retention House April 19 by Judiciary, recommending it do pass. Con-
Elections curring: Bussell (Chairman), Barnes, Liska and Hayes. Rep-
representative Wendte signed no recommendation. To Finance.

SENATE BILLS RECEIVED IN THE HOUSE

<u>Assault</u> (police, fire fighters & emergency responders)	<u>CS FOR SENATE BILL NO. 24 (JUD)(AM)</u> , (see pages 8;88;242; 318). Received in the House March 21 and referred to Judi- ciary.
<u>Minors</u> (presence of in rest. that serve alcohol)	<u>CS FOR SENATE BILL NO. 88 (JUDICIARY)</u> , (see pages 82;279; 373). Received in the House March 25 and referred to Judi- ciary.
<u>Emergency</u> Guards/Dept. <u>Pub. Safety</u>	<u>CS FOR SENATE BILL NO. 116 (STATE AFFAIRS)</u> , (see pages 138; 280;373). Received in the House March 23 and referred to Judiciary.
<u>Guide Board</u> (conducting/ licensing)	<u>CS FOR SENATE BILL NO. 138 (RULES)</u> , (see pages 194;315; 373). Received in the House March 25 and referred to Re- sources.
<u>Appropriations</u> (special & supplemental) (capital proj's.)	<u>CS FOR SENATE BILL NO. 162 (RULES)</u> , (see pages 263;315; 373). Received in the House March 23 and referred to Finance.

COMMITTEE REPORTS (House)

<u>Landlords & Tenants</u> (term. of tenancy)	<u>SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1</u> , (see pages 25;91; 186;336). Reported back to the House March 23 by Finance as follows: Bettisworth, Ward, Hurlbert, Grussendorf and Martin recommended do pass. Adams (Chairman), Flood, Zharoff, Duncan and Pestinger had no recommendation. To Rules.
<u>Pregnant Women</u> (prenatal services for)	<u>HOUSE BILL NO. 39</u> , (see pages 39;337). Reported back to the House March 23 by Finance recommending it do pass. Concur- ring: Pescinger, Ward, Zharoff, Duncan, Grussendorf and Martin. Not concurring: Lindauer and Bettisworth recommended do pass with amendments. Adams (Chairman) and Flood had no recommendation. To Rules. On March 25 Rep. Lindauer was added as a co-sponsor.
<u>Motor Fuel Tax</u> (repeal of)	<u>SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 40</u> , (see pages 40; 149). Reported back to the House March 23 by Transportation as follows: Cato (Chairman) and Abood recommended do pass. M. W. Miller and Davis had no recommendation. McBride, Herrmann, Lacher and Phillips recommended do not pass. The committee attached an amendment that would delete section 2 of the bill. Sec. 2 made the Act retroactive to January 1, 1983 and provided for the adoption of regulations by the Department of Revenue for refunds of motor fuel taxes collected after December 31, 1982. To Finance.
<u>Municipal Roads</u> (state aid)	<u>HOUSE BILL NO. 41</u> , (see pages 40;161). Reported back to the House March 23 by Transportation recommending it do pass. Concurring: Cato (Chairman), Phillips, Lacher, Szymanski,

Landlords &
Tenants
(term. of
tenancy)

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1. (see pages 25;91;186). Reported back to the House March 16 by Judiciary recommending it be replaced with a Judiciary substitute and that it do pass. Concurring: Bussell (Chmn.), Liska, Hayes, and Barnes. Not concurring: Clocksin had no recommendation. To Rules. On March 18, at the request of the Finance Committee Chairman, the Speaker added a Finance referral. Taken from Rules and sent to Finance.

The Judiciary substitute adds new section amending AS 09.45.085 (Code of Civil Procedure, Actions relating to real property): "Enforcement. A judgment for the restitution of real property rendered in an action for forcible entry or detention may be enforced by the plaintiff without further judicial action and the plaintiff may not be required to obtain a writ of assistance or other order to enforce the judgment."

Adds language to section amending AS 34.03.270 (Uniform Landlord and Tenant Act, Remedy after termination) stating that failure by the tenant to provide the required notice when terminating a tenancy is presumed to be wilful and not in good faith. Provides a month to month tenancy must be terminated by written notice by either party at least 30 days before the specified termination date (as is currently on the books), rather than 45 days as was specified in the Labor & Commerce substitute.

Amends AS 34.03.310(a) (Landlord & Tenant Act. Retaliatory conduct prohibited), providing a landlord may not retaliate by terminating the rental agreement or providing notice of termination (currently prohibits retaliation by increasing rent or decreasing services) if the tenant complains of maintenance violations, has tried to enforce his rights, has organized or become a member of a tenant's union, or has complained to a government agency responsible for enforcement. Adds language presuming a landlord has violated retaliation provisions if he terminates the rental agreement or provides notice of termination.

Makes technical correction in section 4.

Commercial
Fishing Loans

HOUSE BILL NO. 15, (see pages 31;105;296). Reported back to the House March 18 by Finance recommending it be replaced with a Finance substitute and that it do pass. Concurring: Grussendorf (Acting Chairman), Bettisworth, Hur. bert, Ward, Pestinger, Flood, Lindauer, and Zharoff. Rep. Luncan had no recommendation. to Rules.

The Finance substitute adds a new section amending AS 16.05.050 (Powers and Duties of Commissioner of Fish & Game). Gives the Commissioner the power to ". . . (13) sell or lease a state hatchery facility."

Changes language in new section added to AS 16.10 (Fisheries and Fishing Regulations) relating to the allocation of loans. Provides the Department of Fish and Game ". . . shall allocate at least ten percent of the money that is appropriated to make loans . . ." (former version provided the department allocate 10 percent of the

SENATE BILLS RECEIVED IN THE HOUSE

Arson
(definition) COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 13 (JUD), (see pages 4;118;147). Received in the House February 14 and referred to Judiciary. The Senate Judiciary letter of intent accompanied the bill (see page 118).

US/Canada
Salmon Inter-
ception
Treaty COMMITTEE SUB. FOR SENATE JOINT RESOLUTION NO. 10 (RES), (see page 84;178). Received in the House February 17 and referred to the House Special Committee on Fisheries, then to Resources.

COMMITTEE REPORTS (House)

Department of
Corrections
(creation of) EXECUTIVE ORDER NO. 54, (see page 70). Reported back to the House February 14 by Health, Education & Social Services recommending it do pass. Concurring: Tischer (Co-Chairman), Fritz (Co-Chairman), Goll, Koponen, Davis, and M.W. Miller. To Judiciary.

Landlords &
Tenants
(term. of
tenancy) HOUSE BILL NO. 1, (see pages 25;91). Reported back to the House February 15 by Labor & Commerce recommending it be replaced with a Labor & Commerce Substitute and that it do pass, and attaches a letter of intent. Concurring: Furnace (Chairman), Malone, Ringstad, Cowdery, Uehling and Wendte. To Judiciary.

The Labor & Commerce Substitute adds a new section amending AS 34.03.270 (Uniform Residential Landlord and Tenant Act, Remedy after termination), providing for recovery of damages by the landlord if the tenant terminates the rental agreement and fails to give the required 14 days notice for a week to week tenancy or the required 45 days notice for a month to month tenancy (this bill changes the current 30 day notice to 45 days). Provides the landlord may recover an amount not to exceed one and one-half times the actual damages.

The Substitute also makes language change in section dealing with periodic tenancy and holdover (AS 34.03.290). Would read that if the tenant remains in possession without the landlord's consent and his holdover is "wilful or not in good faith, the landlord, may recover an amount not to exceed one and one-half times the actual damages. . . ." (original language stated "If the tenant's holdover is wilful and not in good faith. . .").

The Labor and Commerce Committee letter of intent reads:

LETTER OF INTENT FOR CSSS FOR HB 1 (L & C)

The Legislature recognizes that an increase in rent by the landlord may constitute a form of termination, in that it terminates the rental agreement then in existence and offers a new rental agreement at different terms. The tenant, however, should be given ample time to locate a new dwelling and to move. Upon receipt of a notice of rent increase a tenant should have the full 45 days to vacate provided under this bill if he chooses not to accept the higher rent. The tenant would be under the obligation to inform the landlord of his intention to vacate within the 45 day period if the tenant does not intend to pay the higher rent.

INTRODUCTION OF BILLS (House)

Landlords &
Tenants
(term. of
tenancy)

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1. by Rep. Abood.
Identical to original bill (p. 25)--just deletes reference to
a nonexistent statute contained in Sec. 1. (Deleted from pro-
posed addition to AS 09.45.090, "Unlawful Holding by Force".)

Introduced January 28 and referred to Labor & Commerce and
Judiciary.

Cert. of
Need Program
(repealing)

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 19. by Reps. Fritz,
Hayes, Zharoff, Cato, Lindauer and Szymanski. Identical to
original bill (p. 32), but corrects references to federal
statutes contained in Sec. 1 of bill (amendment to AS 18.07.021,
duties of the state's health planning and development agency).

Introduced January 24 and referred to Health, Education & Social
Services and Finance.

Property Tax
Exemptions
(municipal)

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 21. by Lindauer.
Decreases proposed \$100,000 residential property tax exemp-
tion contained in the original bill (p. 34). Under SSHB 21,
those under 65 could receive "at least \$10,000 in assessed value
and not more than \$50,000 in assessed value of the real property
owned and occupied as a permanent place of abode."

Introduced January 26 and referred to Community & Regional Affairs
and Finance.

Prison Terms

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58. by Lindauer,
Barnes, Abood, Pestinger, Liska and Uehling. Basically identical
to original bill (p. 47), but changes wording of paragraph (b) of
new section on "Service of Full Sentence." Original (b) read: "If
the court orders a sentence to be served in full in accordance with
this section, good cause shall be shown in all proceedings under
this section. The prisoner is entitled to be represented by
counsel in all proceedings under this section."

New (b) would read: "If the court orders a sentence to be served
in full, good cause shall be shown in all proceedings under this
section. The prisoner is entitled to be represented by counsel and
may not be released, paroled, or furloughed pending any
proceeding."

Introduced January 26 and referred to Judiciary and Finance.

Minors
(prosecution
as adults)

HOUSE BILL NO. 109. by Pestinger, Furnace, Uehling, Flood,
Barnes and Bussell. Would allow the courts to prosecute a
minor as an adult if it finds at a hearing on a petition "...
(1) that the minor was 16 years of age or older at the time of the
offense and that there is probable cause to believe that the minor
has committed an unclassified felony or a class A felony; or (2)
that the minor is not amenable to treatment under this chapter and
there is probable cause to believe that the minor is delinquent."
(AS 47.10.060(a), Delinquent Minors and Children in Need of Aid,
Waiver of Jurisdiction, rewritten in this bill, now provides "(a)
If the court finds at a hearing on a petition that there is
probable cause for believing that a minor is delinquent and finds

INTRODUCTION OF BILLS (House)

Landlords & Tenants (termination of tenancy)

HOUSE BILL NO. 1, by Abood. Amends the Landlord Tenant Act, (AS 34.03) to provide a landlord or tenant may terminate a month to month tenancy by giving written notice 45 days in advance of specified termination date (law currently provides notice must be given 30 days before specified rental due date). Provides it is unlawful to remain in possession of dwelling unit after expiration of tenancy. Provides landlord may bring action for possession and recovery of actual damages (underlined language added to current law) if tenant remains in possession without landlord's consent.

Adds new language to the Landlord and Tenant Act prohibiting a landlord from increasing rent, decreasing services or threatening to bring an action for possession within 60 days after a tenant has complained of violations, availed himself of rights and remedies granted under the Act, organized or become a member of a tenant's union, or complained to a governmental agency responsible for enforcement of governmental housing, wage, price or rent controls.

Does not provide for an effective date (effective 90 days after Governor's signature).

Introduced January 17 and referred to Labor & Commerce, then to Judiciary.

Handguns (use of armor- piercing ammunition)

HOUSE BILL NO. 2, by Hayes, Flood and Lindauer. Establishes penalties for crimes in which the defendant uses or carries a handgun loaded with armor-piercing ammunition. Provides for a five year term of imprisonment for the use of that type of ammunition, in addition to any other sentence imposed for the crime itself. The additional five year sentence may not be suspended or otherwise reduced, and may not be served concurrently with other terms. Does not provide for an effective date (effective 90 days after Governor's signature).

Introduced January 17 and referred to Judiciary, then to Finance.

Appropriation (supplemental) (school districts)

HOUSE BILL NO. 3, by Duncan, Grussendorf, Clocksin, Zharoff, Wendte, Koponen, Malone, Vaska, M.M. Miller, Goll, Davis, McBride, Larson and Szymanski. Makes a supplemental appropriation in the amount of \$33,746,700 to the Department of Education for payments to school districts under the Public School Foundation Program for the fiscal year ending June 30, 1983. Provides Act takes effect immediately. (See SB 16, page 5, identical. Also see SB 22, HB 35 and HB 73, this report, identical).

Introduced January 17 and referred to Health, Education & Social Services, then to Finance.

Construction Insurance (state con- struction projects)

HOUSE BILL NO. 4, by Martin, Furnace and Grussendorf. Provides state departments or agencies may not require a contractor to obtain workers' compensation, general liability, or other required insurance from a particular insurer, agent or broker when that department or agency is requesting bids or awarding contracts. In addition, the department or agency may not

Dear Senator Fischer:

You currently have HB 1 "An Act relating to landlords and tenants" in your committee on State Affairs for consideration.

From the way that I read the bill, the changes are minimal and are mainly made to make the law somewhat more specific. If I am incorrect please explain to me what affect the changes will incur.

Being a long time resident and tenant of this State, I see no reason why this bill will have a problem being passed and made into law, supporting it whole heartedly.

My first impression on seeing another revision being proposed to the landlord-tenant act was, of course, that the rights of the tenant were being whittled away at once again and upon carefully reading of the bill, it seems to me that this is not the case and sigh relief.

Thank you for your time.

Very truly yours,

Amy Garrett
c/o 3761 Winterset Dr
Anchorage AK 99508

ALASKA LANDLORD- TENANT LAW

This booklet is a June 1982 update of the 1980 publication prepared by the Cooperative Extension Service, with the assistance of Alaska Legal Services and the Consumer Protection Section of the Alaska Dept. of Law.

INTRODUCTION

In 1974, the Alaska Legislature passed the Uniform Residential Landlord and Tenant Act (A.S. 34.03.010-.380). The purpose of the Act was to simplify, clarify and modernize Alaskan laws relating to the rental of dwellings. It was also intended to encourage both landlords and tenants to maintain and improve the quality of housing.

While the law does not cover every problem a landlord or tenant may have, it was written to protect the rights of both parties:

In addition to the Uniform Residential Landlord and Tenant Act, other laws which have application to the rental of dwellings include:

1. Alaska Statute 09.45.060-.160
Procedure for Recovering Possession
2. Alaska Statute 34.06.010-.060
Emergency Residential Rent Regulation and Control

This booklet was prepared directly from A.S. 34.03.010-.380. Where appropriate, we have cited the actual portion of the law that pertains so that if you need to go to court, you can either use this booklet or can refer directly back to the law. The reference will be the letters "A.S." (short for Alaska Statute) followed by some numbers (these are the title, chapter and article numbers of the law respectively); for example: (A.S. 34.03.330).

You can get a copy of the actual law at your nearest courthouse, public library or magistrate's office.



who is covered

A dwelling, in this law, is a structure or part of a structure used as a home, residence or sleeping place by one or more persons, including the rental of mobile home space.

If you rent a house, apartment, mobile home, mobile home space, condominium, townhouse or duplex, this law applies to you!

the law does not cover:

1. residency in an institution (school dorm, jail, hospital, nursing home, etc.);
2. hotels, motels and other transient housing;
3. condominiums occupied by the owner;
4. occupancy under a contract of sale;
5. occupancy of a dwelling owned by a fraternal or social organization of which you are a member;
6. live-in employment (apartment managers, housekeepers, etc.);
7. occupancy when the premises are used primarily for agricultural purposes.

terminology

In this booklet, several terms are used that mean the same thing.

Landlord means the owner or manager or rental agent for the dwelling.

Dwelling, unit, property and premises means the rental unit, whether it is a home, apartment, mobile home, etc.

Tenant means any of the people who rent a dwelling.

Other technical definitions may be found in A.S. 34.03.360—Definitions.

written notices

Putting things in writing does not mean the landlord and tenant are enemies or do not trust each other. It is simply a good way to do business. Oral agreements are legal; however, under the law, a written notice or agreement may be your only protection if something goes wrong. Some people hesitate to put agreements in writing because they don't know what to say. There are examples of various notices in the back of this booklet that may help.

Here are some things that should definitely be in writing:

1. receipts for payments of any kind;
2. promises to fix things;
3. rental agreements;
4. eviction or moving notices;
5. notices of repairs needed;
6. details of what needs to be done to get back a deposit.

It cannot be emphasized strongly enough how important this is:
GET IT IN WRITING!



BEFORE YOU MOVE IN rental agreements

Rental agreements may be either written or oral, but written is best. If any disagreement occurs later, both tenants and landlords will have evidence to back their claims.

If a tenant signs a rental agreement, moves in and begins paying rent, the agreement is still legal even if the landlord didn't sign the agreement.

If the landlord shows the tenant a rental agreement to which the tenant agrees, moves in and begins paying rent, the agreement is still legal even if the tenant did not sign it. It is critical that tenants and landlords review and discuss any rental agreements and rules before anyone moves in or money changes hands.

A lease is a rental agreement that tells how long the tenant will stay (usually four, six or twelve months). If there is a lease, the

landlord cannot raise the rent or evict the tenant unless promises in the lease are broken. If there is a lease but the tenant must move, the tenant is still responsible for the rent for the rest of the lease period, unless the dwelling can be re-rented.

Here are some things which should appear in a rental agreement:

1. name and address of the owner and his/her manager or agent as well as the tenant's name and address;
2. the amount of rent, when it is due, where and how it is to be paid;
3. if this is a month-to-month agreement or lease with time limits;
4. when the rent will be considered overdue and what penalty will be levied;
5. what is included in the rent (heat, lights, water, etc.) and what is provided (driveway, garage, furnishings, kitchen appliances, snow removal, storage, laundry, etc.);
6. total number of full-time occupants and pets allowed;
7. a list of prohibited equipment (snowmobiles, motorcycles, musical equipment, etc.);
8. the amount and type of deposit (cleaning, security, pets, etc.) and what has to be done to get it back;
9. a list of landlord and tenant repair and maintenance duties;

Rental agreements cannot:

1. force a tenant to waive any legal rights,
2. excuse the landlord from any legal responsibilities,
3. let the landlord sue the tenant without notice,
4. require the tenant to pay the landlord's attorney fees should you go to court;
5. allow the landlord to take a tenant's personal belongings (A.S. 34.03.040).

DO NOT SIGN A RENTAL AGREEMENT THAT HAS ILLEGAL WORDING.

If the rental agreement contains any of the things listed below, they should be removed before signing:

1. agreeing to let the landlord come into the dwelling whenever he/she wants;
2. agreeing to immediate eviction for nonpayment of rent;
3. agreeing that the tenant will make all repairs;
4. excusing the landlord from liability in case of accidents due to his/her neglect;
5. giving up rights to the deposit.

change your mind?

Once an agreement to rent a place has been made, and all or part of the deposit and rent has been paid and then a tenant doesn't move in, he/she may not be able to have all his/her money returned. If this happens on a month-to-month agreement (written or oral), the tenant may have to pay for one month's rent or rent on a day-to-day basis until someone else rents the place, whichever is less. If a lease was signed, the tenant may owe rent until the place is re-rented or the lease period ends, whichever is less.

EXCEPTION: If the landlord lied about the place or deceived the tenant by not telling about important problems (for instance, no heat, the building is condemned, etc.) the tenant should get all the money back. In addition, the tenant could sue for fraud. If this situation comes up, see a lawyer.

illegal discrimination

It is illegal for landlords to refuse to rent to someone because of sex, age, race, religion, national origin, color, marital status, pregnancy or changes in marital status, unless the housing is specially designated for "singles only" in advance.

It is unlikely that a landlord will openly refuse to rent to someone for an illegal reason. There are some indications that a landlord may be practicing discrimination in renting when:

- the apartment the tenant called about is "suddenly" taken when the landlord sees the tenant.
- a place the tenant was told is "rented" remains vacant.
- the rent or deposit is much higher than advertised or charged for similar units.
- rules will be different for one tenant than for others in the same apartment house or court. (For example, others have pets, but you cannot. A landlord may decide to allow no more pets, but he/she must stick to the new rules as far as new tenants are concerned.)
- the tenant is not referred to a listing in a real estate office that fits his/her needs.
- a house or apartment in the tenant's area is rented with the intention of forcing others to leave (block-busting).
- an advertisement indicates a preference based upon race, color, religion, sex, age, marital status or national origin.

Everyone should have a free choice about where to live, and there are legal methods of fighting discriminatory practices. If you feel you have been discriminated against and want to do something about it, you can complain to the State Human Rights Commission. The Commission's investigation costs you nothing.

For more help on illegal discrimination, contact the Human Rights Commission in your town or:

State Human Rights Commission
204 East 5th
Anchorage, Alaska 99501
phone: 276-7474

disclosure

The law says that someone must be responsible for such things as decisions about maintenance, repairs, collecting rent and receiving notices from tenants or from the court. It is a requirement that when a tenant moves in, he/she must be told in writing the name and address of the owner (or who the owner wants his/her agent to be). This information must be kept up-to-date.

If this information is not provided, whoever made the rental agreement or receives the rent becomes the legally responsible person. Then, when the tenant is required to give a written notice or wants to sue, he/she should:

1. contact the owner or his/her agent, or
2. if that information was never officially given to the tenant, contact the person who made the original agreement or takes the rent. (A.S. 34.03.080)

deposits

Deposits are often collected for pets, children, cleaning or security before a tenant moves in. Sometimes the tenant will be asked to pay the last month's rent, too. The total amount collected for all deposits and pre-paid rent, except the first month's rent, cannot exceed two month's rent. (A.S. 34.03.070)

Deposits and pre-paid rent along with first month's rent can make total move-in costs high. Here are some examples of how these move-in costs might be set:

Legal Examples

#1: \$ 375 first month's rent
\$ 375 last month's rent
\$ 375 security deposit
\$1125 total to move in

#2: \$ 325 first month's rent
\$ 150 cleaning deposit
\$ 175 security deposit
\$ 325 last month's rent
\$ 975 total to move in

Illegal Examples

#1: \$ 375 first month's rent
\$ 375 last month's rent
\$ 400 security deposit
\$1150 total to move in

#2: \$ 325 first month's rent
\$ 300 cleaning deposit
\$ 200 security deposit
\$ 325 last month's rent
\$1150 total to move in

The deposit and any pre-paid rent must be deposited in a trust account in a bank, savings and loan association or with a licensed escrow agent. Exceptions are made for rural Alaska, if it is impractical to bank the money. When the deposit is collected, be sure to get a receipt. Also, it is a good idea to have the landlord write on the receipt the amount paid for each type of deposit and what has to be done to get the deposit back. (Always get and keep records for any money paid.)

If the tenant is renting a unit and the building is sold, there is often confusion as to which person, the old or new landlord, is responsible for the deposit and pre-paid rent money. The original landlord who accepted the money is the person responsible for returning the money to the tenant UNLESS the new owner receives the money from the old landlord and agrees to the responsibility of taking care of it.

When a tenant finds out the building is being sold, he/she should find out whether the old or new landlord will hold the deposit money. If the old landlord keeps the deposit, the tenant should get in writing the name of the bank where the deposit is kept and the new address of the old landlord.

inspections

While the law does not specify that an inspection must be done, it is a good idea for the landlord and tenant to inspect the dwelling together before anyone moves in. Make a list of items needing repair and the date the work should be completed (10 days is standard). Make another list of damage that will not be changed or repaired. Both the landlord and the tenant should sign and date these lists. Each of you should keep a copy. These lists will be handy when the tenant is ready to move out.



WHILE RENTING

paying rent/rent increases

The landlord is not required to ask tenants each month for their rent before they are "required" to pay it. If a time and place for payment of rent was not agreed upon when the tenant moved in, it is assumed that the rent will be collected at the dwelling.

If the tenant rents monthly, the rent is due every 30 days, unless otherwise agreed. So, if the tenant moves in on the 8th, the rent is due on or before the 8th of every month.

If there is a signed lease, rent may not be increased during the lease period. Other rent increases may be levied as the landlord sees fit; however, the law is unclear regarding the notice period which the landlord is required to give.

The general interpretation is that a rent increase is either:

1. a termination by the landlord of the tenancy at the old rental rate and an offer to renew it at a higher rate or
2. a modification of a rule or regulation.

In either case, tenants should be given a written notice 30 days before the next rental due date. If the tenant does not agree with the rent increase or cannot pay, he/she may give notice to move. Since the law is not clear, landlords and tenants should seek legal advice if they are unsure about a proposed rent increase. (A.S. 34.03.290b and A.S. 34.03.130b)

4

rules and regulations

Almost every landlord has rules and regulations. Often these are not mentioned until after a tenant moves in or until the rule

has been broken. To avoid problems, the law requires the landlord to show his/her rules and regulations to the tenant before the tenant commits himself to a rental agreement (oral or written). The tenant may discover that he/she does not agree with them and decide not to move in. The rules and regulations must be reasonable and specific, or under the law, the landlord will not be able to enforce them.

Remember that once the tenant has seen the rules and moved in, he/she is agreeing to live by these rules. A copy must be posted by the landlord someplace at the dwelling where it can be easily seen.

Rules must apply to all tenants equally and fairly. Rules and regulations cannot be changed without first giving tenants reasonable notice. If tenants do not agree to the change, and it changes the original rental agreement a great deal, they may move after giving at least 30 days notice or they may refuse to accept the rule. Landlords may evict tenants who refuse to abide by a reasonable rule change. If the change does not apply to all tenants in the building equally, an eviction based on a tenant's breaking of a rule may be illegal. (A.S. 34.03.130)

subleasing

When a lease is signed, the tenant is promising to stay for a certain length of time (usually four, six or twelve months). The tenant is telling the landlord that each and every month, whether the tenant still lives in the apartment or not, he/she will be responsible for paying the rent. Unless the landlord signs a paper saying it's okay with him/her for someone else to move in if the tenant moves out, the tenant cannot just have someone else "take over" the place.

There are usually only two ways to get out of a lease:

1. If the landlord breaks his/her part of the bargain (what's written in the lease) ... the tenant can move after giving 30 days written notice.
2. Get the landlord to agree to let the tenant sublease the place. Under the law the landlord has a right to ask for certain information about the new tenants. The landlord can reject the new tenants only for certain reasons, and cannot unreasonably prevent subleasing.

The information the landlord can ask for **IN WRITING** about the new tenant includes:

1. name, age and present address;
2. occupation, present employment and name and address of employer;
3. marital status;
4. how many people will live in the apartment;
5. two credit references;
6. names and addresses of all landlords of this person for the last three years.

Once this information has been given to the landlord, he/she has 14 days to answer the request. No answer within 14 days is considered the same as consent, so go ahead and sublease. If the answer is "no", the landlord must give written reasons for the decision.

The only legal reasons for refusing to allow a sublease are:

1. bad credit record;
2. too many people;
3. too many children;
4. unwillingness of new tenant to accept rental agreement;
5. pets not acceptable;
6. proposed business activity;
7. bad report from former landlord.

If the landlord says "no" to the suggested new tenant, but doesn't give reasons in the list of acceptable rejection reasons, the law says the old tenant can go ahead and sublease or move out; however, to move out without subleasing, a thirty day **WRITTEN** notice must be given to the landlord. (A.S. 34.03.070)

privacy

A common problem landlords and tenants have is that of the tenant's right to privacy. Many landlords feel they can come and go from their property whenever they please. Some tenants feel they never have to let a landlord come in.

To clear up the confusion, the law says a landlord must give a tenant 24 hours notice that he/she would like to come for the purpose of making repairs, maintenance, an inspection or showing the place. The landlord may enter only with the tenant's consent and only at reasonable times.

TWO EXCEPTIONS: No such notice is required if it is not possible to contact the tenant by ordinary means within 24 hours, or if there is an emergency (smoke, water, explosion, etc.).

Landlords cannot abuse their right to request entry or harass tenants, and tenants cannot unreasonably keep a landlord from entering.

If a tenant has a nosy landlord who believes he/she can come and go as he/she pleases, it might be a good idea to get a copy of the law to show him/her the section called ACCESS (34.03.140). If the landlord comes in and will not leave, call the police.

When a landlord does abuse his/her right to enter (by coming in without the tenant's permission, or when the tenant is gone or repeatedly without need), the tenant can ask a court to demand that the landlord stop (called an injunction). The tenant may also sue for actual damages or one month's rent, whichever is greater, court costs and attorney fees. If the tenant wishes to move because the landlord has abused the access privilege, a 10-day written notice is required.

If the tenant unreasonably refuses to allow the landlord in, the landlord can get an injunction. The landlord may also sue for actual damages or one month's rent, whichever is greater, or evict the tenant with a 10-day written notice.

absence/abandonment

Tenants must tell their landlord every time they plan to be gone for more than seven days. If the tenant plans to be gone only 2 or 3 days, then finds that for whatever reason he/she will actually be gone more than a week, they must notify the landlord as soon as possible.

This is to help protect the property from pipes freezing up, etc. While the tenant is gone, the landlord may go into the place only if there is an emergency or with 24 hours notice.

A landlord may assume the dwelling has been abandoned when:

1. the tenant is behind in rent, and
2. the tenant has been gone for more than 7 straight days and
3. the tenant did not notify the landlord that he/she would be gone.

The landlord may then enter the dwelling, store the tenant's belongings and re-rent the place. He must attempt to send the tenant a notice telling where the belongings are being kept and asking the tenant to remove his/her property within 15 days. The notice must also tell whether the landlord is going to have a public sale to get rid of the belongings or is going to throw or give them away, if

they are not picked up within 15 days. A tenant's belongings cannot be thrown or given away unless they can be considered to have no value or are food. (A.S. 34.03.230 and 34.03.260)

fire/casualty damage

If the dwelling is damaged by a fire or other casualty (earthquake, flood, etc.), depending on the amount of damage, there are a couple of things the tenant can do.

1. Partial damage: When only a part of the dwelling is damaged and it is lawful for the tenant to stay (the place isn't condemned), move out of the damaged part. The rent can be reduced to an amount which reflects the fair value of the undamaged part of the dwelling.
2. Total destruction: If the tenant can no longer live in the place, he/she can move out, notify the landlord and stop paying rent. The rental agreement and responsibility to pay rent ends when the tenant moves.

After the tenant moves, the landlord must return any deposits and/or pre-paid rent to the tenant. Rent paid for the time the tenant didn't live in the dwelling must be returned (counted from the day of the casualty and including the day of the casualty) to the tenant. (A.S. 34.03.200)

housing codes

The primary objective of codes is the protection of the health and safety of the people who live in houses and apartments. A minimum standard of maintenance is set, making the landlord (not the tenants) responsible for keeping rental property in decent shape. (The section of this booklet called LANDLORD DUTIES explains what the landlord is expected to repair and maintain.)

The law protects tenants who use their right to report code violations. If they call to complain and ask for an inspection, the landlord cannot take revenge by evicting or harassing the tenant. Alaska has a statewide fire code but does not have a statewide housing code.

The following places do have local housing codes. Report substandard conditions to:

- Anchorage - New Construction—Building Safety Division (264-6533)
- Existing Housing—Health & Environmental Protection (264-4666)

Fairbanks - Fairbanks Building Official (452-1881)

Juneau - Juneau-Douglas Borough Housing Inspector
(586-3300)

Ketchikan - City Building Inspector (225-3111)

Kodiak - City Building Inspector (486-5731)

condemned

Buildings inspected and found to be very unsafe may be condemned. The housing inspector will tell the landlord that he/she must repair the problems or he/she will be taken to court. If the problems are so serious that the inspector feels the building is beyond repair, the inspector will order that it be torn down.

The tenant may come home one day and find a sign posted on the building saying that the place is unsafe for anyone to live there. Tenants should immediately find out when the inspector and landlord expect all the tenants to move. They should also see an attorney before paying any more rent.

landlord duties

These are the things tenants can expect their landlords to do:

1. make all repairs to keep the dwelling in a livable condition;
2. keep all common areas (stairs, halls, yard, garbage area, etc.) clean and safe;
3. keep in safe and working condition all electrical, plumbing, toilet ventilating (fans, windows), air conditioning, kitchen and other appliances or facilities supplied by him/her;
4. provide garbage cans and arrange for removal service;
5. supply running water and reasonable amounts of hot water and heat at all times, unless there is a severe energy shortage or the furnace or hot water heater is in the complete control of the tenant (as in a house);
6. if requested by the tenant, supply locks and keys. If the lock can be easily broken, it does not provide enough protection. A tenant can demand that a proper lock be put on the door.

This is a check list of the main things the landlord should repair and maintain:

- doors, windows, roof, floors, walls, and ceilings that leak or have holes;

- plumbing fixtures (must work, not leak and provide a reasonable amount of running, hot and cold water at a reasonable water pressure level);
- a working and safe stove and oven;
- a reliable heating system which provides heat to all rooms in a reasonable amount;
- a safe electrical system (no loose or exposed wires, sockets that do not spark and enough power so the system does not blow fuses when used normally);
- windows (or fans) that provide fresh air when wanted;
- enough garbage cans to provide an adequate and safe trash removal service;
- extermination service if roaches, rats, mice or other pests infest the building, apartment or property;
- proper maintenance of vacuum cleaners, washing machines, dish washers, etc. supplied by the landlord (when not abused or broken by the tenant).

If the dwelling is in an isolated area where public sewer or water service is not available, the landlord does not have to provide those services; however, if the landlord privately provides these services at the beginning of the rental agreement, he/she must maintain the services. If there is a serious problem with something mentioned above that is not the tenant's fault, the law provides remedies for the tenant. The landlord must be given a reasonable chance to fix the problem first, but if he/she won't fix it, here is what the tenant can do:

1. **MOVE.** The tenant gives the landlord a written notice describing the problem and saying that if the problem is not fixed within 10 days, he/she will move within 20 days. If the problem is fixed within 10 days, but the tenant still wants to move, a regular 30-day notice is required.

2. **EMERGENCY REPAIR AND DEDUCT.** If heat, water, sewer or other essential service breaks down, the tenant may get the problem fixed and deduct the actual and reasonable expenses from the next month's rent. The tenant must give the landlord a written notice that this is what he/she plans to do, and if the problem is major, the tenant must provide the landlord with a copy of the estimated repair costs. However, once written notice is given, the tenant may immediately go ahead with repairs. If the cost is very great, it is advisable to contact a lawyer before proceeding with repairs. If the problem cannot be fixed right away and it

landlord duties

makes the dwelling unlivable, the tenant can give the landlord written notice that he/she is moving into substitute housing. The tenant is excused from paying rent until the problem is cured and may charge the landlord for the cost in excess of rent of staying in a hotel or other substitute housing until the problem is fixed. (A.S. 34.03.180)

3. **SUE FOR DAMAGES.** If the tenant or his family have suffered because the landlord failed to fix something, the tenant can sue. If the total amount is less than \$2,000, the tenant may sue in the state small claim court. For larger claims, the tenant should see a lawyer.

4. **WITHHOLD RENT.** In some cases where the problem is really serious, it may reduce the value of the dwelling. If this happens, tenants may give written notice to their landlord that they refuse to pay a part of their rent until the problem is fixed. However, landlords and tenants may not agree on what is a serious problem, so it is wise to see a lawyer before using this remedy.

If the tenant notified the landlord in writing of a problem, and the landlord fixed it within the time allowed, but through the landlord's negligence, virtually the same thing happens again within 6 months, the tenant may terminate the rental agreement with a 10-day written notice. The notice must specify the problem and the date of termination.

handyman agreements

In the renting of a house or duplex, the landlord and tenant may agree **IN WRITING** that the tenant will be responsible for (4), (5) and (6) of the **LANDLORD DUTIES**. Also, if it is done in good faith, the landlord and tenant of any dwelling may agree that the tenant will do specific repairs, remodeling or maintenance jobs in exchange for payment or reduction of rent, etc. The landlord cannot force a tenant to agree to this kind of arrangement to get out of his/her obligations as a landlord. It must be

made **IN WRITING**, signed by both parties and cannot be on the same paper as the rental agreement. Also, this agreement cannot be made if it will reduce or endanger the services to the other tenants. (A.S. 34.03.100)

tenant duties

These are the duties tenants must perform to keep their part of the rental bargain:

1. pay rent on time;
2. keep the place clean;
3. use the facilities properly (sinks, toilet, kitchen appliances, etc.);
4. do not disturb the neighbors;
5. do what is required by the lease, rental agreement or landlord's posted rules;
6. replace or fix anything damaged or broken because of an accident or carelessness;
7. do not destroy, damage or deface any part of the property.

If tenants do not uphold their end of the bargain, the landlord may be able to evict them. Eviction notices must be in writing and be specific about the problem in question. If the tenants were notified of a problem and remedied the problem within the time allowed, but the problem occurs again within 6 months, the landlord may evict the tenant using a 10-day written notice. The notice must specify the problem and the date of termination.

eviction

Landlords may evict tenants:

1. for failure to pay rent when it is due;
2. when the tenant has broken an important part of the rental agreement.



eviction

Many people think that tenants cannot be evicted in the winter in Alaska or if they have small children. This is not true.

A 10-day written notice is required when a landlord is evicting because the tenant is behind in his/her rent. If the rent is paid before the 10 days are up, the tenant may stay. The notice must tell tenants they have the choice of paying or moving. Ten days notice is also required when the landlord is evicting because the tenant has refused reasonable requests to enter the dwelling or has broken the rental agreement more than once in a 6-month period.

A 20-day written notice is required when the landlord is evicting because the tenant has broken an important part of the rental agreement, such as using the place illegally, etc. If the tenant fails to maintain the rental unit with the result that the health and safety of others are endangered, the landlord may deliver a written notice to correct the problem within 10 days of the receipt of the notice; or the tenant will have to move within 20 days. If the problem is corrected, the tenant may stay.

A 30-day written notice is required when the landlord wishes to evict for general reasons. This notice must be delivered 30 days before the next rental due date.

Eviction notices must be in writing, and the landlord cannot harass the tenant by:

- shutting off utilities
- changing the locks
- taking the tenant's belongings

If the tenant refuses to move at the end of the notice period (10, 20 or 30 days), the landlord must go to court to evict. The court calls most eviction suits "Forcible Entry and Detainer" (F.E.D.) cases. Here is how F.E.D. works:

The landlord files his/her claim with the court. The tenant will receive a complaint and summons to appear in court and give his/her side of the story. The trial will be scheduled 2-4 days after the summons is served. Tenants must act quickly if they don't want to be evicted. See a lawyer.

Tenants may have legal defenses or claims against the landlord which could prevent an eviction. Again, see a lawyer. If the tenant loses at the trial, the judge will sign an order telling the State Troopers to remove the tenant from the dwelling. The tenant may also have to pay the landlord's attorney fees, but if the tenant prevails, the landlord may have to pay the tenant's attorney fees. F.E.D. cases are usually handled by district court. For more information on evictions, read A.S. 09.45.060, 160, Forcible Entry and

Detainer. Information on preparing an eviction suit may be found in the Alaska Rules of Court, volume 2 - Civil Rules (read rules 1-5, 10, 76 and 85). The Rules of Court are available at the Alaska Law Library or your local magistrate's office.

retaliation

IF THE TENANT

1. complains to the landlord about repairs or failing to make repairs; OR
2. uses his/her rights under the Alaska Landlord-Tenant Law; OR
3. joins a tenant union or organization; OR
4. complains to a government agency about code violations or rent eviction controls;

THEN, THE LANDLORD CANNOT

1. raise the rent; OR
2. decrease services (such as shutting off utilities, etc.); OR
3. evict the tenant.

If the tenants feel illegal retaliation has occurred against them, they can move out or stay and sue for as much as 1 1/2 times their actual damages.

An eviction is not considered illegal retaliation, if it is done because:

- the tenant is behind in the rent;
- the landlord must make repairs to meet code requirements or big changes that require a vacant dwelling;
- the tenant is using the place for illegal purposes;
- the landlord wants to use the place for something other than a rental dwelling for at least 6 months, or for personal purposes;
- the property is being sold.

Rent increases are not considered illegal retaliation if the landlord can show:

- a sizeable increase in taxes or cost of maintaining the property (not including the cost of repairing something because of a tenant's complaint);
- that similar dwellings are being rented for a higher rate, and in fact, the landlord has been undercharging;
- that the cost of major improvements made to the property are being passed on to all tenants fairly and equally. (A.S. 34.03.310)

MOVING OUT

proper notice

When a tenant wants to move, the law requires that he/she give a written notice 30 days before the next rental due date. For example, if rent is due on the 8th of each month and the tenant decides on January 20 that he/she wants to move, the soonest he/she could get out of the obligation would be March 8, providing the tenant gives a written notice on or before February 8.

(Tenants who rent by the week must give 14 days written notice.)

Tenants not giving proper written notice will be held responsible for rent up to that 30-day period or until the place is re-rented, whichever is less.

This does not include tenants who are moving because of serious problems which the landlord has not fixed (see the section under LANDLORD DUTIES).

Also, tenants who do not give proper written termination notice, the proper number of days before they move out, must have to wait 30 days after the move to get their security deposit refund (with proper notice, the refund must come back in 14 days).

cleaning and damages

Tenants should clean the dwelling completely before moving, including the refrigerator, bathtub, toilet and oven. Other cleaning responsibilities may have been spelled out in the rental agreement, lease or landlord's posted rules.

When the place has been cleaned, the tenant and landlord should inspect the place together, using the damage list prepared when the tenant first moved in as a guide. Tenants cannot be charged for ordinary wear and tear. But, since landlords and tenants sometimes disagree on what "ordinary wear and tear" is, here are some guidelines:

1. A family with children or pets will wear things out faster—this type of wear is the landlord's responsibility.
2. If something cannot be cleaned because of the landlord's act or negligence, it is the landlord's responsibility (non-washable paint on the walls, water leaks staining the walls, etc.).



3. Shampooing carpets and painting walls are usually considered landlord responsibilities, as these items are bound to get dirty through normal useage. Holes in the carpet or writing on the walls, however, are not normal wear and tear and are the tenant's responsibility to repair.

Damages caused by the tenant are the tenant's responsibility, even if they were caused by an accident. The damage deposit can be kept by the landlord in the amount needed to make repairs. If the tenant has purposely destroyed the landlord's property (throwing a rock through the window, writing on the walls, smashing furniture, etc.) the tenant may be guilty of a misdemeanor and face up to one year in prison, a \$500 fine or both and will still have to pay for the damage.

deposit return

After either the landlord or the tenant has given a proper written termination notice, (see the section above: "Proper Notice"), then the landlord must return the security deposit to the tenant within fourteen (14) days after the tenant moves out, or the landlord must send a written notice telling the tenant why any or all of the deposit is being kept by the landlord.

If the tenant does not give proper written termination notice, then the landlord can take up to thirty (30) days after the tenant moves to send the tenant's deposit refund or a written notice about withholding refund.

The landlord is obligated to send the written notice plus the refund being returned to the tenant to the last known address of the tenant. Therefore, the tenant should be sure to give the landlord a good forwarding address, since the landlord has the duty only to make a "reasonable effort" to locate the tenant, and only if the landlord "actually knows or has reason to know" how to locate the tenant.

(These are some new amendments, effective 7/19/82.)

Deposits may be kept only if the tenant:

- causes damage;
- owes back rent;
- doesn't leave the place as clean as it was when he/she moved in (other than ordinary wear and tear that cannot be removed by cleaning);
- does not comply with previously agreed upon requirements of deposit return as specified in the lease, rental agreement or landlord's posted rules. (A.S. 34.03.070b)



SPECIAL RULES FOR MOBILE HOMES

rental agreements

Rental agreements between mobile home park operators and mobile home park tenants may not:

1. prohibit the tenant from selling his mobile home (unless the mobile home is in violation of laws or ordinances, the proposed buyer doesn't agree with the terms of the existing rental agreement or the buyer does not have sufficient financial responsibility, and the park operator notifies the tenant of his/her objection in writing 30 days in advance);
2. require the tenant to provide permanent improvements to park property (the tenant may be required to maintain existing conditions);
3. require the tenant or prospective buyer to pay a fee to sell or transfer the mobile home (unless services were actually performed by the park operator to assist the sale or transfer, and the tenant was notified in writing of these charges before he/she moved into the park); or
4. require a fee to set up a mobile home in the park or to move an existing home out of the park (unless services were actually performed by the park, and the tenant was notified in writing of the charges before he/she moved in to the park).

capital improvements

Mobile home park operators must give prospective tenants a list of all capital improvements that will be required (skirting, utility hookups, tie-downs, etc.) before the tenant moves in. Even though park operators may specify the type of equipment, tenants cannot be required to buy their equipment from the park operator.

eviction

Mobile home park tenants may be evicted only if:

1. they are behind in the space rent; or
 2. they are violating a law or ordinance, and the violation endangers the health, safety or welfare of others in the park; or
 3. the tenant has substantially violated a reasonable term or provision of the initial written rental agreement; (new law, effective 8/12/82)
 - or
 4. there is to be a change in the use of the land on which the park is located. When there is to be a change in the use of the mobile home park land, landlords or park operators must give tenants a 90-day written notice, unless a longer period was specified in a previously signed lease.
- For all other evictions, the same notices are required as for other types of tenants. (A.S. 34.03.040c, 34.03.080d, 34.03.130c and 34.03.225)

WHERE TO GO FOR HELP



Both landlords and tenants can get help from the following agencies:

1. For copies of this publication and general assistance, contact the Cooperative Extension Service.

Anchorage 277-1488
Bethel 543-2503
Fairbanks 456-6885
Homer 255-8176
Juneau 586-7103
Ketchikan 225-3290
Nome 443-2320
Palmer 745-3360
Soldotna 262-5824

2. To file a complaint on false advertising, chronic misuse of deposit money or fraud, see the Consumer Protection Section, Alaska Department of Law.

Anchorage 1049 West 5th Avenue, Suite 101
Anchorage, AK 99501
279-0428

Fairbanks 604 Barnette, Room 228
Fairbanks 99701
456-8588

Juneau NBA Building
217 2nd Street
Pouch, K
Juneau, AK 99811
465-3692

3. Persons with low incomes may call Alaska Legal Services for attorney help. If your landlord tries to evict you, be sure you mention this when you call.

Anchorage	272-9431
Barrow	852-2311
Bethel	543-2237
Dillingham	842-5653
Fairbanks	452-5181
Juneau	586-6425
Ketchikan	225-6420
Kodiak	486-4178
Kotzebue	442-3398
Nome	443-2951

4. If you need a lawyer but don't qualify for Alaska Legal Services, see the low-cost legal clinics in your town or call the statewide Lawyer Referral Service at 272-0352 in Anchorage. They may be able to refer you to a lawyer in your town.

5. For complaints against state government officials, contact the State Ombudsman Office.

Anchorage 840 K Street
Anchorage 99501
276-4011

Fairbanks 613 Cushman
Fairbanks 99701
452-4001

Juneau 525 Village Street
Juneau 99811
465-4970

6. For complaints against Municipality of Anchorage employees, contact the Municipal Ombudsman Office at 264-4461.

7. To file a claim for damages of \$2,000 or less, see the Alaska Court System and ask for their publication, "Alaska Small Claim Handbook".



SETTLING DISPUTES

When landlords and tenants disagree, sometimes tempers flare, and things may be said and/or done which are wholly outside the law. Sometimes the disagreement becomes just plain petty and small. It will only complicate matters if either party takes the issue to court.

If there is disagreement on any issue, remember that the court looks favorably on "good faith" action; that is, action taken in an honest, forthright manner. Try to remain calm. Gather your facts and **PUT THEM IN WRITING**. Be sure to pay attention to sections of the law that require written notices and that specify the number of days allowed for landlords or tenants to remedy disagreeable situations. Present your problem to the other party in writing, clearly stating what you want to change and what you will do if the situation doesn't change. The forms in the back of this booklet may help.

Generally speaking, the rental of dwellings is a business, and as in any other business, both parties should conduct themselves in a fair, honest manner. There are not many agencies that will mediate landlord/tenant disputes, and problems are frequently no serious enough to require a lawyer or go to court. Most landlord/tenant problems could be settled by both parties acting "in good faith."

If serious problems do arise, it is always advisable to see a lawyer. But first, give the other person a chance by trying to work it out together.

SAMPLE FORMS

The following notices were prepared as samples of what is necessary. These samples may not apply in all situations, but could be helpful.

NOTICE OF EVICTION FOR NON-PAYMENT OF RENT

(Date) _____

TO: _____
(Tenant)

(Address)

You are notified that you owe rent in the amount of \$_____.

If you do not pay this rent within **TEN DAYS** of the day you receive this notice, your tenancy is terminated and you must move. You must pay your rent in cash, money order or certified check.

If you have not paid the rent or moved within **TEN DAYS**, a lawsuit will be filed to evict you. If you pay your rent on or before the **TEN DAY** period, you may stay.

Signed, _____

(Landlord)

Receipt:

I received this notice on the _____ day of _____
19____ at _____ am/pm.

(Tenant)

KEEP A COPY OF THIS NOTICE

NOTICE OF TERMINATION OF TENANCY (BY TENANT)

(Date) _____

TO: _____

(Landlord)

(Address)

You are notified that I am terminating this tenancy effective on the rent due date which occurs at least 30 days from the date you receive this notice. My rent is due on the _____ of each month, so I will be gone by the _____ day of _____, 19____.

Please send my security deposit of \$_____, or an explanation of how it was used, to _____

(address)

within 14 days of the date I move.

Signed, _____

(Tenant)

(Address)

Receipt:

I received this notice on the _____ day of _____, 19____ at _____ am/pm.

(Landlord)

KEEP A COPY OF THIS NOTICE

NOTICE OF EVICTION FOR VIOLATION OF AGREEMENT AND/OR THE LAW

(Date) _____

TO: _____

(Tenant)

(Address)

You are notified that you have seriously violated your agreement with me and/or your duties under the law. The violation (s) are set out specifically as follows: _____

If you do not remedy the violation (s) listed above within TEN DAYS after the date you receive this notice, your tenancy will terminate in not less than TWENTY DAYS, and you must move. Failure to remedy the violation (s) listed above will mean you must leave by the _____ day of _____, 19____.

If you have not remedied the problem (s) and have not moved by the date listed above, a lawsuit will be filed to evict you. If you remedy the problem (s) within TEN DAYS, you may stay.

Signed, _____

(Landlord)

Receipt:

I received this notice on the _____ day of _____, 19____ at _____ am/pm.

(Tenant)

KEEP A COPY OF THIS NOTICE

14

NOTICE OF DEFECTS IN ESSENTIAL SERVICES

(Date)

TO: _____

(Landlord)

(Address)

You are notified that you are failing to provide (water/hot-water/heat/sewer service or other/essential services) at the above address; The specific defect (s) is as follows: _____

If you do not fix this defect **WITHIN 24 HOURS**, I have a right to 1) have it fixed myself and deduct the cost from my rent, 2) sue you for damages, or 3) move out and hold you responsible for my expenses in doing so.

Signed, _____

(Tenant)

Receipt:

I received this notice on the _____ day of _____
19____ at _____ am/pm.

(Landlord)

KEEP A COPY OF THIS NOTICE

NOTICE OF TERMINATION OF TENANCY
BY LANDLORD

(Date)

TO: _____

(Tenant)

(Address)

You are notified that your tenancy is terminated and that you must move from the address listed above on the rent due date which occurs at least 30 days from the date you receive this notice. Your rent is due on the _____ of each month, so you must be gone by the _____ day of _____ 19____.

The reason you are being evicted is as follows: _____

If you are not gone by that date, a lawsuit will be filed to evict you.

Signed, _____

(Tenant)

Receipt:

I received this notice on the _____ day of _____
19____ at _____ am/pm.

KEEP A COPY OF THIS NOTICE

15

COMMON RENTAL PROBLEMS

Problem

Remedy

1. No written notice
Written notices are required in many sections of the law; re-read this bulletin carefully to see when to use a written notice.
2. Landlord tells a tenant to move immediately or cuts off essential services without warning
Evictions are controlled by specific sections of the law. Tenants do not have to move if these rules are not followed and may sue for 1½ times actual damages.
3. Tenant refuses to move after receiving an eviction notice
The landlord should go to court for an F.E.D. order; the State Troopers will carry out the order. In addition, the landlord may sue for 1½ times the actual damages. See the section—EVICTIONS.
4. Deposit is not returned
Tenants may sue for twice the amount kept; re-read the section—DEPOSIT RETURN.
5. Tenant is habitually late with rent or repeatedly breaks rules
Late rent and other problems repeated within a 6-month period may be grounds for eviction; re-read section on EVICTIONS or see a lawyer.

RENT CONTROL

During the pipeline boom of the early 1970's, several Alaskan cities experienced a severe housing shortage, and the legislature passed an emergency rent control law, (A.S. 34.06.010-.060)

When emergency rent control is in force, the rules regarding rent increases and evictions change; however, the law expired in 1977, and if an emergency situation occurred again, a new law would have to be passed by the legislature.

THERE IS NO RENT CONTROL IN ALASKA AT THE CURRENT TIME.

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well understood, and so is not defined by statute; but constructive force is defined by AS 09.45.090, and that only is constructive force which that section declares to be such. *Miners' & Merchants' Bank v. Brice*, 5 Alaska 418 (1915).

Actual possession must be shown.— Since forcible entry and detainer is an action purely for possession, and not to try title (AS 22.15.050), such an action cannot be maintained without showing actual possession. *Wills v. Peterson*, 5 Alas. L.J. No. 12, p. 266 (Dec., 1967).

Possession of tenant does not make such tenant an agent or employee of his landlord. *Wills v. Peterson*, 5 Alas. L.J. No. 12, p. 266 (Dec., 1967).

Sec. 09.45.080. Undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint or any part of it, no appeal may be taken by the defendant from the judgment until he gives, in addition to an undertaking required upon appeal, an undertaking to the adverse party with two sureties. The sureties shall justify, in the manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the real property of which restitution shall be adjudged from the rendition of the judgment until final judgment in the action, if the judgment is affirmed upon appeal. (§ 17.03 ch 101 SLA 1962)

Sec. 09.45.090. Unlawful holding by force. The following are cases of unlawful holding by force within the meaning of §§ 60—160 of this chapter:

(1) when the tenant or person in possession of a premises fails or refuses to pay the rent due on the lease or agreement under which he holds, or deliver up the possession of the premises for 10 days after demand made in writing for the possession;

(2) when, after a notice to quit as provided in §§ 60—160 of this chapter, a person continues in the possession of the premises at the expiration of the time limited in the lease or agreement under which that person holds, or contrary to a condition or covenant in the lease or agreement, or without a written lease or agreement;

(3) when, after a notice to terminate the tenancy as provided in this title with reference to termination of estate at will or by sufferance, a person continues in possession of the premises after expiration of the time for determining the tenancy. (§ 17.04 ch 101 SLA 1962)

Section defines detainer article is designed to prevent.—This section of the forcible entry and detainer act suggests the character of the de-

cessed without legal process is entitled to maintain action for forcible entry and detainer, 45 ALR 323.

Forcible entry and detainer as remedy for interference with right of way, 47 ALR 556.

Criminal offense of forcible detainer where entry was peaceable, 49 ALR 957.

Forcible entry and detainer as a remedy of tenant against stranger wrongfully interfering with his possession, 12 ALR2d 1199.

Right of landowner who has conveyed property to third person to maintain forcible detainer or similar summary possessory action, 47 ALR2d 1170.

Actual force is a term well understood, and so is not defined by statute; but constructive force is defined by this section, and that only is constructive force which this section declares to be such. *Miners' & Merchants' Bank v. Brice*, 5 Alaska 418 (1915).

Where entry was without force and under claim of title, article is inapplicable. — Where defendant en-

with the consent and under of a prior claimant, the ho entryman, and entered under verse claim of title, and will mitting the title or possession plaintiff, under such facts he be summarily removed by th ble entry and detainer act, b titled to have his title tried *Steil v. Dessmore*, 3 Ala: (1907).

Sec. 09.45.100. Requisites of notice to quit. A notice to quit be in writing and shall be served upon the tenant or person session by being delivered to him or left at the premises of his absence from the premises, or the notice may be s registered or certified mail, in which case an additional three shall be added to the 10 days. (§ 17.05 ch 101 SLA 1962)

C.J.S. reference. — 36 C.J.S. Forcible Entry and Detainer §§ 23 to 25.

Sec. 09.45.110. Period between service of notice and brought. An action for the recovery of the possession of the ises may be maintained in the cases specified in § 90(2) chapter when the notice to quit has been served upon the or person in possession for the period of 10 days before th mencement of the action unless the leasing or occupation is purpose of farming or agriculture, in which case the notice s served 90 days before commencement of the action. (§ 17.06 SLA 1962)

Sec. 09.45.120. Summons and continuance. Summons in for forcible entry and detainer shall be served not less th nor more than four days before the date of trial. No contin shall be granted for a longer period than two days unless t fendant applying for the continuance gives an undertaking adverse party, with sureties approved by the court cond to the payment of the rent that may accrue if judgment i dered against the defendant. (§ 17.07 ch 101 SLA 1962)

Sec. 09.45.130. Action against persons paying rent in ad The service of a notice to quit upon a tenant or person in sion does not authorize an action to be maintained against h the possession of the premises until the expiration of the for which that tenant or person may have paid rent for the ises in advance. To authorize an action against a tenant or in possession who has paid rent in advance, a notice must be at least 10 days before the date the rent is due again in cas month-to-month tenancy or at least three days before in th of a week-to-week tenancy. (§ 17.08 ch 101 SLA 1962)

Sec. 09.45.140. Agricultural tenant. When the leasing or

Municipality
Anchorage



POUGH 6-1
ANCHORAGE, ALASKA 99502-0650
(907) 264-4342
(TTY) 279-4725
TERRY K. KOWAL
MAYOR

EQUAL RIGHTS COMMISSION
620 EAST 10TH AVENUE

February 23, 1983

Hugh Malone, Representative
State of Alaska
Pouch V
Juneau 99811

Dear Mr. Malone:

The following information is provided in response to an inquiry from your office.

The Anchorage Equal Rights Commission is an administrative agency which is charged with enforcement of the municipal discrimination ordinance. This ordinance is found in the Anchorage Municipal Code, Section 5, a copy of which is enclosed.

In 1982, the Equal Rights Commission opened 97 investigations of alleged discriminatory practices. Of this total, 20 cases or 21%, were filed in the category of housing. Of these housing cases, 9 were filed on the basis of parenthood, which by definition is included under sex discrimination (see Section 5.20.010). This represents 9% of the total cases filed with the agency.

Additionally, the Equal Rights Commission received numerous inquiry calls regarding housing discrimination against parents with children. These callers generally sought clarification of our jurisdiction and were from both property seekers and property owners.

It is significant that prior to 1982, no cases had been filed with the Commission on the basis of parenthood. These 1982 filings are attributed to the severe shortage of rental units in the Anchorage area. With a vacancy rate that at times stood at 1%, parents found it extremely difficult to obtain rental units.

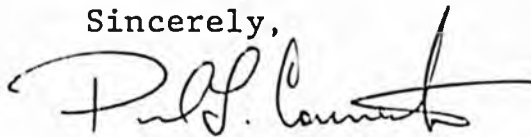
Mr. Hugh Malone
Page Two
February 23, 1983

As the problem continued to accelerate throughout the year, the Equal Rights Commission took steps to alert the community to the requirements of the local ordinance. Advertisements were placed in the local papers which spelled out the Commission's jurisdiction. A public forum on Housing Discrimination and meetings were held with property owners and interested public, to discuss the situation and the method in which the Equal Rights Commission would handle complaints. These actions were of particular importance in raising the awareness level of property seekers and in reassuring property owners that each allegation resulting in a complaint, would be reviewed on a case-by-case basis.

In 1983, we will continue in our efforts to prevent and eliminate alleged discrimination and aggressively enforce Title 5 of the Anchorage Municipal Code.

If I can be of further assistance, please do not hesitate to call me.

Sincerely,



PAUL L. CONNERTY,
Executive Director
Anchorage Equal Rights Commission

jf
Enc.

Chapter 5.10

COMMISSION ESTABLISHED

Sections:

- 5.10.010 Prohibition.
- 5.10.020 Establishment.
- 5.10.030 Appointment.
- 5.10.040 Powers and duties.

5.10.010 Prohibition.

The public policy of Anchorage is declared to be equal opportunity for all persons. The Assembly finds that invidious discrimination in employment, housing, public accommodations, education and financing practices based upon race, color, sex, religion, national origin, marital status, age, or physical handicap adversely affects the welfare of the community. Accordingly, such discrimination is prohibited.
(Charter, §17.01 and new).

5.10.020 Establishment.

Pursuant to the provisions of the Charter, there is established an equal rights commission of nine persons, which shall be known as the Anchorage Equal Rights Commission.
(Charter, §17.02).

5.10.030 Appointment.

The mayor shall appoint members of the commission, subject to confirmation by the Assembly, to three-year terms. Of those members first appointed, three shall be appointed for a term of one year, three for a term of two years, and three for a term of three years. A member chosen to fill a vacancy other than by expiration of a term shall be appointed for the unexpired term of the member whom he/she is to succeed. A member of the commission shall be eligible for reappointment.
(Charter, §17.02 and new).

5.10.040 Powers and duties.

The commission may:

- A. Hold public hearings and issue orders under Sections 5.30.030 and .050 of this title;
- B. Administer oaths and affirmations, certify its official acts, issue subpoenas duces tecum, and other legal process to compel the attendance of witnesses and the production of testimony, books, records, papers, accounts, documents or things in any inquiry, investigation, hearing or proceeding before the commission; the commission may petition the superior court of the State of Alaska having jurisdiction to enforce its subpoenas, subpoenas duces tecum, and other legal process;
- C. Intervene in any court proceeding brought under this title;
- D. Enter into agreements with counterpart agencies at all governmental levels to promote effective and efficient enforcement of the law;
- E. Grant relief described in Section 5.30.050 of this title;
- F. Develop programs designed to bring about the prevention and elimination of discrimination;
- G. Hire, subject to approval of the mayor, an executive director who shall serve at the pleasure of the commission;
- H. Delegate to the executive director all powers and duties given it by this title, except the power to hold hearings, issue orders, and hire the executive director; and
- I. Adopt procedural and evidentiary rules necessary to fulfill the intent of this title. (new, CAC 2.64.330, and Charter, §17.02).

Chapter 5.20

UNLAWFUL PRACTICES

Sections:

- 5.20.010 Definitions.
- 5.20.020 Unlawful practices in the sale or rental of real property.
- 5.20.030 Unlawful financing practices.
- 5.20.040 Unlawful employment practices.
- 5.20.050 Unlawful practices in places of public accommodation.
- 5.20.060 Unlawful practices in educational institutions.
- 5.20.070 Unlawful practices by the Municipality of Anchorage.
- 5.20.080 Lawful practices.

5.20.010 Definitions.

As used in this chapter:

- A. "Age" is not intended to conflict with the provisions of AS 23.10.325-.370, or any other laws relating to the rights and activities of minors.
- B. "Blockbusting" means any discriminatory practice by real estate brokers, real estate salesmen or employees or agents of a broker or other individual, corporation, partnership or organization for the purpose of inducing a real estate transaction from which any such person or its stockholders or members may benefit financially, to represent directly or indirectly that a change has occurred or will or may occur from a composition with respect to race, religion, color or national origin of the owners or occupants of the block, neighborhood or area in which the real property is located, and to represent directly or indirectly that this change may or will result in undesirable consequences in the block, neighborhood or area in which the real property is located, including, but not limited to the lowering of property values, an increase in criminal or antisocial behavior or decline in the quality of the schools or other facilities.

- C. "Commission" means the Anchorage Equal Rights Commission.
- D. "Discrimination" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, color, religion, national origin, age, sex, marital status or physical handicap, or the aiding, abetting, inciting, coercing or compelling thereof.
- E. "Educational institution" means any day care center, nursery, kindergarten, elementary or secondary school, academy, college, university, extension course, or nursing, secretarial, business, vocational, technical, trade, or professional school.
- F. "Employee" means an individual employed by an employer, but does not include an individual employed in the domestic service of any person.
- G. "Employer" means an employer, public or private, of one or more persons.
- H. "Employment agency" means any person undertaking to procure employees or to procure for employees opportunities to work.
- I. "Financial institution" means commercial banks, trust companies, mutual savings banks, cooperative banks, homestead associations, credit unions, bonding companies, surety companies, or other commercial institutions which extend secured or unsecured credit or offer insurance.
- J. "Labor organization" means any organization which is constituted for the purpose, in whole or in part, of collective bargaining or in dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.
- K. "Marital status" means any differential treatment because of a person's marital status or change in marital status. This includes differential treatment shown toward a person because he/she is not married, a person because he/she is married, a person because

he/she is widowed or divorced, a person because he/she is a parent and unmarried, or a person because she is pregnant and unmarried.

- L. "National origin" includes ancestry, persons not citizens, their descendants, persons naturalized, and their descendants.
- M. "Person" means one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, employees, employers, employment agencies, labor organizations, joint apprenticeship committees or other legal or commercial entity.
- N. "Physical handicap" means any physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including diabetes, epilepsy, and including any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, or other remedial appliance or device.
- O. "Public accommodation" means any place in or through which any business or professional activity is conducted that is open to, accepts or solicits the patronage of or caters or offers goods or services to the general public. This includes, but is not limited to, a public inn, restaurant, eating house, day care center, hotel, motel, soda fountain, soft drink parlor, tavern, night club, liquor establishment, roadhouse, place where food or spiritous or malt liquors are sold for consumption, trailer park, resort, campground, mobile home, barbershop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company and all other public amusement and business establishments, subject only to the conditions and limitations established by law and applicable alike to all persons.
- P. "Real property" means a housing accommodation, unimproved property, a building or a portion of a building, whether constructed or to be constructed, structures, real estate, lands, tenements, leaseholds, interest in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein, a mobile home, which is or will be used as sleeping quarters of its occupants, or a trailer park.
- Q. "Sex discrimination" means differential or preferential treatment shown toward a person because of one's sex, pregnancy, or parenthood. (AS 23.10.325-370 and new).

5.20.020 Unlawful practices in the sale or rental of real property.

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property:

- A. To refuse to sell, lease or rent the real property to a person because of race, religion, age, sex, color, national origin, marital status or physical handicap;
- B. To discriminate against a person because of race, religion, age, sex, color, national origin, marital status or physical handicap in a term, condition or privilege relating to the use, sale, lease or rental of real property;
- C. To make a written or oral inquiry or record of the race, religion, age, sex, color, national origin, marital status or physical handicap of a person seeking to buy, lease or rent real property;
- D. To offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection therewith because of a person's race, religion, age, sex, color, national origin, marital status or physical handicap;
- E. To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is available, or to refuse a person the right to inspect real property, because of the race, religion, age, sex, color, national origin, marital status or physical handicap of that person or because of any person associated with that person;
- F. To engage in blockbusting;
- G. To circulate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement, with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on race, religion, age, sex, color, national origin, marital status or physical handicap. This shall not be construed to apply to publishing companies which accept advertising in the ordinary course of business. (Adapted from CAC 8.36.090 and new).

5.20.030 Unlawful financing practices.

It is unlawful for an insurance company, a financial institution or other commercial institution extending secured or unsecured credit, upon receiving an application for financial assistance or credit for the acquisition, construction, rehabilitation, repair or maintenance of a housing accommodation or other property or services, or the acquisition or improvement of unimproved property, or upon receiving an application for any sort of loan of money, or upon receiving an application for insurance to permit one of its officials or employees during the execution of his/her duties:

- A. To discriminate against the applicant because of race, religion, age, sex, color, national origin, marital status or physical handicap in a term, condition or privilege relating to the obtainment or use of the institution's financial assistance, insurance or credit, except to the extent of a federal statute or regulation applicable to a transaction of the same character;
- B. To make or cause to be made a written or oral inquiry or record of the race, religion, age, sex, color, national origin, marital status or physical handicap of a person seeking the institution's financial assistance, insurance, or credit unless the inquiry is for the purpose of ascertaining the applicant's creditworthiness or insurability;
- C. To refuse to extend credit, issue a credit card, insure or make a loan to a single, divorced, pregnant or married person who is otherwise creditworthy, if so requested by the person;
- D. To refuse to insure or to issue a credit card to a married person in that person's name, if so requested by the person, provided, however, that the person so requesting a card may be required to open an account in that name if so requested by that person. (Adapted from CAC 8.38.020 and new).

5.20.040 Unlawful employment practices.

It is unlawful for:

- A. An employer to refuse employment to a person, or to bar him/her from employment, or to discriminate against him/her in compensation or in a term, condition, or privilege of employment or to discharge, expel, reduce, suspend or demote him/her because of his/her race, religion, age, sex, color, national origin, marital status or physical handicap unless the reason for the discrimination is a bona fide occupational qualification;

- B. A labor organization because of a person's race, religion, age, sex, color, national origin, marital status, or physical handicap to exclude or to expel him/her from its membership or to discriminate against one of its members or employer or employee;
- C. A person, employer or employment agency to broadcast, publish, print, circulate or cause to be broadcasted, published, printed or circulated a statement, advertisement in connection with prospective employment or to use a form of application for employment which expresses, directly or indirectly, a limitation, specification, preference or discrimination as to race, religion, age, sex, color, national origin, marital status or physical handicap;
- D. A person to discriminate in the payment of wages as between sexes, or to employ a person of one sex in an occupation at a salary or wage rate less than that paid to a person of another sex for work of comparable character or work in the same operation, business or type of work in the same locality. (Adapted from CAC 8.40.040).

5.20.050 Unlawful practices in places of public accommodation.

It is unlawful for a person, whether the owner, operator, or agent or employee of an owner or operator of a public accommodation:

- A. To refuse, withhold from or deny to a person any of its accommodations, advantages, facilities, benefits, privileges, services or goods of that place on account of race, religion, age, sex, color, national origin, marital status or physical handicap;
- B. To publish, circulate, issue, display, post or mail a written or printed communication, notice, or advertisement which states or implies:
 - 1. that any of the services, goods, facilities, benefits, accommodations, advantages or privileges of the public accommodation will be refused, withheld from or denied to a person of a certain race, age, religion, sex, color, national origin, marital status or physical handicap; or
 - 2. that the patronage or presence of a person belonging to a particular race, religion, age, sex, color, national origin, marital status or physical handicap, is unwelcome, not desired, solicited, objectionable or unacceptable.

- C. To make a written or oral inquiry concerning the race, religion, age, sex, color, national origin, marital status or physical handicap of an individual in connection with the solicitation, reservation, booking, sale, or dispensing of accommodation, advantage, facility, benefit, privilege, service or good. (Adapted from CAC 8.40.020).

5.20.060 Unlawful practices in educational institutions.

- A. It is unlawful for a person operating or assisting in the operation of an educational institution:

1. to refuse to admit or otherwise to discriminate against an individual with respect to the terms, conditions, accommodations, advantages, facilities, benefits, privileges, or services of that institution on account of race, religion, age, sex, color, national origin, marital status or physical handicap;
2. to make or use a written or oral inquiry or form of application for admission that elicits information concerning the race, religion, age, sex, color, national origin, marital status or physical handicap of an applicant for admission;
3. to require or cause to be required that a photograph of an applicant for admission be submitted with an application for admission;
4. to publish, circulate, or display, or cause to be published, circulated or displayed, a written, printed, oral or visual communication, advertisement, catalog, or any other form of publicity relating to admission that expresses or indicates a preference, limitation, specification, or discrimination on account of the race, religion, age, sex, color, national origin, marital status or physical handicap of an applicant for admission;
5. to establish, announce, or follow a policy of denial or limitation of education opportunities for members of a group on account of race, religion, age, sex, color, national origin, marital status or physical handicap;
6. to use in the recruitment of potential applicants for admission, a service or agency that discriminates against individuals on account of race, religion, age, sex, color, national origin, marital status or physical handicap.

- B. Discrimination is lawful for a religious or denominational institution or organization, or an organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious or denominational institution or organization, limiting admission to, or giving preference in, its accommodations, advantages, facilities, benefits or services to persons of the same religion or denomination, or for making a selection of applicants or individuals that is reasonably calculated to promote the religious principles for which it is established or maintained.

Such organizations otherwise remain subject to the provisions in this title with regard to race, color, age, national origin, sex, physical handicap or marital status. (Adapted from CAC 8.40.030).

5.20.070 Unlawful practices by the Municipality of Anchorage.

It is unlawful for the Municipality of Anchorage or any public agency thereof:

- A. To refuse, withhold from or deny to a person any local, state or federal funds, services, goods, facilities, advantages or privileges because of race, religion, age, sex, color, national origin, marital status or physical handicap,
- B. To publish, circulate, issue, display, post or mail a written or printed communication, notice or advertisement which states or implies that any local, state or federal funds, services, goods, facilities, advantages or privileges of the office or agency will be refused, withheld from or denied to a person of a certain race, age, religion, sex, color, national origin, marital status or physical handicap or that the patronage of a person belonging to a particular race, religion, age, sex, color, national origin, marital status, or physical handicap is unwelcome, not desired or solicited. (new)

5.20.080 Lawful practices.

Notwithstanding any provision of this chapter, it shall not be unlawful for a person in connection with employment, housing, financing or insurance, public accommodation, education, or governmental service to make or keep records identifying the race, religion, age, sex, color, national origin, marital status, or physical handicap if the purpose of the record is to comply with federal or state equal opportunity laws or regulations or in furtherance of a program designed to ensure compliance with this title. (new).

Chapter 5.30

ENFORCEMENT

Sections:

5.30.010	Complaint.
5.30.020	Investigation and conciliation.
5.30.030	Public hearing.
5.30.040	Injunctive relief--Temporary restraining order.
5.30.050	Order.
5.30.060	Retaliation, coercion, aiding, abetting and inciting.
5.30.070	Penalty.
5.30.080	Judicial review and enforcement.
5.30.090	Effect of compliance with order.
5.30.100	Legal assistance.

5.30.010 Complaint.

A person who believes he/she is aggrieved by any discriminatory conduct prohibited by this title may file a written complaint with the commission within 120 days from the date of the alleged discriminatory conduct, stating the name and address of the person alleged to have engaged in discriminatory conduct, and the particulars of the act. In like manner, the executive director may file a complaint when an alleged discriminatory act against an individual or group of individuals comes to his attention. (Adapted from CAC 8.36.020).

5.30.020 Investigation and conciliation.

The commission shall investigate promptly and impartially the matters set out in the filed complaint. If it determines that the allegations are supported by substantial evidence, it shall immediately attempt to eliminate the discriminatory act or practice by conference, persuasion and conciliation. The commission shall in any event make findings of fact within 180 days after the filing of the complaint. (Adapted from CAC 8.36.040).

5.30.030 Public hearing.

If the commission determines that the efforts to eliminate the alleged discrimination are unsuccessful, the commission shall serve written notice, together with a copy of the complaint as it may be amended, requiring the person, employer, labor organization or employment agency charged in the complaint to answer the allegations of the complaint at a public hearing before the commission. The time and place of the public hearing will be specified in the notice. The case in support of the complainant shall be presented before the commission by the executive director or his/her designee, provided that such designee does not concurrently represent the complainant. The complainant may be represented by counsel.

The person charged in the complaint may file a written answer to the complaint and may appear at the hearing in person or by counsel and submit testimony. The complainant has the power reasonably and fairly to amend the complaint, and the respondent has the power reasonably and fairly to amend his answer at any time up to and including the time of hearing. Any person may obtain a transcript upon payment of reasonable costs thereof. (Adapted from CAC 8.36.050 and new).

5.30.040 Injunctive relief--Temporary restraining order.

At any time after a complaint is filed under this title or in cases of noncompliance with a lawful commission order, the commission may file a petition in any superior court of the State of Alaska having jurisdiction seeking temporary or permanent injunctive relief. This includes the granting of a temporary restraining order not to exceed 10 days in duration, unless a longer period is agreed to by the parties, and the granting of preliminary and/or permanent injunction following a court hearing. (Adapted from CAC 8.36.060 and new).

5.30.050 Order

- A. At the completion of the hearing, if the commission finds that a person against whom a complaint was filed has engaged in discriminatory conduct, it shall order him to refrain from engaging in discriminatory conduct. The order shall include findings of fact, and may prescribe conditions on the respondent's future conduct relevant to the type of discrimination. In a case involving discrimination in:

1. employment, the commission may order any equitable relief, including, but not limited to the hiring, reinstatement or upgrading of an employee or group of employees with or without back pay, restoration to membership in a labor organization, or his admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program;
 2. housing, the commission may order any equitable relief, including, but not limited to the sale, lease or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease or rental of the next vacancy in like accommodations owned by the person against whom the complaint was filed;
 3. public accommodations, the commission may order any equitable relief, including, but not limited to, restoration to membership in a place of public accommodation, or admission to or service in a place of public accommodation;
 4. financial institutions, the commission may order any equitable relief, including, but not limited to, the issuance of a credit card to a person, the approval of a loan to a person, or the issuance of insurance to a person;
 5. educational institutions, the commission may order any equitable relief, including, but not limited to, admission to the institution or admission to the program or programs of the institution.
- B. The commission may order payment of reasonable expenses to the complainant or to the respondent when the commission determines the allowance is appropriate.
- C. The commission may monitor compliance with orders. The order may require a report or reports to be made to the commission on the manner of compliance.
- D. If the commission finds that a person against whom a complaint was filed has not engaged in the discriminatory conduct alleged in the complaint, it shall issue and cause to be served on the complainant an order dismissing the complaint.

- E. A copy of all orders issued following public hearing shall be filed with the municipal attorney. (new).

5.30.060 Retaliation, coercion, aiding, abetting and inciting.

It shall be unlawful for a person to discharge, expel, evict, retaliate or to otherwise discriminate against a person because he/she has filed a complaint, testified or assisted in a proceeding under this title. It is unlawful for a person to aid, abet, incite, compel or coerce the doing of an act forbidden under this title or to attempt to do so. (new).

5.30.070 Penalty.

A person who willfully resists, prevents, impedes or interferes with the commission or any of its authorized representatives because of or in the performance of duty under this title and is convicted by a court of competent jurisdiction and found guilty is guilty of a misdemeanor punishable by fine of not more than \$500.00, or by imprisonment in a jail for not more than 30 days, or by both. (new).

5.30.080 Judicial review and enforcement.

- A. A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission may obtain judicial review of the order in accordance with AS 44.62.560-.570.
- B. The commission may obtain a court order for the enforcement of any of its orders by filing a complaint with the Superior Court in the Third Judicial District. (new).

5.30.090 Effect of compliance with order.

Immediate and continuing compliance with all the terms of a commission order is a bar to prosecution for the particular instances of discriminatory conduct described in the accusation filed before the commission. (new).

Dear Senator:

Please expedite passage of HB 1 now being considered by the State Affairs Committee. This bill corrects a difficulty for both tenant and landlord in change of lease, making 30 days notice adequate rather than 30 days from next rent due date, which most often is more than 30 days total notice. It also clarifies other sections of the Landlord-Tenant Act.

Thanks for your assistance!

Signed: Carl F. Cartwright



STATE FAIR HOUSING LAWS: TYPES OF DISCRIMINATION PROHIBITED

	RACE	RELIGION	COLOR	NATIONAL ORIGIN	ANCESTRY	CREED	SEX	MARITAL STATUS	PREGNANCY	PHYSICAL DISABILITY	AGE	PERSONAL APPEARANCE	SEXUAL ORIENTATION	FAMILY RESPONSIBILITY	NATURALIZATION	POLITICAL AFFILIATION	SOURCE OF INCOME	PLACE OF RESIDENCE	PLACE OF BUSINESS	BLINDNESS	MENTAL DISABILITY
ALASKA	x	x	x	x			x	x	x												
CALIFORNIA	x	x	x	x	x	x	x	x		x											
COLORADO	x	x	x	x	x	x	x	x													
CONNECTICUT	x		x	x	x	x	x	x													
DELAWARE	x		x	x		x	x	x			x										
DIST. OF COL.	x	x	x	x			x	x			x	x		x	x	x					
GEORGIA																					
HAWAII		x	x		x			x													
IDAH0	x	x	x	x			x	x													
ILLINOIS	x	x	x	x		x	x			x											x
IOWA	x	x	x	x		x	x														
KANSAS	x	x	x	x	x		x														
KENTUCKY	x	x	x	x																	
MAINE	x	x	x	x	x		x														
MARYLAND	x	x	x	x			x	x													
MASSACHUSETTS	x	x	x	x	x		x	x												x	
MICHIGAN	x	x	x	x			x	x			x										
MINNESOTA	x	x	x	x		x	x	x									x				
MONTANA	x	x	x	x			x				x										
NEBRASKA	x	x	x	x							x										
NEVADA	x	x	x	x	x		x				x										
NEW HAMPSHIRE	x	x	x	x			x	x			x										
NEW JERSEY	x		x	x	x	x	x	x													
NEW MEXICO	x	x	x	x			x														
NEW YORK	x		x	x		x															
OHIO	x	x	x	x	x			x													
OREGON	x	x	x	x			x	x													
PENNSYLVANIA	x	x	x	x	x		x														
RHODE ISLAND	x	x	x	x																	
SOUTH DAKOTA	x	x	x	x	x	x	x														
VERMONT	x	x	x	x																	
VIRGINIA	x	x	x	x			x														
WASHINGTON	x		x	x		x	x	x													
WEST VIRGINIA	x	x	x	x	x																
WISCONSIN	x	x	x	x	x																

The State Constitutions forbid discrimination in the sale or rental of property on the basis of race, color, creed, national ancestry and sex, in Indiana.

COMPILED BY: THE NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING (NCDH), 6/3/76
(Source: Prentice-Hall, Equal Opportunity in Housing Series, Section on State Laws)

x Indiana - race, rel., color, sex, handicap, natl. org. ancestry.

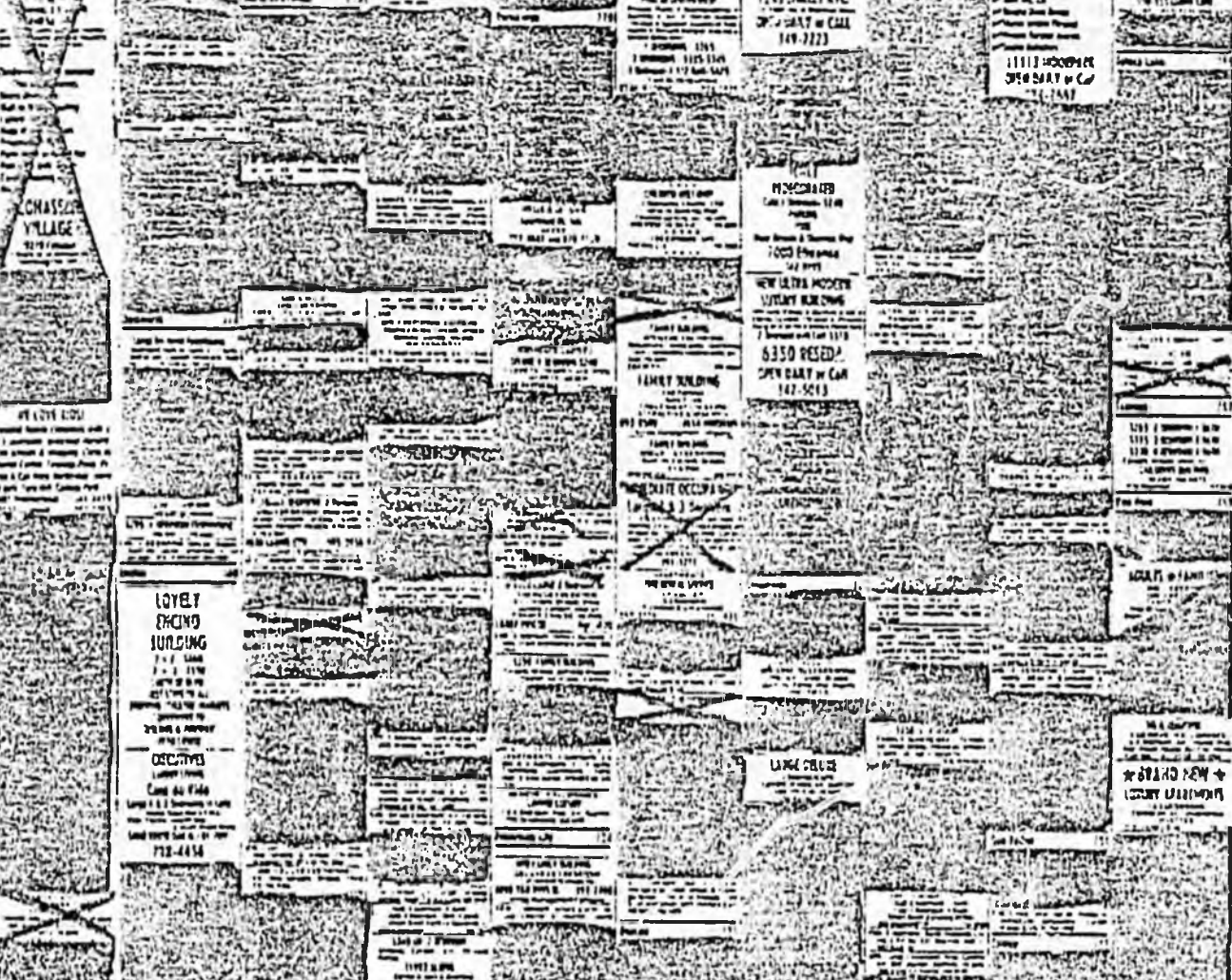
STATE CITATIONS

Alaska Statutes 1962, as amended. Title 18, Ch. 80, Articles 1-5.
California Fair Housing Act, Calif. Health and Safety Code, Sec. 35700 et seq.
Colorado 1963 Revised Statutes, Fair Housing Act of 1959, Ch. 69, Art. 7.
Connecticut General Statutes, Title 53, Ch. 939. Offenses Against the Person
Delaware Code Annotated, Ch. 46, Title 6, Equal Rights to Housing
D.C. Rules and Regulations, Title 34, Human Rights Law, Part I- Unlawful
Discriminatory Practices, Reg.(873-22)
Ga. L. 1975, Ch. 753, Rights of Blind and Visually Handicapped.
Hawaii Revised Statutes, Ch. 515, Discrimination in Real Property Transactions.
Idaho Code, Sec. 67-5901, Ch. 59, Commission on Human Rights.
Illinois State Constitution, Art. 1. Bill of Rights
Indiana Civil Rights Law, Ind. Code 22-9-1
Iowa Code, Ch. 601A. Civil Rights Act.
Kansas Statutes Annotated. Kansas Act Against Discrimination, Supp. Act of 1970,
Sec. 44.
Kentucky Revised Statutes (1968 Supp.) Ch. 344, Civil Rights
Maine revised Statutes, Title 5, Part 10, C. 317, Human Rights Act.
Maryland Annotated Code, Art. 49B. Commission on Human Relations
Mass. Annotated Laws. Laws Against Discrimination, Ch. 151 B.
Michigan Fair Housing Act of 1968, Ch. 2
Minn. State Act Against Discrimination, Minn. Statutes, 1968, Ch. 363, Dept.
of Human Rights
Missouri Fair Housing Law. L. 1972. S.B. 624.
Montana Freedom From Discrimination, Title 64 R.C.M. Ch. 3.
Nebraska Civil Rights Act of 1969, Open Housing, L.B. 718, 1969.
Nevada Revised Statutes, Nev. Fair Housing Law, Ch. 136.
New Hampshire Revised Statutes Annotated. Ch. 354A State Comm. on Human Rights
New Jersey Statutes Annotated. Law Against Discrimination Sec.10.
New Mexico Statutes Annotated. Sec. 4-33-1 et seq. Art. 33 Human Rights
New York Executive Law, Art. 15, Human Rights Law.
Ohio Revised Code Annotated, Title 41, Sec. 4112, et seq. Civil Rights Comm.
Oregon Revised Statutes, Enforcement of Civil Rights Sec. 659.
Penna. Statutes Annotated, Pa. Human Relations Act. Title 43, Ch. 17.
Rhode Island General Laws, R.I. Fair Housing Practices Act, Sec. 34
South Dakota Compiled Laws, Ch. 20-13.
Vermont Statutes Annotated. Title 13. Human Rights Law, Ch. 29. Discrimination.
Virginia Code, Va. Fair Housing Law. L. 1972, c. 591.
Washington Revised Code Sec. 49.60.010 et seq., Ch. 49.60 Law Against Discrimination.
West Virginia Code 1971, Ch. 5, Art. 11 Human Rights Commission
Wisconsin Statutes Annotated, Open Housing Law, Equal Rights Sec. 101.

The Extent and Effects of

Discrimination against Children in Rental Housing

A Study of Five California Cities



Dora J. Ashford
B.A. Thesis

The Fair Housing Project

December 1979

This report was prepared under a grant from the Rosenberg Foundation.

Cover by Vanann Allen
Maps by Maurice Herman

Cover: Ads are shaded to indicate those which state in print they will not accept children--full shading means no children of any age, diagonal shading indicates a portion of the complex excludes children, "X's" indicate age restrictions such as "infants only." Section was taken from a 1978 Los Angeles newspaper survey. Follow-up phone calls to the remaining ads (unshaded) revealed an additional 50% would not accept children.



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The Extent and Effects of

Discrimination against Children in Rental Housing

A Study of Five California Cities

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Perla Eston*

The Fair Housing Project

December 1979

PREFACE

In 1977, the following "action item" appeared in the California Statewide Housing Plan, a publication of the California Department of Housing and Community Development:

The Fair Housing Act and the Unruh Civil Rights Act should be amended so that they contain identical lists of the factors upon which discrimination is prohibited, and to add to those lists at least "families with children."

Statewide attention was turning to the plight of renters who are denied housing solely because they have children.

This interest prompted a state senator from Hollywood, David A. Roberti, to introduce three consecutive pieces of legislation designed to extend fair housing protections to renters with children.¹ Several local governments also passed ordinances to protect renters with children from discrimination.² However, during extensive public hearings on these laws it became apparent that there was little statewide or multi-city data available on the extent and effects of anti-child rental policies.

This report attempts to supply some of that information. We hope it will encourage others to examine the housing problems of families with children and to re-evaluate public and private policies that exclude children from shelter.

¹ SB-440, the last of these bills, was narrowly defeated in January 1980 in the California State Senate. On March 19, 1980, Sen. Roberti introduced SB-2024 which prohibits all arbitrary housing discrimination based on age. In addition to families with children, SB-2024 also protects other tenants from age discrimination, e.g., single young adults in their twenties, who may be stereotyped as "swinging singles."

² Ordinances have been adopted in San Francisco (1975), Berkeley (1975), Davis (1979), Santa Monica (1979), Los Angeles (1980), and the County of Santa Clara (1979).

7. Even when income is held constant, families with children are more often inadequately housed than childless renters. Among moderate and upper income renters, the rate of inadequate housing is twice as great for families with children as for those without children.

8. In all cities studied and for the state as a whole, approximately half of all renter families with children are inadequately housed. Between 81 and 98 percent (varies by city) of very low income renters with children are inadequately housed.

9. Holding number of persons per household constant, families with children are inadequately housed more often than other renters. In all cities studied and for the state as a whole, among two-person renter households, families with children are inadequately housed nearly twice as often as families without children.

10. When family size and income are simultaneously held constant for the state as a whole, two-person middle and upper income renter households with children are inadequately housed 10 times more often than their childless counterparts.

11. In all 5 cities, minority and especially female-headed families with children are renters significantly more often than non-minority or male-headed families with children, and thus are affected more severely by all renter housing problems. (It should be noted that although minorities are disproportionately affected by rental housing problems, the majority of inadequately housed renters with children are "white."¹)

12. Exclusion of renters with children from a major portion of the rental market is, in effect, excluding most minorities and women.

13. While minority renter households with children are inadequately housed to a significantly greater degree, minority renters without children do not face housing problems any more often than "white" renters of comparable income.

Similarly, female-headed renter households with children tend to

¹"White" as used here means other than Black or Hispanic. It may include other minority groups which represent smaller portions of the population.

SUMMARY

The findings of this study are as follows:

1. The percent of families with children who are renters ranged from 28 percent in San Jose, to 55 percent in San Francisco, in every case a significant percentage of all families. For the state as a whole, 30 percent of families with children are renters.

2. A sample survey of newspaper advertisements for available apartments in Los Angeles found that only 14 percent surveyed allowed children with no age restrictions, and 15 percent allowed only certain ages. Thus, 71 percent of the apartment units surveyed allowed no children of any age.

Surveys in Fresno, San Diego, and San Jose found that 53 percent, 65 percent, and 70 percent, respectively, of units surveyed would not allow children of any age.

In contrast, the same type of survey in San Francisco, which has an ordinance prohibiting "no-kids" rentals, found that only 12 percent of units surveyed banned all children.

3. In all cities except San Francisco, the child-exclusion rate was significant even among larger units. In the 4 cities where child discrimination is legal, only 17 to 32 percent of two-bedroom units, and between 24 and 45 percent of three-bedroom units accept children.

4. Exclusion of families with children is being perpetuated in newly constructed rentals. Seventy-four percent of new rental units surveyed in Los Angeles exclude children. By comparison, only 10 percent of new units surveyed in San Francisco exclude children.

5. In every city studied except San Francisco, median rents are higher for equivalent sized units that allow children as compared to those which exclude children.

6. Renter families with children are inadequately housed significantly more often than renters without children. This tendency is true in all of the cities studied as well as for the state as a whole (45 percent of renters with children are inadequately housed, compared to 32 percent of renters without children).

7. Even when income is held constant, families with children are more often inadequately housed than childless renters. Among moderate and upper income renters, the rate of inadequate housing is twice as great for families with children as for those without children.

8. In all cities studied and for the state as a whole, approximately half of all renter families with children are inadequately housed. Between 81 and 98 percent (varies by city) of very low income renters with children are inadequately housed.

9. Holding number of persons per household constant, families with children are inadequately housed more often than other renters. In all cities studied and for the state as a whole, among two-person renter households, families with children are inadequately housed nearly twice as often as families without children.

10. When family size and income are simultaneously held constant for the state as a whole, two-person middle and upper income renter households with children are inadequately housed 10 times more often than their childless counterparts.

11. In all 5 cities, minority and especially female-headed families with children are renters significantly more often than non-minority or male-headed families with children, and thus are affected more severely by all renter housing problems. (It should be noted that although minorities are disproportionately affected by rental housing problems, the majority of inadequately housed renters with children are "white."¹)

12. Exclusion of renters with children from a major portion of the rental market is, in effect, excluding most minorities and women.

13. While minority renter households with children are inadequately housed to a significantly greater degree, minority renters without children do not face housing problems any more often than "white" renters of comparable income.

Similarly, female-headed renter households with children tend to

¹"White" as used here means other than Black or Hispanic. It may include other minority groups which represent smaller portions of the population.

be ill-housed to a greater extent than all other renters with children, while female-headed renter households without children have a level of housing problems identical to other childless renters.

14. Renters with children are concentrated in a number of neighborhoods in each city. These concentrations correlate with concentrations of minorities and women, demonstrating that "no-children" housing tends to reinforce, if not create, segregated living patterns by age, race, and sex.

15. Since families with children make up less than a third of the renter household population, a non-discriminatory housing market would mean that in a representative building, childless renters would outnumber renters with children by at least 2 to 1, thus eliminating the undesirably high concentrations of children revealed by this study.

16. With respect to landlord concerns about decreased property values, the presence or absence of children is not a factor in determining a building's market value.

17. No empirical evidence was found to show that operating and maintenance costs are higher for buildings that allow children.

18. The presence of children in rental buildings does not affect liability or property insurance rates.

19. Building code and safety standards are identical for apartment buildings with and without children. Swimming pool fencing ordinances apply to all buildings whether or not children are in residence.

ACKNOWLEDGEMENTS

We wish to thank the Rosenberg Foundation for their concern for the welfare of children, and the following hardworking and persistent persons for assisting the project:

- Jim Lowery and Ruth Yannatta Goldway of the Center for New Corporate Priorities, for advice and assistance on funding;
- Melanie Lewis for indispensable help at every stage of the project;
- Suzanne Burra, Carole Oligario, Chester Covington, and Michael Fitzgerald for office help and survey work;
- Volunteer surveyors in San Diego (Laura Lent, Tom Kozden, Melissa Birch, Barbara Powell, Therese Cauchon, Walter Rosenberg, Alice M. Flores, Kathy Pode, Kathy Perlis, Caryn Johnson, Rebecca Boyer, Sheryl Cook); Los Angeles (Mickey Rosado, Lorraine Farrell, Gloria Kalesh, Rena and Perry Horowitz, Lois Surnow, Sylvia Montoya); Fresno (Ute Rauscher, Barbara Belmonte, Kay Bryan, Mary Hall, Vera Zavala, Kathy Chastain, Tom Taylor); San Jose (Sheila Torres W., Angie Carrillo, Nancy Robertson, Dan Basora); and San Francisco (Mark McBride, Linda Walsh, Benilde Sarrico, Andrew Bundy);
- Carl Elan for data analysis, and Phil Rush for survey work.

And finally, thanks to Anna, Fred, Ian, Alisa, and Skip for their patience.

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* Source:

1970 U. S. Census of Housing and Population
Bureau of the Census/HUD Annual Housing Surveys (1975, 1977, 1978)
1979 Housing Assistance Plans for the Cities of Fresno, Los Angeles,
San Diego, San Francisco, and San Jose
1979 California Statewide Housing Plan

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"Children's issues are not 'kiddie' issues--they are issues of social justice and the wider social welfare of the nation."

--Kenneth Keniston

INTRODUCTION

This report presents the results of a 1979 study on the extent and effects of discrimination against families with children in rental housing in California. Five cities were selected for study: Fresno, Los Angeles, San Diego, San Francisco and San Jose.¹ These cities represent all areas of the state and together comprise more than 30 percent of the state's population. In addition, data for the state as a whole were extensively analyzed.

The data presented are based on analysis of U.S. census materials, local "mid-decade" censuses, local housing surveys and plans, and original survey research.

¹ At the time of the study, San Francisco was the only city of these 5 that prohibited housing discrimination against families with children. Los Angeles passed a similar fair housing law in 1980.

Originally this project covered 6 cities, but Redding was dropped because census and housing survey information necessary to develop the tabulations shown in the report are not available for cities of that size outside Standard Metropolitan Statistical Areas (SMSA's).

THE HOUSING SHORTAGE FOR RENTERS WITH CHILDREN

Several factors have contributed to the housing crisis facing California renters with children. Among these are: 1) low vacancy rates; 2) high cost of home ownership; 3) exclusion of families from existing rentals; and 4) exclusion of families from newly-constructed rentals.

Low Vacancy Rates

A healthy rental vacancy rate is considered to be between 5 and 6 percent. Such a rate is high enough to allow people opportunities to move and to allow for the absorption of population growth and new household formation, but is low enough to allow owners of rental property to meet their costs.

Table 1 shows vacancy rates for the State of California and the 5 target cities. The state overall has an extremely low vacancy rate, less than half the "healthy" 5 percent. The low vacancy situation in rentals has been exacerbated by the low level of new construction of rental units and by condominium conversions, which reduce the available rental stock.

In such low vacancy situations renters must compete for available units, with the result that "less desirable" tenants, such as families with children, are excluded from major portions of the market. This exclusion cuts the true vacancy rate for the excluded class to a fraction of the overall vacancy rate. In Los Angeles, for example, where the overall renter vacancy rate is 2.6%, the effective vacancy rate for families with children is less than eight-tenths of one percent.

In San Jose, where the renter vacancy rate is at a healthy level (5.4%), the effective vacancy rate for families with children is only 1.6%.

High Cost of Homeownership

An ever-increasing percentage of families with children in California are renters. To a large degree this shift toward renting is a result of the high cost of homeownership.

Table 1

VACANCY RATES

	<u>Overall</u>	<u>Owner</u>	<u>Renter</u>
State of California	3.2%	N.A.	N.A.
City of Fresno	1.6%	1.3%	2.0%
City of Los Angeles	2.5%	2.3%	2.6%
City of San Diego	3.9%	4.1%	3.7%
City of San Francisco	2.4%	0.4%	3.4%
City of San Jose	3.5%	2.6%	5.4%

Source: 1979 Housing Assistance Plans for the five cities
1979 California Statewide Housing Plan

According to the California Department of Housing and Community Development, in 1979 the median sales price of a single-family home in California was between \$90,000 and \$100,000. Few families can afford the traditional option of buying a home in which to raise a family because although the median value of a home rose by 220 percent in the past 9 years, the median income of a household rose by only 98 percent during the same period.

In another example, the SCAG¹ Regional Housing Element found that while a middle-income family (\$10,000/year) in 1970 could afford to buy about half the homes in the state, in 1977 the equivalent-income family (\$15,000/year) could afford less than 15 percent of those homes.

Exclusion of Families with Children from Existing Rental Units

Data Sources and Methods - To document the problem of exclusion of families with children, a survey of 5 California cities was used. The survey was conducted on two dates, approximately one month apart, in each city. Using rental listings in the major newspapers in each city, surveyors called the available rentals as if they were seeking to rent the units and asked whether children were allowed. The results were tallied by rent levels, by number of bedrooms, by whether the apartment was furnished or unfurnished, and by number of units in the building. A copy of the survey instruments are included in Appendix A. The results were used to determine child-exclusion rates and types of age restrictions.

In addition to this survey, an earlier survey of 10,000 Los Angeles rentals was used to compare rents on apartments which allow children to those which prohibit children.

Newspaper surveys have been used by a variety of agencies to determine rental rates, costs and availability. The Southern California Association of Governments, U.S. Department of Housing and Urban Development, public housing agencies and city planning departments are among the groups who have found newspaper rental listings to be an excellent source of housing market data. Furthermore, not only are newspaper advertisements

¹ Southern California Association of Governments

the most frequently used information source for active searchers, they also prove to be the most effective means for most who obtain housing.¹

Findings - The survey conducted for this study found that children are excluded from the majority of rental units in every city studied, except San Francisco where "adults only" rentals are prohibited by local ordinance:

	<u>Accept Children</u>	<u>No Children</u>	<u>Age Restrictions</u>
Fresno	24%	53%	23%
Los Angeles	14%	71%	15%
San Diego	23%	65%	13%
San Francisco	86%	12%	2%
San Jose	22%	70%	8%

Thus, in all of the cities where exclusion of children is allowed, less than one-fourth of all rentals allow children of any age. Even including buildings with age restrictions, less than one-half of the units surveyed allow children.

The problem is most severe in San Jose, San Diego, and Los Angeles, where 70, 65, and 71 percent, respectively, of rentals allow no children of any age.

In contrast, the same type of survey in San Francisco, where local ordinance prohibits "no-kids" rentals, found that only about 12 percent of rentals surveyed banned all children, and only 2 percent placed age restrictions on tenant children.

The San Diego survey results are matched almost perfectly by a study performed by the San Diego Apartment Owners Association which found that only 34 percent of San Diego City rentals allow children.

¹ Kevin F. McCarthy, Housing Search and Mobility, The Rand Corporation, R-2451-HUD, September 1979. (Note: The Rand study suggests that illegal racial discrimination may cause some low-income searchers in racially mixed areas to depend more on friends and relatives as information sources rather than on newspapers. That theory, if true, would only apply to one survey--San Francisco's--because discrimination against children is neither illegal nor covert in the other 4 cities studied.)

Table 2 shows the same survey results tabulated by number of bedrooms in the unit. The exclusion rate remains high even in the units which by any standard should be large enough to accommodate families with children. The vast majority (about 75%) of renter families with children have only one or two children, and would therefore need a two-bedroom or smaller unit. Yet only about one-fourth of the two-bedroom units surveyed accept children without restrictions. In San Jose and Los Angeles over 70 percent of the two-bedroom rentals prohibit children of any age.

Even among three or more bedroom units, which should accommodate families, the majority of available rentals in every city studied, except San Francisco, either accepted no children or imposed age restrictions. In San Jose, Fresno, and Los Angeles, only 38, 35, and 24 percent, respectively, of three-bedroom rentals allow children.

The argument is often made that many buildings must exclude children because the available units are not appropriate for family use. The results of the survey indicate that, while the larger rentals do allow children somewhat more often than the smaller units, the exclusion rate is high even among rentals which would be considered "appropriate" for family tenancy. In this regard it is also interesting to note that in 3 of the 5 cities surveyed efficiency (or zero-bedroom) units are more likely to be available to families with children than are one-bedroom units, a situation which clearly does not support the "appropriateness" argument.

Exclusion of Families from Newly-Constructed Rentals

The argument is often made that the housing problems of families with children could be solved by simply building more rental units. While more rental construction is clearly a partial solution in that it eases pressure on the rental market, it does not appear to be the answer, or even a major component of the answer to the problem.

A survey was conducted of newly completed rentals in Los Angeles City, using building permits issued in 1977 to insure that the units involved had been completed and were occupied at the time of the survey in September 1979.

Table 2

ACCEPTANCE OF CHILDREN BY NUMBER OF BEDROOMS

No. of Bedrooms	Accept Children		No Children		Age Restricted		Total	
	#	%	#	%	#	%	#	%
<u>Fresno</u>								
0	1	7.7%	12	92.3%	0	0	13	100.0%
1	18	9.9%	133	73.5%	30	16.6%	181	100.0%
2	99	32.4%	125	40.8%	82	26.8%	306	100.0%
3+	6	35.3%	6	35.3%	5	29.4%	17	100.0%
Total	124	24.0%	276	53.3%	117	22.6%	517	100.0%
<u>Los Angeles</u>								
0	6	12.2%	38	77.6%	5	10.2%	49	100.0%
1	34	9.0%	283	74.7%	62	16.4%	379	100.0%
2	64	17.4%	264	71.9%	39	10.6%	367	100.0%
3+	26	24.3%	54	50.5%	27	25.2%	107	100.0%
Total	130	14.4%	639	70.8%	133	14.7%	902	100.0%
<u>San Diego</u>								
0	18	20.5%	63	71.6%	7	8.0%	88	100.0%
1	76	17.0%	306	68.6%	64	14.3%	446	100.0%
2	90	27.9%	198	61.3%	35	10.8%	323	100.0%
3+	19	45.2%	17	40.5%	6	14.3%	42	100.0%
Total	203	22.6%	584	65.0%	112	12.5%	899	100.0%
<u>San Francisco</u>								
0	72	90.0%	8	10.0%	0	0	80	100.0%
1	145	78.8%	33	17.9%	6	3.3%	184	100.0%
2	110	92.4%	9	7.6%	0	0	119	100.0%
3+	41	35.3%	0	0	2	4.7%	43	100.0%
Total	368	86.4%	50	11.7%	8	1.9%	426	100.0%
<u>San Jose</u>								
0	5	9.4%	47	88.7%	1	1.9%	53	100.0%
1	17	18.1%	72	76.6%	5	5.3%	94	100.0%
2	37	25.2%	103	70.1%	7	4.8%	147	100.0%
3+	12	37.5%	6	18.8%	14	43.8%	32	100.0%
Total	71	21.8%	228	69.9%	27	8.3%	326	100.0%

Source: Fair Housing Project Survey, 1979

A total of 3,148 units were surveyed, representing a sample of one-third of the rental building permits issued by Los Angeles in 1977. They include permits issued from all district offices. The findings are as follows:

Total Units Surveyed	3,148
Number converted to condominium	354
Condominiums allowing children	79 (22%)
Adults-only condominiums	275 (78%)
Number available for rent	2,794
Rentals allowing children	728 (26%)
Adults-only rentals	2,066 (74%)

Thus only about one-fourth of the new rental units in Los Angeles are available to families with children. The exclusion of families with children in the rental market is being perpetuated in new construction. New units are therefore not alleviating the problems faced by renters with children in Los Angeles.

By contrast, in San Francisco a study of 493 units revealed that only 10 percent of new units prohibited children. Also, none of the condominium conversions in San Francisco excluded children, as compared to 78 percent in Los Angeles. The findings were:

Total Units Surveyed	493
Number converted to condominiums	147
Condominiums allowing children	147 (100%)
Adults-only condominiums	0
Number available for rent	346
Rentals allowing children	311 (90%)
Adults-only rentals	35 (10%)

Clearly, San Francisco's ban on rental discrimination against children has had a positive effect on the availability of new rental units to families. A secondary effect appears to be the carry-over of nondiscriminatory policies from apartments to condominiums.

ECONOMIC IMPACT OF DISCRIMINATION
AGAINST RENTERS WITH CHILDREN

Renters with children, as a class, are in the curious position of paying the price of their own exclusion. As explained by economist Claude Elias, "...the fact that families with children are arbitrarily excluded from certain units represents a limitation to their choice of units, and so to that extent, they pay the cost of that arbitrary restriction."¹

Higher Rents

The same survey discussed earlier found that rentals which allow children tend to command a higher rent than those which exclude children.

Table 3 shows the survey results by rent category. With the exception of San Francisco where an ordinance prohibits discrimination against families with children in rental housing, the most expensive units (rents of \$450 per month and over) are most likely to rent to families with children.

Table 4 shows the median rent by bedroom size for rentals which allow, exclude, or restrict children. No clear pattern is evident for units that restrict children. However, comparing units which accept children to those which absolutely exclude children, in every case except San Francisco, median rents are higher for equivalent sized units that allow children. Rents are generally between \$20 and \$30 more per month higher for equivalent units that allow children, with the smaller difference being in one-bedroom rentals in Fresno, where buildings which allow children had the same median rents as "no-children" buildings. The biggest difference is in three-or-more bedroom units in Los Angeles where rentals that allow children have median rents \$97 higher than similar sized units which exclude children.

¹ Testimony of Dr. Claude Elias, Jr., President, Real Estate Research Council of Southern California, in the case of Marina Pt. Ltd. vs. Wolfson, Culver City Municipal Court, June 16, 1979.

Table 3
ACCEPTANCE OF CHILDREN BY RENT CATEGORY

<u>Rent Category</u>	<u>Accept Children</u>		<u>No Children</u>		<u>Age Restricted</u>		<u>Total</u>	
	#	%	#	%	#	%	#	%
<u>Fresno</u>								
0 - 149	5	12.8%	33	84.6%	1	2.6%	39	100%
150 - 249	96	25.7%	191	51.2%	86	23.0%	373	100%
250 - 349	17	20.5%	44	53.0%	22	26.5%	83	100%
350 - 449	6	27.2%	8	36.4%	8	36.4%	22	100%
450+	0	-	0	-	0	-	0	-
Total	124	24.0%	276	53.3%	117	22.6%	517	100%
<u>Los Angeles</u>								
0 - 149	3	60.0%	2	40.0%	0	-	5	100%
150 - 249	16	13.2%	87	71.9%	18	14.3%	121	100%
250 - 349	32	10.2%	246	78.1%	37	11.7%	315	100%
350 - 449	42	14.6%	192	66.9%	53	18.5%	287	100%
450+	37	21.3%	112	64.4%	25	14.4%	174	100%
Total	130	14.4%	639	70.8%	133	14.7%	902	100%
<u>San Diego</u>								
0 - 149	1	9.1%	10	90.9%	0	-	11	100%
150 - 249	122	23.0%	318	59.9%	91	17.1%	531	100%
250 - 349	64	21.3%	217	72.1%	20	6.6%	301	100%
350 - 449	12	27.9%	30	69.8%	1	2.3%	43	100%
450+	4	30.8%	9	69.2%	0	-	13	100%
Total	203	22.6%	584	65.0%	112	12.5%	899	100%
<u>San Francisco</u>								
0 - 149	10	100.0%	0	-	0	-	10	100%
150 - 249	52	83.9%	8	12.9%	2	3.2%	62	100%
250 - 349	96	94.1%	6	5.9%	0	-	102	100%
350 - 449	81	91.0%	8	9.0%	0	-	89	100%
450+	129	79.1%	28	17.2%	6	3.7%	163	100%
Total	368	86.4%	50	11.7%	8	1.9%	426	100%
<u>San Jose</u>								
0 - 149	0	-	1	100.0%	0	-	1	100%
150 - 249	19	19.4%	74	75.5%	5	5.1%	98	100%
250 - 349	40	23.8%	120	71.4%	8	4.8%	168	100%
350 - 449	9	17.3%	30	57.7%	13	25.0%	52	100%
450+	3	42.9%	3	42.9%	1	14.3%	7	100%
Total	71	21.8%	228	69.9%	27	8.3%	326	100%

Source: Fair Housing Project Survey, 1979

Table 4

MEDIAN RENTS BY NUMBER OF BEDROOMS*

<u>No. of Bedrooms</u>	<u>Accept Children</u>	<u>No Children</u>	<u>Age Restricted</u>
Fresno			
0	N.A.	\$125	N.A.
1	\$185	\$185	\$187
2	\$218	\$226	\$207
3+	\$337	\$275	\$200
Overall Median	\$214	\$209	\$207
Los Angeles			
0	N.A.	\$404	\$313
1	\$338	\$328	\$297
2	\$366	\$347	\$411
3+	\$515	\$418	\$438
Overall Median	\$380	\$348	\$371
San Diego			
0	\$232	\$183	\$217
1	\$233	\$222	\$221
2	\$273	\$248	\$239
3+	\$325	\$316	\$316
Overall Median	\$246	\$239	\$228
San Francisco			
0	\$218	\$263	N.A.
1	\$339	\$463	N.A.
2	\$455	\$525	N.A.
3+	\$514	N.A.	N.A.
Overall Median	\$381	\$460	N.A.
San Jose			
0	\$204	\$225	N.A.
1	\$267	\$246	\$238
2	\$309	\$293	\$292
3+	\$375	\$366	\$382
Overall Median	\$296	\$276	\$352

*unfurnished units

Source: Fair Housing Project Survey, 1979

It is noteworthy that in San Francisco, where over 85 percent of all units surveyed allow children, rents tended to be higher for buildings that prohibit children, placing the cost of illegal discrimination on those practicing discrimination rather than on the excluded class.

The findings of this survey are further supported by earlier surveys of more than 10,000 units in Los Angeles. Table 5 compares average rents for restricted vs. not-restricted buildings from that survey. Again, particularly among the larger bedroom sites, rentals which allowed children were significantly more expensive than those which did not.

Inadequate Housing Conditions

Having established that there is widespread discrimination against families with children in rental housing and that the restricted market is forcing families to pay higher rents, the study sought to examine additional effects of this discrimination. For example, if families with children could afford to pay more for housing or if the available stock, although limited, was sufficient to accommodate the need for family rental housing, then the discrimination problem could be said to have insignificant economic impacts. Consequently, the study compared inadequate housing conditions for renter families with children to those without children using federal and California state definitions of inadequate housing:

- overpaying: paying more than 25% of gross income for rent
- overcrowding: more than 1.01 persons per room
- substandard: living in a unit which lacks one or more essential systems (plumbing, heating, etc.) or has a major defect or combination of defects which make the unit unsafe or unsanitary

The study found consistently that renters with children are inadequately housed more often than those without children.

Data Sources & Methods - The study of the effects of discrimination is based on analysis using the following data sources:

- U.S. Census of Housing and Population, special cross-tabulations
- local "mid-decade" censuses and housing surveys to update census materials in each of the 5 cities

Table 5

**"HOMES UNLIMITED" SURVEY
(LOS ANGELES)**

	1976 1746 Listings			1977 2689 Listings			1978 6059 Listings			Total 10,494 Listings		
	No.	%	Avg. Rent	No.	%	Avg. Rent	No.	%	Avg. Rent	No.	%	Avg. Rent
"ACCEPT CHILDREN"	440	25.2%	\$390	985	36.6%	\$468	1817	29.9%	\$471	3242	30.9%	\$460
Single	7		204	25		181	59		201	91		196
1 Bedroom	73		223	93		257	182		292	348		268
2 "	223		355	52		463	960		454	1703		445
3 "	119		500	?		561	560		559	1006		553
4 "	13		690	.		635	53		753	86		716
5+ "	5		775	.		-	3		875	8		813
"NO CHILDREN"	678	38.8%	\$252*	1077	40.0%	\$321	2529	41.7%	\$331	4224	40.8%	\$316
Single*	170		157	234		193	520		205	924		193
1 Bedroom	242		206	439		282	1077		301	1758		283
2 "	245		350	372		431	864		434	1481		419
3 "	18		406	31		561	66		472	115		486
4 "	3		423	-		-	2		380	5		405
5+ "	-		-	-		-	-		-	-		-
"WILL CONSIDER"***	409	23.4%	\$375	495	18.4%	\$395	1271	20.9%	\$425	2175	20.7%	\$418
Single	5		177	17		182	51		200	73		194
1 Bedroom	90		229	68		288	243		300	421		283
2 "	212		371	295		433	695		435	1202		423
3 "	100		524	108		562	251		560	459		552
4 "	2		425	7		639	11		758	20		683
5+ "	-		-	-		-	-		-	-		-

* The average rents shown on the Table includes all sizes of apartments; but because some "sing'es" are not suitable for families, rents have been refigured for averages without singles: 1976 - \$284; 1977 - \$357; 1978 - \$363; Total - \$349. Even not counting singles, average rents for apartments refusing children are significantly lower than those accepting.

** A small number of listings (5 - 7%) indicate that they will accept or will consider children on an age-restricted basis, usually infants or older teenagers.

SOURCE: Brief of Amicus Curiae Fair Housing for Children Coalition, Wolfson v. Marina Point, Ltd., Los Angeles County Superior Court, September 18, 1978.

- The Census/HUD Annual Housing Survey for San Francisco, San Diego, and Los Angeles
- The California Statewide Housing Plan and other materials supplied by the California Department of Housing and Community Development (HCD)

Findings - For the State of California as a whole, 45% of renters with children are inadequately housed, as compared to 32% of renters without children.¹

A similar comparison held true for each of the five cities studied. To summarize:

<u>City</u>	<u>Percent of Renters Inadequately Housed</u>	
	<u>With Children</u>	<u>Without Children</u>
State of California	45%	32%
Fresno	46%	35%
Los Angeles	49%	35%
San Diego	48%	42%
San Francisco ²	50%	38%
San Jose	51%	41%

Holding income constant, the results are even more striking. Table 6 compares inadequate housing by income group. Low income is here defined as income below \$15,000 per year (or about 80% of the statewide median); moderate income is \$15,000 - \$22,499 (or 80 - 120% of the statewide median); and upper income is defined as \$22,500 and up. These are standard State of California definitions.

¹ Note that in this comparison and all subsequent comparisons of inadequate conditions the data presented are for households with two or more persons. Since single-person households do not have children, they do not provide a valid comparison to households with children, and therefore were excluded from the analysis.

² Please note that statistics on inadequate housing for San Francisco are not current enough to reflect any changes caused by the local anti-discrimination ordinance, and in any case the ordinance has not been in effect long enough to affect the overall living patterns in that city as reflected in this analysis.

Table 6

PERCENT OF INADEQUATELY-HOUSED RENTERS BY INCOME LEVEL
(RENTERS WITH CHILDREN COMPARED TO RENTERS WITHOUT CHILDREN)

	<u>Low Income</u>	<u>Moderate Income</u>	<u>Upper Income</u>
<u>State of California</u>			
With Children	63%	13%	12%
Without Children	53%	6%	5%
<u>City of Fresno</u>			
With Children	56%	12%	6%
Without Children	47%	3%	*
<u>City of Los Angeles</u>			
With Children	65%	22%	14%
Without Children	56%	7%	4%
<u>City of San Diego</u>			
With Children	62%	16%	8%
Without Children	49%	5%	2%
<u>City of San Francisco</u>			
With Children	68%	21%	13%
Without Children	64%	11%	5%
<u>City of San Jose</u>			
With Children	71%	20%	12%
Without Children	65%	6%	2%

* Less than 1%.

As Table 6 shows, the majority of low income renters in California face some housing inadequacies. However, it is consistently found that all income renters with children are more often inadequately housed than those without children.

Among moderate and upper income renters who should be able to function adequately in the housing market, a substantial percentage of families with children continue to be inadequately housed, while less than half as great a percentage of renters without children face these problems. In three of the 5 cities, Los Angeles, San Jose and San Francisco, more than 20 percent of moderate income renters with children are inadequately housed. Even for upper incomes, for the state as a whole and for three of the 5 cities surveyed, more than 12 percent are inadequately housed. This compares to between 2 and 5 percent of renters without children.

It is evident, therefore, that insufficient rentals are available to families with children at all incomes, and that even those families who, by virtue of their income, could be expected to be able to obtain decent housing at affordable rents, are forced to overpay or overcrowd in order to be housed.

Table 7 details the findings by income group. It shows that holding income constant, families with children are consistently more often inadequately housed than renters without children.

Inadequate housing conditions were also compared holding family size constant in order to investigate whether renters with children were overpaying and overcrowding more often than childless renters because of the greater number of people in the household. Table 8, therefore, shows inadequate housing conditions by number of persons per household. Consistently, renters with children are less well-housed than other renters. For the state as a whole, among two-person households, renter families with children are inadequately housed nearly twice as often as those without children, as shown by Table 8a:

Table 7

INADEQUATE HOUSING CONDITIONS FOR TWO OR MORE PERSON HOUSEHOLDS BY INCOME
(RENTERS WITH CHILDREN COMPARED TO RENTERS WITHOUT CHILDREN)

	Renters With Children			Renters Without Children		
	Total (In Thousands)	Inadequately Housed (In Thousands)	Percent Inadequately Housed	Total (In Thousands)	Inadequately Housed (In Thousands)	Percent Inadequately Housed
<u>State of California</u>						
Income						
\$0-\$ 7,499	292.4	284.0	97%	282.8	232.6	82%
\$ 7,500-\$14,999	431.8	173.4	40%	394.0	127.8	32%
\$ 15,000-\$22,499	270.7	35.9	13%	300.5	16.6	6%
\$ 22,500-\$34,999	98.6	12.3	12%	158.1	9.2	6%
\$ 35,000 and up	29.1	2.9	10%	63.6	2.6	4%
Total	1122.0	508.5	45%	1199.0	388.8	32%
<u>City of Fresno</u>						
Income						
\$0-\$ 7,499	5.7	4.6	81%	4.9	3.8	78%
\$ 7,500-\$14,999	6.0	2.0	33%	5.8	1.2	21%
\$ 15,000-\$22,499	2.5	0.3	12%	2.6	0.1	3%
\$ 22,500-\$34,999	0.8	*	5%	0.8	*	1%
\$ 35,000 and up	0.4	*	7%	0.5	0.0	0%
Total	15.4	7.0	46%	14.6	5.1	35%
<u>City of Los Angeles</u>						
Income						
\$0-\$ 7,499	50.5	46.6	92%	47.4	41.2	87%
\$ 7,500-\$14,999	72.3	33.8	47%	65.1	21.4	33%
\$ 15,000-\$22,499	42.6	9.5	22%	46.0	3.4	7%
\$ 22,500-\$34,999	17.1	2.5	14%	18.9	0.8	4%
\$ 35,000 and up	10.2	1.2	12%	13.7	0.4	3%
Total	192.7	93.6	49%	191.1	67.2	35%
<u>City of San Diego</u>						
Income						
\$0-\$ 7,499	12.7	12.3	97%	13.2	12.4	94%
\$ 7,500-\$14,999	19.4	8.3	43%	25.0	10.0	40%
\$ 15,000-\$22,499	9.7	1.6	16%	11.0	0.6	5%
\$ 22,500-\$34,999	3.3	0.2	7%	3.8	0.1	3%
\$ 35,000 and up	1.8	0.1	7%	2.2	0.1	5%
Total	46.8	22.5	48%	55.2	23.2	42%
<u>City of San Francisco</u>						
Income						
\$0-\$ 7,499	10.8	10.5	96%	15.1	13.6	90%
\$ 7,500-\$14,999	16.1	9.3	57%	23.1	10.8	47%
\$ 15,000-\$22,499	12.2	2.7	22%	18.0	2.0	11%
\$ 22,500-\$34,999	5.6	0.9	15%	9.4	0.6	6%
\$ 35,000 and up	3.6	0.4	11%	6.0	0.1	2%
Total	48.3	23.9	50%	71.6	27.0	38%
<u>City of San Jose</u>						
Income						
\$0-\$ 7,499	6.5	6.4	98%	5.5	5.3	96%
\$ 7,500-\$14,999	11.4	6.7	59%	8.9	4.0	45%
\$ 15,000-\$22,499	8.0	1.6	20%	5.8	0.3	6%
\$ 22,500-\$34,999	2.7	0.4	14%	2.1	*	2%
\$ 35,000 and up	1.4	0.1	6%	1.0	*	2%
Total	29.9	15.2	51%	23.4	9.6	41%

* less than 0.1%

Table 8
PERCENT OF INADEQUATELY HOUSED RENTERS BY NUMBER OF PERSONS PER HOUSEHOLD
(RENTERS WITH CHILDREN COMPARED TO RENTERS WITHOUT CHILDREN)

Household Size	Renters With Children			Renters Without Children		
	Total Households (In 1000's)	Inadequately Housed (In 1000's)	Percent	Total Households (In 1000's)	Inadequately Housed (In 1000's)	Percent
<u>State of California</u>						
2 persons	88.5	57.1	65%	1009.1	338.8	34%
3-4 persons	664.2	248.7	37%	175.5	42.3	24%
5 or more persons	369.3	202.7	55%	14.4	7.7	54%
Total	1122.0	508.5	45%	1199.0	388.8	32%
<u>City of Fresno</u>						
2 persons	1.1	0.8	74%	11.7	4.5	39%
3-4 persons	7.9	3.1	39%	2.7	0.5	20%
5 or more persons	6.4	3.1	48%	0.2	0.1	46%
Total	15.4	7.0	46%	14.6	5.1	35%
<u>City of Los Angeles</u>						
2 persons	19.0	12.4	65%	165.2	57.3	35%
3-4 persons	114.7	45.4	40%	24.5	9.2	38%
5 or more persons	59.0	35.8	61%	1.4	0.7	51%
Total	192.7	93.6	49%	191.1	67.2	35%
<u>City of San Diego</u>						
2 persons	2.8	2.0	71%	32.5	13.2	41%
3-4 persons	20.8	9.1	44%	6.0	2.7	44%
5 or more persons	9.8	5.0	51%	0.9	0.5	50%
Total	33.4	16.1	48%	39.4	16.4	42%
<u>City of San Francisco</u>						
2 persons	4.2	3.2	77%	59.0	22.4	38%
3-4 persons	27.8	12.3	44%	11.7	4.1	35%
5 or more persons	16.3	8.5	53%	0.9	0.5	50%
Total	48.3	23.9	50%	71.6	27.0	38%
<u>City of San Jose</u>						
2 persons	1.7	1.3	73%	18.5	7.2	39%
3-4 persons	17.7	7.7	43%	4.3	2.1	48%
5 or more persons	10.5	6.3	60%	0.6	0.3	50%
Total	29.9	15.2	51%	23.4	9.6	41%

Note: Totals and percents may not compute exactly as shown due to rounding.

Table 8a
SUMMARY OF STATE PERCENTAGES FROM TABLE 8

<u>Persons per Household</u>	<u>Percent Inadequately Housed Renters</u>	
	<u>With Children</u>	<u>Without Children</u>
2	65	34
3-4	37	24
5+	<u>55</u>	<u>54</u>
Total	45	32

These results are consistent among the 5 cities studied. Clearly, therefore, the greater problem faced by families with children does not result from their larger size. In this regard it is also noteworthy that two-person renter families with children are ill-housed (65% statewide) more often than large (5+ person) families with children (55% inadequately housed statewide).

Finally, Table 9 holds both income and family size constant for renters with and without children. At every income and for all areas studied, renters with children are more often inadequately housed. Again, the most striking comparison is among middle and upper income households. For the state as a whole, Table 10 shows that of two-person households with incomes above \$15,000 per year, families who should, by income and family size standards, have available to them the majority of rental units, experience inadequate housing 10 times as often as the percentage of renters with no children.

With all other factors held constant, the renter with a child is, therefore, much more likely to overpay, overcrowd, or live in substandard conditions than the all-adult household.

Table 9

PERCENT OF INADEQUATELY HOUSED TWO-PERSON HOUSEHOLDS BY INCOME
(RENTERS WITH CHILDREN COMPARED TO RENTERS WITHOUT CHILDREN)

	<u>\$0</u> <u>to</u> <u>\$7,499</u>	<u>\$7,500</u> <u>to</u> <u>\$14,999</u>	<u>\$15,000</u> <u>to</u> <u>\$22,499</u>	<u>\$22,500</u> <u>to</u> <u>\$34,999</u>	<u>\$35,000</u> <u>or more</u>	<u>Total</u>
<u>State of California</u>						
Two-Person Renters						
With Children	95%	44%	33%	30%	17%	64%
Without Children	87%	36%	4%	3%	1%	34%
<u>City of Fresno</u>						
Two-Person Renters						
With Children	83%	34%	8%	0%	0%	65%
Without Children	78%	22%	1%	1%	0%	39%
<u>City of Los Angeles</u>						
Two-Person Renters						
With Children	89%	62%	18%	12%	2%	65%
Without Children	85%	30%	6%	3%	1%	35%
<u>City of San Diego</u>						
Two-Person Renters						
With Children	89%	50%	40%	13%	0%	71%
Without Children	86%	25%	2%	6%	2%	40%
<u>City of San Francisco</u>						
Two-Person Renters						
With Children	100%	50%	40%	12%	2%	77%
Without Children	90%	45%	9%	5%	0%	38%
<u>City of San Jose</u>						
Two-Person Renters						
With Children	100%	60%	8%	0%	0%	73%
Without Children	84%	46%	3%	*	0%	39%

*less than 1%

SOCIAL AND PSYCHOLOGICAL IMPACT

In addition to economic burdens, there are other negative effects associated with housing discrimination against children. Among these are psychological damage to children, de facto discrimination against a large percentage of women and minorities,¹ and segregation by age, race, and sex.

Effect on Children

"Since every human being depends upon his cumulative experiences with others for cues as to how he should view and value himself, children who are consistently rejected understandably begin to question and doubt whether they, their family, and their group really deserve no more respect from the larger society than they receive."

--Kenneth B. Clark, Dark Ghetto:
Dilemmas of Social Power, 1965

"The problems children face as public liabilities are related directly to the way our larger economic and political system operates. It is a system that is making life harder in our schools, our communities, and our families. It threatens not only our children's humanity, but the possibilities of their being able to live as citizens in a political democracy."

--Will Riggan, "Children as Social
Liabilities: Working Paper #9,"
Childhood and Government Project,
UC Berkeley, 1976

¹ California's Unruh Civil Rights Act and Rumford Fair Housing Act collectively protect renters from discrimination based on race, religion, national origin, ancestry, sex, marital status, and physical disability. The courts have extended these protections to unmarried couples, homosexuals, men with long hair, and persons of "unusual" political views. However, as now interpreted, it is perfectly legal under state law to refuse to rent to any person who has a child. This legal loophole is being challenged by a couple who were evicted for having a baby in an adults-only complex. Their case, *Wolfson v. Marina Point, Ltd.*, is on appeal before the California Supreme Court.

According to sociology researcher Dr. Susan Robbins, "It is clear from these and other psychological and sociological studies that discrimination against children can result in grave damage to the essential social structures upon which society depends--the family, the socialization of the young, and the integrated social structure as a whole."

Impact on Minority and Female-Headed Households

Black, Hispanic and female-headed families with children are renters more often than "white"¹ or male-headed families with children. Consequently, they are more deeply affected by any problems related to rental housing. Charts 1-3 show that, statewide, a major percentage of minority renters (41% for Blacks, 54% for Hispanics) and female-headed renter families (62%) have children.²

Table 10 compares minority and female-headed households to total and "white" households with children as to the percent who are renters. So, for example, in Fresno where 36% of all families with children are renters and only 30% of "white" families with children are renters, as many as 57% of Black, 47% of Hispanic, and 72% of female-headed families with children are renters. Thus, in Fresno, Blacks with children rent nearly twice as often as "whites," and female-headed households are renters twice as often as families with children overall.

In all 5 cities, a far greater percentage of minority and female-headed families with children are renters than is true of non-minority or male-headed families.

From this data alone it is apparent that exclusion of families with children also tends to exclude minorities and female-headed families.

¹ "White" as used here means other than Black or Hispanic. It may include other minority groups which represent smaller portions of the population.

² Although each chart includes all households which fit the category description, some households fall into more than one category, e.g., some Black renter households are also female-headed. Therefore, the categories cannot be added together to obtain a grand total.

CALIFORNIA RENTERS

FEMALE
TOTAL

FEMALE
WITH
CHILDREN

616,200

62%
384,800

Source: California Department of Housing & Community Development, July 1978

CALIFORNIA RENTERS

HISPANIC
TOTAL

HISPANIC
WITH
CHILDREN

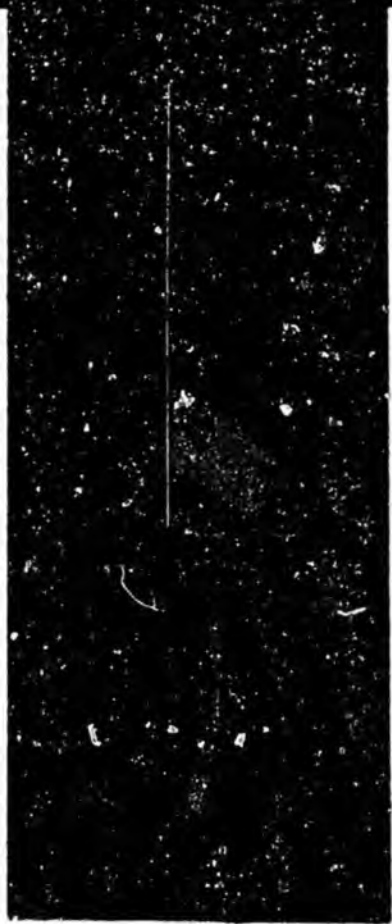
54%

517,000

278,000

CALIFORNIA RENTERS

BLACK
TOTAL



399,000

BLACK
WITH
CHILDREN



165,000

Source: California Department of Housing & Community Development, July 1978

Table 10

RENTERS WITH CHILDREN AS A PERCENT OF TOTAL HOUSEHOLDS WITH CHILDREN
BY RACIAL, ETHNIC AND FEMALE-HEADED HOUSEHOLDS

<u>City</u>	<u>Total Households With Children</u>	<u>Black Households With Children</u>	<u>Spanish Surname Households With Children</u>	<u>"White" Households With Children</u>	<u>Female-Headed Households With Children</u>
Fresno	36%	57%	47%	30%	72%
Los Angeles	49%	62%	69%	38%	73%
San Diego	41%	57%	50%	37%	65%
San Francisco	55%	65%	66%	46%	75%
San Jose	28%	17%	42%	24%	60%

Table 11 summarizes an analysis of inadequate housing conditions for minority and female-headed as compared to "white" families with children. The table shows that among all groups studied, renter families with children have worse housing than renters without children.

In addition, minority and female-headed households are consistently inadequately housed more often than "white" households with children, even holding income constant.

More importantly, while minority and female-headed renter families with children are inadequately housed to a significantly greater degree, minority renters without children do not appear to face housing problems any more often than "white" renters of similar income.

Thus, to the extent that discrimination against minorities and women exists in the California housing market, it appears to be directed at families with children. When racial and sex discrimination lead to inadequate living conditions, it appears that they are confined to families with children.

These findings further suggest that exclusion of renters with children from a major portion of the rental market is in effect excluding minorities and women. They certainly show a disproportionately large impact on minority and female-headed households even when income is taken into consideration.

Clustering/Segregation

To quote economist Claude Elias, "...the results of arbitrary exclusion will be (the) clustering (of) families with children and that would impose certain social problems, such as the need for additional schooling facilities, transportation patterns, differential traffic controls, more police protection, more recreational facilities--and these costs are borne by the general taxpayer, by society as a whole."¹ Dr. Elias concludes that clustering does not strike housing economists as an economic method for solving the housing allocation problem.

Renters with children do tend to become clustered as a result of their exclusion from the majority of the housing market. In California, families

¹ Elias, Ibid., June 20, 1979.

Table 11

PERCENT INADEQUATELY HOUSED MINORITY AND FEMALE-HEADED RENTERS
 COMPARED TO TOTAL "WHITE" RENTERS WITH AND WITHOUT CHILDREN BY INCOME

	<u>"White"* Renters</u>		<u>Black Renters</u>		<u>Hispanic Renters</u>		<u>Female-Headed Renters</u>	
	<u>Low Income</u>	<u>Middle + Income</u>	<u>Low Income</u>	<u>Middle + Income</u>	<u>Low Income</u>	<u>Middle + Income</u>	<u>Low Income</u>	<u>Middle + Income</u>
<u>State of California</u>								
With Children	77%	17%	99%	29%	95%	30%	98%	31%
Without Children	72%	9%	89%	17%	94%	16%	95%	15%
<u>City of Fresno</u>								
With Children	69%	11%	73%	33%	75%	33%	97%	38%
Without Children	67%	4%	69%	4%	61%	4%	61%	5%
<u>City of Los Angeles</u>								
With Children	68%	20%	76%	25%	74%	32%	95%	38%
Without Children	61%	10%	66%	5%	61%	13%	93%	20%
<u>City of San Diego</u>								
With Children	76%	15%	72%	21%	74%	31%	97%	51%
Without Children	74%	7%	73%	4%	70%	10%	96%	26%
<u>City of San Francisco</u>								
With Children	86%	20%	75%	26%	83%	29%	97%	63%
Without Children	79%	14%	74%	11%	80%	12%	97%	6%
<u>City of San Jose</u>								
With Children	88%	20%	89%	35%	83%	34%	98%	59%
Without Children	82%	9%	82%	13%	75%	10%	97%	7%

* "White" as used here means other than Black or Hispanic. It may include other minority groups which represent smaller portions of the population.

with children comprise just over 30 percent of all renters. The availability surveys of rental ads done in 1979 by the Fair Housing Project indicate that between 26 and 35 percent of all rental buildings allow children. Consequently, virtually all renters with children must be concentrated in those buildings to the exclusion of families without children. Such buildings then become "children's ghettos."

Further, by mapping renter families with children by census tract, it was found that they are concentrated in certain areas of each of the cities studied. Maps 1-5 show these clusters. (See Appendix B)

The study also found a correlation between "children clustering" and "racial clustering." Each of the census tracts identified as having a concentration of renters with children was examined for racial composition and proportion of female-headed households. It was found that in the majority of census tracts with high concentrations of renters with children, there were also more minority families and more female-headed households than the citywide norm.

Table 12 summarizes these results. In every city studied there was a correlation between renters with children and minority households. In all but Fresno there was a correlation with female-headed households. The correlation between the isolation of children and minorities was strongest in Los Angeles (78%). The correlation between the isolation of children and female-headed households was strongest in San Jose (93%) with a very strong correlation (83%) also appearing in San Diego.

These correlations occur partly because minority and female-headed households with children tend to be renters more often than "white" male-headed families with children. However, the clustering does demonstrate that "no-children" housing tends to reinforce, if not create, segregated living patterns by age, race and sex.

Not surprisingly, a recent study found that discrimination against children intensifies racial imbalances in schools. "Both the exclusion of middle class white renters from the city and the exclusion of poor minority renters from the suburban housing markets intensify the problem of school segregation."¹ "Jurisdictions which permit discrimination

¹ Dr. Gary Orfield, "Desegregation Principles for Los Angeles: A Report to the Superior Court of the State of California for the County of Los Angeles," November 1, 1978, p. 79.

Table 12

CONCENTRATIONS OF RENTERS WITH CHILDREN CORRELATED WITH
CONCENTRATIONS OF MINORITIES AND FEMALE-HEADED HOUSEHOLDS

<u>City</u>	<u>Census Tracts With Concentrations of Renters With Children</u>				
	<u>Total Number</u>	<u>Tracts with Greater than Citywide Percentage of Black/Hispanic Households</u>		<u>Tracts with Greater than Citywide Percentage of Female-Headed Households</u>	
		<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
Fresno	5	3	60%	2	40%
Los Angeles	69	54	78%	52	75%
San Diego	18	11	61%	15	83%
San Francisco	8	5	63%	6	75%
San Jose	15	9	60%	14	93%

against children in the rental or sale of housing should be asked to examine its impact on school segregation and the future enrollment in their local public schools. This discrimination almost certainly produces 'white flight' of families with school children from the city and some suburbs."¹

Finally, the adverse effects of age segregation are not limited to children and their families. A recent study of housing preferences of the elderly strongly recommended that "...alternatives should be provided that allow older persons to live in age-integrated environments if they so desire. The vast majority of the community elderly stated a preference for age-integrated surroundings, if given a choice."² A related manual on house-sharing explained the benefits of age-integration: "It appears that intergenerational contact, providing it is under favorable conditions, can promote more positive attitudes toward the young and greater willingness to share with them."³

¹ Orfield, p. 81.

² Fernando Torres-Gil, et al., Housing: The Diverse Aged, Project MASP, Andrus Gerontology Center, University of Southern California.

³ "Intergenerational House-Sharing: A Feasibility Study and Resource Manual," Project MASP, Andrus Gerontology Center, University of Southern California.

LANDLORD CONCERNS

Concern is often expressed that the presence of children in apartment buildings may lower property values, increase operating costs, and require owners to make substantial "safety" improvements.

Research under this project found no empirical data to support these claims. In any case, the results of the survey of available rentals (see Tables 3-5) show that even if it is true that it is more expensive to rent to families with children, it is also true that rentals which allow children command higher rents.

Property Values

According to the California State Savings and Loan Commissioner and two major savings and loan institutions,¹ there is no known policy in the industry that would result in underappraisal of property because of the presence of children. In fact, the Society of Real Estate Appraisers (SREA) indicates that member appraisers do not even record whether or not buildings accept children when determining the value of a building--it simply is not an important factor.

Maintenance Costs

The following agencies were contacted in an effort to determine whether or not maintenance costs were higher in buildings which accept children as compared to those that were adults-only: Real Estate Research Council of Southern California, U.S. Department of Housing & Urban Development/Los Angeles Area Office, and the Society of Real Estate Appraisers. None of these sources was able to provide us with data on maintenance cost comparisons of buildings with and without children, nor could they refer us to any agency which had this information.

In addition to the above inquiries, questionnaires were sent to the following associations requesting information on any such studies they

¹ Home Federal Savings and Great Western Savings & Loan Association

might have done: 1) Apartment Association/Los Angeles-Western Cities; 2) Apartment House Association Consolidated, San Francisco; 3) Fresno Apartment Association; 4) Tri-County Apartment Association; 5) California Apartment Association; 6) San Diego Apartment & Rental Owners Association; 7) San Fernando Valley Apartment Association; 8) Foothills/Pasadena Apartment Association; 9) Affiliated Cities Apartment Association; and 10) California/Southern Cities Apartment Association. The first five associations responded, but other than a suggestion to contact individual apartment owners, none was able to supply the information requested.

A request for maintenance data was also made of a witness in a child-eviction case who testified that, "Basically, the presence of children in an apartment project tends to cause the operating cost of that project to be greater than they would otherwise be and also tend to cause the ability of the project to command premium rent from other tenants to be less than what might otherwise be."¹ No supporting data for this statement was introduced as evidence during the trial, and subsequent inquiries have also failed to produce back-up data.

Finally, a review of the available published literature regarding discrimination against children revealed only one reference to higher maintenance costs in buildings which accept children. However, that claim was based on an interview with one apartment owner and, again, no supporting data was cited.²

It appears that there is no empirical data which compares maintenance costs in buildings which do and do not allow children. Should this type of study be made, care should be taken to hold constant such factors as building age, location, amenities, and so forth, as these will clearly affect maintenance costs. Also, the percentage of renters with children in the sample should not exceed their percentage in the general renter population in order to avoid any distortion caused by "ghettoization."

¹ Stephen Roulac, Questor Associates, in the case of Marina Point, Ltd., v. Wolfson, Culver City Municipal Court, October 6, 1977.

² Dennis Shaw, Journal of Family Law, V. 16, 1977-78.

Finally, in assessing the importance of maintenance cost studies as a rationale for child-discrimination, it should be determined whether or not comparisons of this sort could be used to discriminate against other classes of renters if it were found that buildings occupied solely by these other classes had higher maintenance costs. In both cases, it can reasonably be argued that other factors are involved.

Insurance Rates

According to the California State Department of Insurance, "It has been this Department's experience...that an apartment's liability and property rates are not affected by whether or not children are residing in the apartment building. Also, we have never received a rating complaint regarding the residence of children in an apartment building."¹

Additional information was received from the Transamerica Insurance Group, stating that although "some apartment building features do influence premiums," that was due to "the inherent hazard of such features, not the presence of children."² The fact that children do not raise insurance rates for apartment buildings was also confirmed by representatives for the Kemper Insurance Company and Farmer's Insurance Company, both in Los Angeles.

The findings of this study are that the insurance industry, with its enormous amounts of data on claims, does not consider the presence of children a significant factor in setting rates for apartment buildings.

Building Modifications/Safety Standards

Information was obtained from building departments in the 5 cities studied. In all cases, owners of dwellings are subject to either state or local housing codes, building codes--and their amendments--and various

¹ Letter from Janet S. Galiley, Insurance Rate Analyst, California Department of Insurance, to Eden Council for Housing Opportunities, April 24, 1978.

² Letter from E. J. Cogan, Transamerica Insurance Group, December 14, 1979, to Fair Housing Project.

swimming pool codes, irrespective of whether or not children are in residence. According to a representative of the Los Angeles Building Department, if an adults-only building were inspected and found to be safe and up to code, and a child subsequently moved in, no modifications would be required.¹ One of the California legislative proposals emphasized this point by declaring that protecting families from rental discrimination shall not "be construed to require a landlord to make an improvement to a housing accommodation beyond the minimum standards established by building codes and regulations approved by a state or local agency which has the responsibility to approve building plans and designs."²

None of this has been interpreted as disregard for the safety of children, but rather an acknowledgement of the fact that living in an apartment instead of a house presents no special high-risk situations for children. Sadly, Los Angeles County statistics confirm this observation. In 1979, of the 35 children under 12 years of age who drowned in swimming pools, 32 (or 91%) were found in private home pools. One child was found in an apartment house pool. In other types of drownings, three children under the age of 10 died in bathtubs, one in a river, and one in a lake.³

It is clear that a variety of situations, including taking a bath, can be dangerous to young, unsupervised children and that parents have the ultimate responsibility for their children's safety -- whether inside or outside of a dwelling unit.

In denying a family shelter for "safety reasons" (e.g., pools, stairways, balconies, parking lots), it may be that the real safety issue is missed. As documented elsewhere in this report, many families are living in dilapidated, substandard, and overcrowded housing. These are dangerous conditions over which their parents have little control because they are deprived of choice in the housing market.

¹Interview with John Feliciello, Assistant Superintendent of Building and Safety, City of Los Angeles, August 21, 1979.

²Senate Bill 440 (Roberti, et al.), February 22, 1979, amended April 25, 1979.

³Letter from Los Angeles County Department of Chief Medical Examiner-Coroner to Fair Housing Project, April 22, 1980.

"A decent home and a suitable living environment for every American family."

--a national goal since 1949

--a state goal since 1970

CONCLUSIONS AND RECOMMENDATIONS

It is apparent from this study that the basic human need for adequate shelter is not being met for a large percentage of California's renters with children. Part of the problem is caused by an insufficient supply of units, but a significant part is caused by the arbitrary exclusion of families with children from those units which do meet their needs.

In order to lessen the burden of this housing shortage-within-a-shortage for families with children, and to encourage intergenerational housing patterns in the future, serious consideration should be given to the following actions:

1. Enactment of a statewide law, similar to those in effect in 7 other states, prohibiting housing discrimination against renters based exclusively on age, parenthood, pregnancy, or the potential or actual tenancy of a minor child.¹

2. Adoption of local ordinances in the absence of statewide protection for renter families with children.

3. An increase in public incentives to private industry to meet the housing needs of families--especially those with 3 or more children--i.e., expansion of all federal rental programs and increases in rent limits to realistic levels.

4. Enforcement of existing regulations which prohibit discrimination against families with children in publicly financed or publicly insured housing projects.

5. Adoption of local regulations and plans that give incentives for construction of developments which offer a mix of 2 or more bedroom

¹Although such protections normally cover only rentals, their expansion to owner-occupied units may be necessary to deal with the growing child-exclusion problem in the sale of condominiums, cooperatives, mobile homes, and "planned communities."

units with 0-1 bedroom units and which include amenities for all age groups.

Note: These actions deal mainly with the unavailability of housing for families with children. For a broader look at the housing problem, please see the California Statewide Housing Plan, 1979 Update, especially Section II, "Policies and Action Items," and Section III, "Farmworker Housing Plan Update." Available from the Department of Housing and Community Development, 921 Tenth Street, Sacramento, CA 95814.

6. At the federal level, serious consideration should be given to amending civil rights legislation so that it will protect families with children from housing discrimination.

A P P E N D I X

"A"

Survey Forms

Apartment Survey

"CHILDREN OK"

"CHILDREN OK"

[illegible]

Apartment Survey

"NO CHILDREN"

"NO CHILDREN"

-44-

(office use)

[illegible]

Compiled by: _____

Apartment Survey

City: _____

Newspaper/Date: _____

"AGE RESTRICTIONS"

Rent per Month	\$0- 99	\$100- 149	\$150- 199	\$200- 249	\$250- 299	\$300- 349	\$350- 399	\$400- 449	\$450- 499	\$500 up
UNFURNISHED UNITS										
No. of Bedrooms										
0										
1										
2										
3										
4+										
(office use)										
FURNISHED UNITS										-45-
No. of Bedrooms										
0										
1										
2										
3										
4+										
(office use)										

TOTAL NO. OF UNITS IN EACH BUILDING CONTACTED

(office use)

RESTRICTIONS: (e.g., teens only, infants only, etc.)

(cont. on back)

A P P E N D I X

"B"

Age Clustering Maps

FRESNO - CLOVIS METROPOLITAN AREA

1970 Census Tracts

CITY OF FRESNO

Families with Children as a
Percent of Total Households*

Under 15.0%

15.0%-29.9%

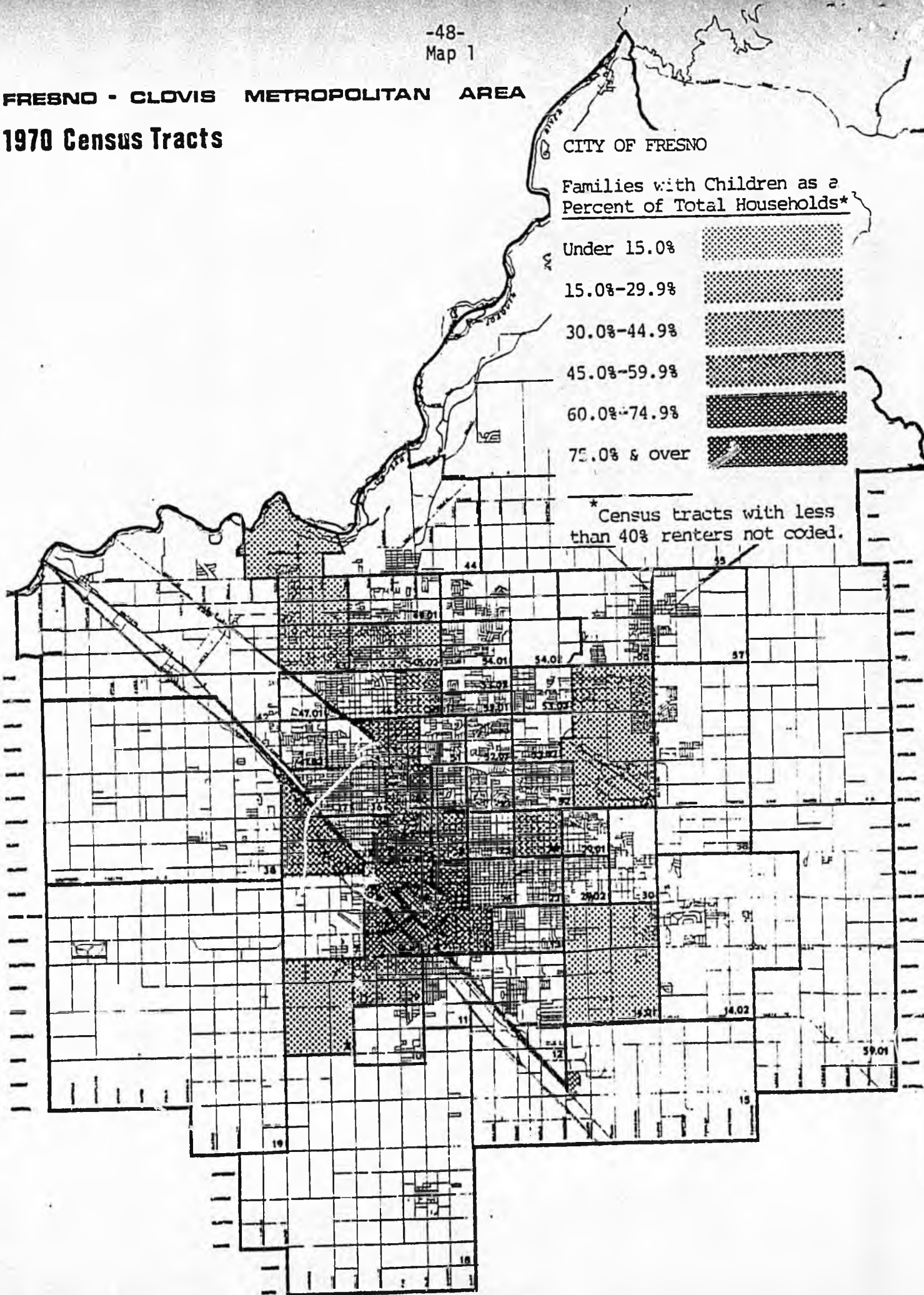
30.0%-44.9%

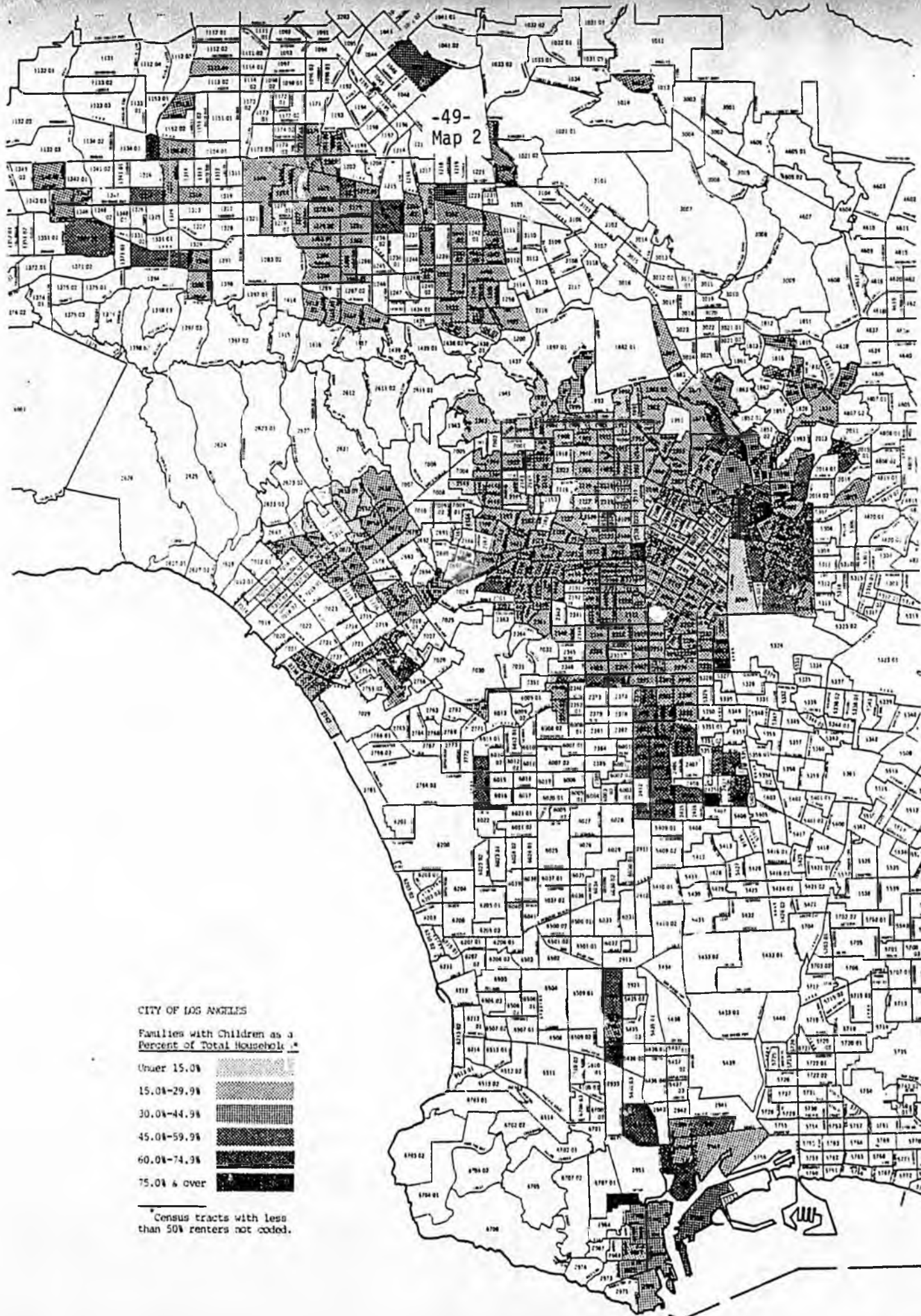
45.0%-59.9%

60.0%-74.9%

75.0% & over

* Census tracts with less
than 40% renters not coded.





83.09

MIRA MESA

CITY OF SAN DIEGO

Families with Children as a
Percent of Total Households*

Under 15.0%

15.0%-29.9%

30.0%-44.9%

45.0%-59.9%

60.0%-74.9%

75.0% & over

* Census tracts with less
than 40% renters not coded.

TORREY PINES

MISSION BEACH

MISSION BEACH

OCEAN BEACH

SAN LOMA



CORONADO

NATIONAL CITY

170.03

98.0

98.0

98.0

98.0

98.0

98.0

98.0

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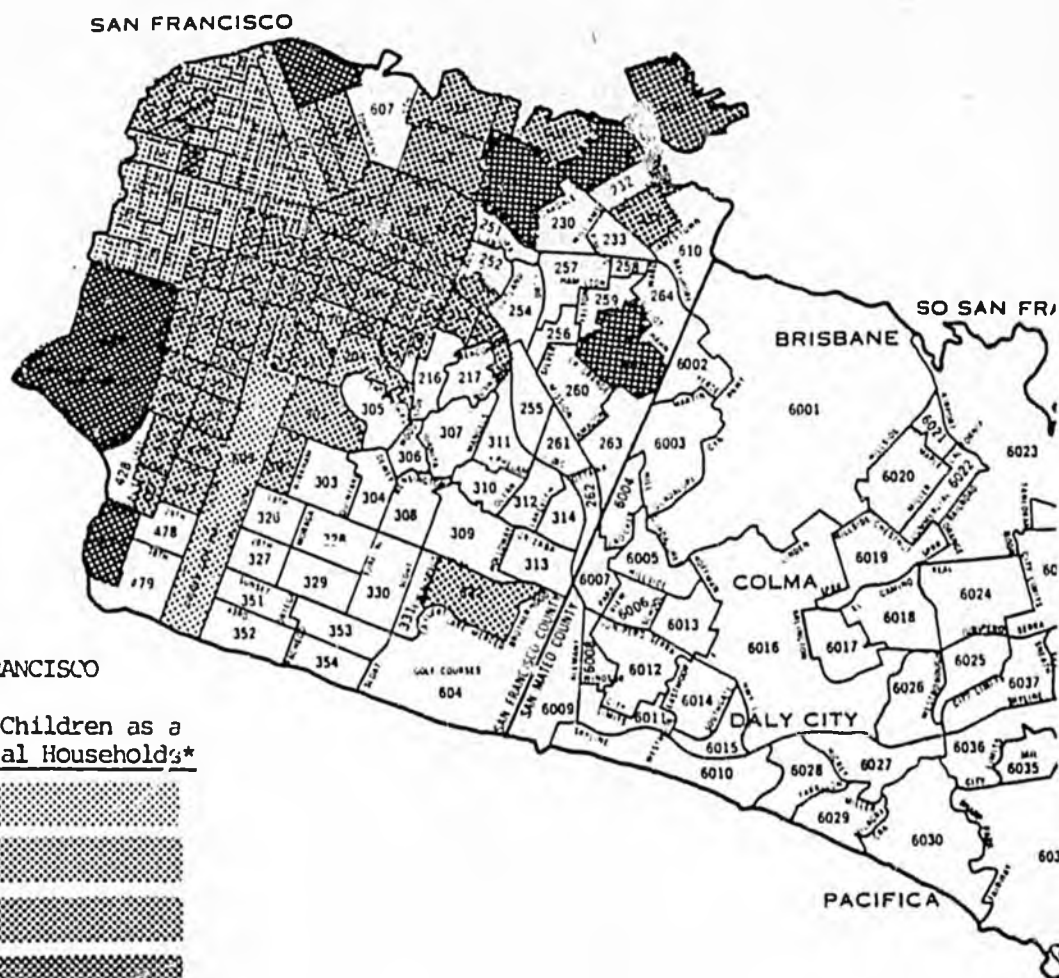
98.0

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98.0

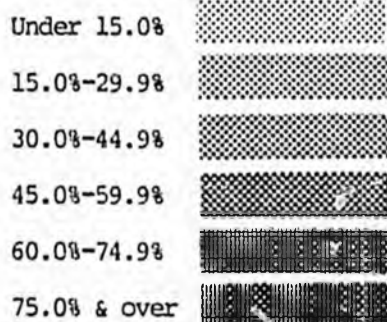
98.0

98.0

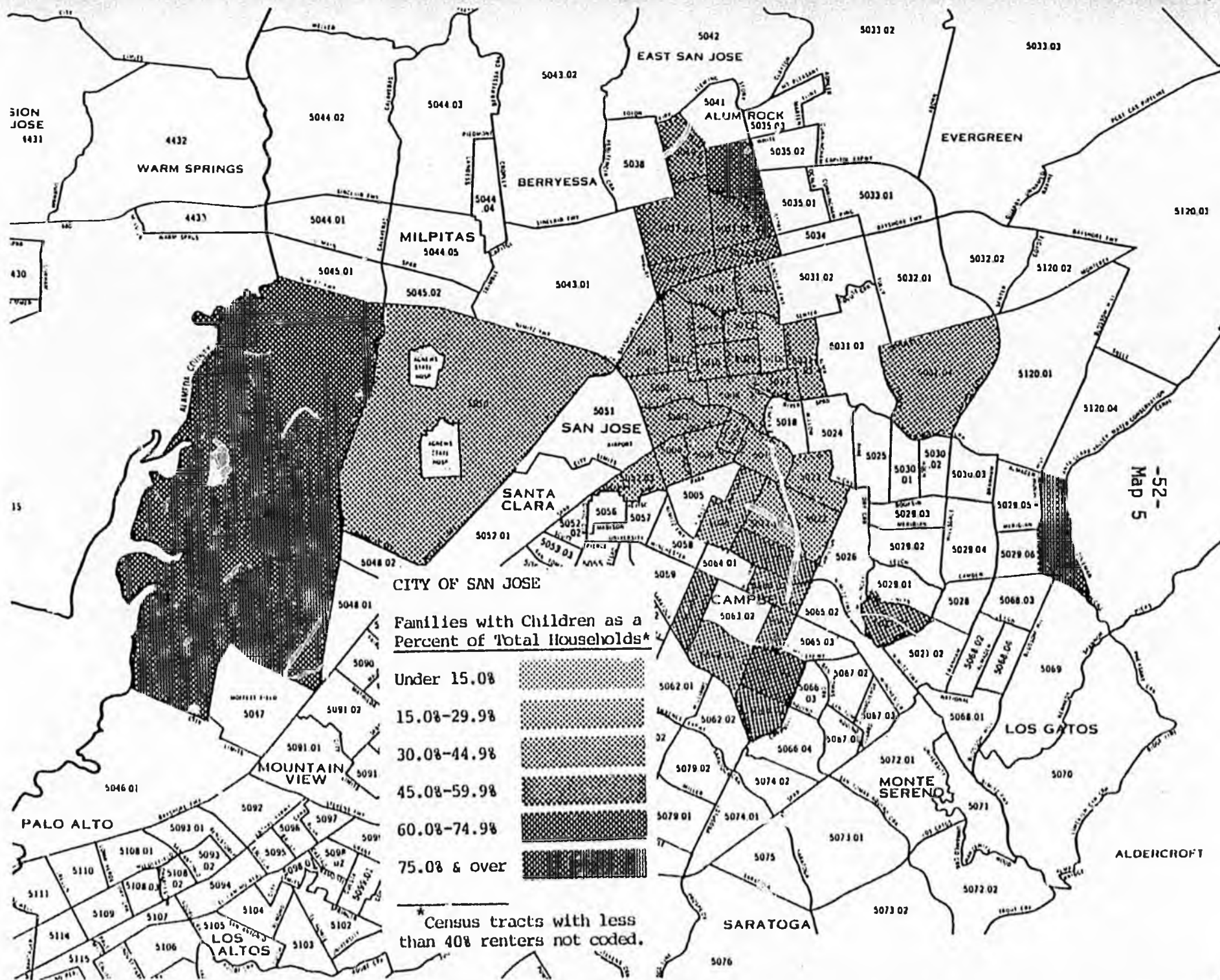


CITY OF SAN FRANCISCO

Families with Children as a Percent of Total Households*



* Census tracts with less than 50% renters not coded.



ANALYSIS OF 1976 HUD ACTS (cont'd.)

funding with existing counselling agencies should be brought to the attention of the House Committee on Appropriations.⁴⁸ In addition, the Authorization Act directed the Secretary of HUD to conduct demonstrations and to study the extent of need for and cost of a home counselling program for its insured unsubsidized programs. Within a year HUD shall report to Congress the progress of such studies and demonstrations.

FARMERS HOME ADMINISTRATION

The Authorization Act clarifies a number of provisions with regard to Farmers Home Administration (FmHA) housing. These changes in some cases are designed to overcome unnecessarily restrictive interpretations imposed by FmHA. The minimum interest rate for rural housing loans is now to be set by the Secretary of Treasury upon the request of the Secretary of Agriculture (USDA) rather than annually. An area outside of a Standard Metropolitan Statistical Area (SMSA) with a population between 10 and 20 thousand may now be declared a rural area for purposes of Title V⁴⁹ if the Secretaries of both USDA and HUD find a serious lack of credit for low and moderate income families. Formerly, the standard for finding that an area was rural included a provision that there be a serious lack of mortgage credit for all families. In addition, if an area is redesignated from rural to non-rural, the Secretary of USDA is authorized to continue processing FmHA loan applications and to take all other actions necessary relating to requests for assistance received or assistance granted.

CONCLUSION

The thrust of the 1977 housing legislation contains no new directions for low income housing. Nevertheless, Congress is clearly displeased with the slow progress of

⁴⁸ H.R. 94-1220, p. 9.

⁴⁹ 42 U.S.C. §1741, et seq.

implementing its directives and the blatant failure to follow congressional command. Impoundments and the rescission of housing programs are scorned. Conventional public housing is reinstated as a viable expanding program. The traditional HUD subsidized programs, Sections 236, 235; the direct loan program for the elderly Section 202; and Section 312 the homeowner rehabilitation program have all been extended some with additional funds. Congress has not given up on Section 8, but it wants action now. Pressure is increasing for FmHA to step up its activity and produce housing for the rural poor. In sum, all the 1977 amendments were intended to fine tune existing programs. Their effect, however, is dependent upon whether HUD and FmHA change their general policy of resistance, follow the congressional initiative and move ahead swiftly to increase the maximum number of safe, sanitary and decent housing units for the lower and moderate income families.

CALIFORNIA SUPREME COURT EXPANDS RETALIATORY EVICTION DEFENSE

The California Supreme Court has ruled that in an unlawful detainer proceeding, a farmworker-tenant may raise the affirmative defense of retaliation for the farmworkers' filing suit in federal court pursuant to the federal Farm Labor Contractor Registration Act. S.P. Growers Association v. Rodriguez, 131 Cal. Rptr. 761 (August 10, 1976). The Court, in a broad opinion by Justice Mosk, reversed the decision of the Appellate Division of the Ventura County Superior Court which had upheld the Municipal Court's denial of the defense. The decision was grounded on public policy--that the purposes of the Registration Act, which relies primarily on individual initiative for enforcement, would be frustrated by denying tenants the defense. This interest in protecting the public policy behind the Act was held to outweigh the traditional interest in preserving the summary nature of the eviction proceeding. Mosk's broad pronouncements on retaliatory defenses give reason to believe that the California judiciary may further expand the defense in the future.

RETALIATORY EVICTION DEFENSE (cont'd.)

The defendant tenants were farmworker-employees who resided in housing provided by the plaintiff through affiliated companies. The tenants, who were members of an unaffiliated citrus-pickers' association, subsequently went on strike and three weeks later filed suit against the plaintiff-contractor alleging violation of the Registration Act. Immediately thereafter, the tenants were served with eviction notices, and when they failed to vacate, the plaintiff filed unlawful detainer actions. At trial the tenants attempted to raise the affirmative defense of retaliation for (1) their strike and (2) their filing suit in federal court.

The Supreme Court quickly rejected the tenants' contention on appeal that retaliation for their strike was unlawful, stating that the contractor is free to hire scabs and provide company housing for those actually working.

The Court, however, engaged in a more detailed analysis regarding the defendants' contention that eviction for their filing suit constituted retaliation. Starting with the general rule that because an action in unlawful detainer is a summary proceeding, affirmative defenses, counterclaims and cross-complaints are inadmissible (Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 721, 84 Cal.Rptr. 756 (1970)), Justice Mosk continued with a brief discussion of those situations where the general rule has been excepted. Most notably, he cited breach of the landlord's implied warranty of habitability, Green v. Superior Court, 10 Cal.3d, 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974). Retaliatory evictions, where the landlord has no legal right to possession because of the invalid motive, also fall into this class of exceptions to the general rule. Schweiger v. Superior Court, 3 Cal. 3d 507, 90 Cal. Rptr. 729, 476 P.2d 97 (1970); Abstract Investment Co. v. Hutchinson, 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962); and Cal. Civil Code §1942.5.

To successfully assert the defense of retaliation, the defendant must convince the court that the lawful activity engaged in is or should be protected. To determine the

validity of the asserted defense in a specific situation, the court will engage in a "balancing process," weighing the public policies furthered by protecting defendants against the interest in preserving the summary nature of the proceeding. Union Oil, *supra*, 4 Cal. App.3d at p. 726. In S.P. Growers, where the defendants argued that to permit eviction in retaliation for filing suits under the Registration Act would frustrate the purposes of the Act, the Court agreed. Because the original Act had not successfully achieved its objective of minimizing the exploitation of migrant labor by mandating only a \$500 penalty for violation, the Act was amended in 1974 to include a private civil remedy (7 U.S.C. §2050a) and a prohibition on discrimination against a worker filing suit (7 U.S.C. §2050b). The Court, reasoning that the Act depended upon individual initiative for its effectiveness, found retaliatory protection for farmworker tenants essential to give teeth to enforcement:

Migrant workers, who often must rely on their employers for housing, will be understandably reluctant to risk losing possession of their homes by taking their landlords to court, regardless of how egregious the latter's violation of the federal law may be. (At 764.)

The situation was analogized to those present in other leading cases, all favorably cited: Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) (reporting of housing code violations); Robinson v. Diamond Housing Corporation, 463 F.2d 853 (1972) (exercise of rent abatement under the warranty of habitability); and Sweiger, *supra* (exercise of statutory right to repair and deduct). Rejecting plaintiff's attempts to distinguish the situation from the Edwards-Schweiger line of cases, the Court stated that state courts may exercise concurrent jurisdiction over the Act and provide their own sanctions for violation. Moreover, according to the opinion, the Act was designed to protect farmworkers as employees and as tenants due to the uniqueness of the farmworker situation.

RETALIATORY EVICTION DEFENSE (cont'd.)

Most importantly, the Court did not stop its analysis here. Rather, it chose to continue with a discussion of retaliatory eviction in broad terms which raises some interesting questions about the broad, common law conception of the retaliatory defense vis-a-vis the restrictive California statute, Cal. Civ. Code §1942.5. Mosk's opinion here has opened further the door cracked by Schweiger, and California tenants now have more reason to hope for expanded retaliatory protections.

S.P. Growers, citing Abstract Investment, supra, says that "the holding of Schweiger cannot be limited to the narrow proposition that tenants are protected from retaliation only when they take action concerning the conditions of their tenancy" (at 766). The Court may protect tenants to further any (articulated) public policy.

At a minimum, Schweiger stands for the proposition that "the right not to be deprived in court of home and shelter because of the exercise of statutory rights is a 'broad equitable principle' as deserving of protection as the right to equal protection under the law." (Schweiger at p. 515.) Statutory public policy must be protected, whether that policy is enunciated by the legislature or by Congress. In a retaliatory eviction proceeding, the crucial question is not whether the statute is designed to aid tenants, but whether it depends for its effectiveness on private initiative and would thus be emasculated by allowing primitive eviction. (At p. 766.)

Justice Mosk continues his discussion with an emphasis upon the distinction between commercial and residential leases, quoting Justice Douglas' characterization of shelter as a fundamental right from his dissent in Lindsey v. Normet, 405 U.S. 56, 90, 92 S. Ct. 862, 31 L. Ed.2d 36:

The home, even though it be in the slums, is where man's roots are. To put him into the street

. . . deprives the tenant of a fundamental right without any opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic questions in the case.

Recognizing that consideration of the retaliation defense will detract from the summary nature of evictions, the Court favorably quotes from the U.S. Supreme Court's opinion in Pernell v. Southall Realty, 416 U.S. 363, 385, 94 S. Ct. 1723, 40 L. Ed.2d 198 (1974):

Some delay, of course, is inherent in any fairminded system of justice Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

One may legitimately wonder about the implications of S.P. Growers, for it is decidedly ambiguous. On the one hand, the second half of the opinion contains these broad dicta quoting favorably from the leading cases in other jurisdictions involving the defense. In these jurisdictions, the protection is considerably greater than that afforded by the California statute, which protects tenants against retaliation for exercising repair and deduct or complaining about conditions to a governmental authority only for a period of sixty days and only once a year. On the other hand, Mosk was careful to refrain from commenting directly on whether case law can expand the limited protection provided by §1942.5 (see p. 767, n. 4), because that statute was not involved in this case where defendants were relying upon the policies underlying a federal statute. Thus, it is unclear how California courts will deal with retaliation for tenant conduct not specified in the statute or retaliation that occurs after the sixtieth day of coverage or more than one time a year. These cases are certain to arise in the near future, and it will be most interesting to see how the court will deal with the retaliatory eviction of a tenant

RETALIATORY EVICTION DEFENSE (cont'd.)

sixty-one days after the reporting of a code violation to a governmental agency. Certainly the retaliatory eviction of such a tenant before or after the expiration of the arbitrary, statutory sixty-day period frustrates with equal effectiveness the public policy underlying housing codes and code reporting. The language and spirit of S.P. Growers give California courts the judicial basis to remedy the inadequacies of the present statutory protection against retaliation.

NEW DEVELOPMENTS

This section of the Bulletin is intended to provide nonexhaustive information to our readers about new developments of interest in housing law. For further information about cases or legislation described herein, please contact Richard E. Blumberg, Senior Staff Attorney at the Project.

NEW YORK HDA ORDERED TO RUN ABANDONED HOUSING

The New York civil court has recently ordered the New York City Housing and Development Administration (HDA) to assume the administrative responsibility for a building in serious violation of codes and abandoned by its judgment-proof absentee owner. Housing and Development Administration of the City of New York v. Fael Realty Co., N.Y.L.J. (Civ. Ct. July 14, 1976).

HDA had sought a contempt action against the judgment-proof corporate landlord and its absentee stockholders for their failure to comply with the court's earlier order to correct 34 substantial building code violations. Rather than exercise existing statutory remedies such as receivership, HDA sought the contempt action, which the court granted. However, the court recognized that the contempt citation would not effectuate repair of the premises and likely would not even be enforceable. The

court therefore ordered HDA to administer the property pursuant to statute. The court noted that the proceeding "illustrates the total breakdown of municipal enforcement of decent housing maintenance and the tragic absence of any affirmative strategy by the city to meet the city's . . . housing chaos." The court charged that maintenance of decent housing was the responsibility of HDA, not the court, and that this responsibility should not be evaded by total reliance on the illusory remedy provided by the court's exercise of its contempt powers.

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RIGHT TO JURY TRIAL IN SUMMARY EVICTION PROCEEDINGS UPHELD IN MISSOURI

The Circuit Court of the city of St. Louis, Missouri, has upheld a tenant's state constitutional right to trial by jury in a summary eviction proceeding where either money damages (for rent or habitability) or possession is at issue. Rice v. Lucas, Cause No. 57190-F (Cir. Ct., Div.#3, October 18, 1976). In an extremely well-reasoned and socially aware opinion, Judge Gaetner relied on the U.S. Supreme Court's guidelines for analyzing state common law vis-a-vis the state Constitution set out in Pernell v. Southall Realty, 416 U.S. 363 (1974), to determine the right to jury trial. The court also relied on King v. Moorhead, 495 S.W.2d 65 (Mo. App. 1973), Missouri's implied warranty of habitability case. After the now-traditional discussion of state common law, the court reached a rather unique yet well-founded conclusion:

The Court has indulged in this historical review in order to show that even if the right to a trial by jury had not been granted at common law to a tenant facing eviction and who claims to have a legal defense, the time has come to grant him the full panoply of judicial process. (Rice supra, slip opinion at p. 5.)



JOINT COMMITTEE ON LEGISLATIVE MANAGEMENT
OFFICE OF LEGISLATIVE RESEARCH

CARL D. FRANTZ

March 9, 1982

FROM: Eileen Stern, Research Fellow
Office of Legislative Research

RE: Just Cause Eviction

You have asked about the effect of just cause eviction laws on the real estate industry, particularly in New Jersey and Washington, D.C.

SUMMARY

It appears to be difficult to assess the impact of just cause eviction on the real estate industry. While some industry representatives characterized the impact as slight or even non-existent, other portrayed it as significant in itself or as part of a trend of industry intervention. The relationships of just cause eviction to the tax codes, rent control, and rehabilitation were often mentioned in interviews and in available literature.

CURRENT SITUATION

Just cause eviction laws already cover a significant segment of the tenant population of the United States. Coverage arises from specific eviction laws (New Jersey, Washington, D.C., Seattle, Washington, and several California municipalities), from condominium conversion laws (Connecticut and New Jersey), and from regulations governing most forms of federal housing. In Connecticut, the impact of just cause eviction arises primarily from subsidized housing situations.

Despite the widespread applicability of just cause eviction protection, there is apparently no hard data nor any study measuring the effects of this area of landlord-tenant legislation. Representatives of the various interests involved in rental housing and its regulation indicate that just cause eviction laws are just one factor, perhaps a very small factor, in the complex rental industry. In order to measure the impact of just cause eviction, one would have to isolate its effects from the effects of the general financial climate, the prevailing interest rates, applicable tax codes, land use restrictions, other legislative mandates or prohibitions, and the general social climate. While some industry representatives

dismissed the impact of just cause eviction legislation within this complex environment, others portrayed it as a final "unbearable insult" or "burden" to the real estate investor or as a psychologically potent issue in real estate investment. Currently the rental market and the general real estate market appears to be very poor everywhere. None of the market participants attributed the condition of the market to just cause eviction alone. Participants in the condominium conversion process expressed greater concern about just cause eviction than others interviewed.

New Jersey Experience

New Jersey statute has been in effect since 1974. Steve Brush of the Connecticut Regional Housing Council has encountered conflicting reports of its impact, a situation borne out by telephone calls made in preparing this memo.

New Jersey Department of Community Affairs Attorney Mike Ziskin reports that he is not aware of any bad effects of the basic just cause eviction law. However, he did state that the 1981 amendment protecting senior citizens, their spouses, and the disabled from eviction for a 40 year period has already been challenged in court.

Attorney Larry Freundlich finds the effect of the New Jersey statute not insubstantial to the real estate market. He indicates that the law slows down transactions and has its greatest impact in the realm of condominium conversions. He does, however, see other factors effecting rental construction more directly, especially local option rent control. Attorney Freundlich attributes the refusal of loans for apartment construction by national insurers to New Jersey's local rent control option.

D.C. Experience

The D.C. Rental Accommodations Commissioner, Marie Nihikian, reports that the just eviction law in the District has been effective as a response to a real estate trend to stop serving one segment of the population. The major related problem is a backlog in the court system, and particularly of the required service of eviction by U.S. Marshals. Several lawyers contacted through the D.C. Bar were not aware of significant impact on the real estate industry from the just cause statute.

The remainder of this memo will be devoted to viewpoints and concerns expressed by attorneys, realtors, interest group spokesmen, and government employees involved in the real estate industry. Copies of appropriate statutes are attached.

GOOD CAUSE EVICTIONS

The prevailing common law rule (judge made) in Connecticut and every other jurisdiction is that a landlord may evict a tenant when the tenant's lease has expired by simply alleging and proving that the term of the lease is over. The landlord does not have to

allege and prove any misconduct on the part of the tenant such as nonpayment of rent, destruction of property, excessive noise, etc. As noted before, New Jersey, Washington, D.C. and, for certain protected tenants, Connecticut, have modified this common law rule by enacting good cause eviction laws. Both the D.C. Code and the New Jersey statute specify that a tenant may not be evicted solely because his lease has expired (Section 45-1653 (b) D.C. Code; 2A:18-61.3 N.J.).

Members of the private bar indicated that their concern was not the eviction of tenants during the term of their lease. Rather it is the statutory requirement that a tenancy be continued indefinitely unless or until the tenant terminates the tenancy or the landlord can successfully bring an eviction action based upon cause. If a tenancy may not be terminated upon expiration without resort to documentation and involved legal procedure, then according to Attorney Allen Thomas, the landlord is at a distinct disadvantage. Philosophically, Thomas wonders at what point people are no longer able to dispose of their property, raising questions of restraint on alienation (restriction on power to transfer property) and constitutionality. More concretely, he suggests other tenants may suffer if the landlord cannot utilize non-renewal as a means of dealing with nuisance tenants. In part, this last point is related to the costs to the landlord of eviction proceedings.

COST OF JUDICIAL RECOURSE

Attorney Ralph Alexander suggests that just cause evictions is potentially costly to the landlord. Against a background in which he finds the small landlord (less than 20 units) at a disadvantage because spiraling legal costs make it difficult to seek legal recourse, particularly in situations when the other party is represented by a legal aid attorney, Attorney Alexander is concerned that the small landlord may be "wiped out by just cause". The larger landlord will feel the financial pressure also, because rentals are a marginal business investment. Attorney Alexander's experience with Section 8 housing just cause regulations have led him to a conclusion similar to Attorney Thomas': if cost and other difficulties in proving the validity of a tenant non-renewal impede the landlord in correcting a nuisance, the other tenants suffer.

PSYCHOLOGICAL IMPACTS

D.C. Rental Accomodations Commissioner Marie Nihikian describes a psychological issue in just cause eviction: people do not want to invest in rental housing because they are concerned about the impact of just cause laws. Ms. Nihikian suggests that this psychological impact is the only impact to be found resulting from just cause legislation. It would appear that some of the concerns stated throughout this memo are examples of this psychological impact.

The Connecticut condominium conversion law just cause protection of the elderly and handicapped raises a different psychological issue. Several speakers at the Judiciary Committee Hearing of March 2, 1982 referred to the trauma of displacement, particularly repeated displacement. Attorney Don Buck, President of the Community Association Institute, found evidence of the psychological impact in his experience during conversion of the Linden building. Elderly tenants resisted moving, despite what Attorney Buck characterized as substandard and potentially hazardous conditions.

SUBSTANTIAL RENOVATION

Attorney Buck's primary concern with the effect of just cause eviction stems from its impact on substantial renovation. Deteriorated or deteriorating buildings are extremely costly to renovate. The code requires that if the rehabilitation cost equals or exceeds 50% of the building's appraised value--which is often the case in renovations--tenants must vacate the premises during renovation (there are some exceptions, such as townhouses). According to Attorney Buck:

- Just cause eviction is a disaster for substantial renovation.
- Two or three historically significant buildings have not been rehabilitated recently because just cause eviction laws and large numbers of elderly and handicapped tenants combined to discourage potential development.
- Good cause laws may force piecemeal renovation which in the long run is more expensive and will lead to higher rents.
- Deterioration is the end result of inadequate substantial rehabilitation.
- There have not been many problems with just cause eviction in Connecticut, because the conversion and rental markets have been dead over the last two years.

JUST CAUSE EVICTION AND RENT CONTROL

Some amount of defacto rent control seems to be necessary to the success of just cause eviction protection; a tenant that is forced out by burgeoning rents has not benefitted from the law. The New Jersey condominium conversion-protection of the elderly and handicapped addendum to the just cause statute addresses this issue with specific provisions for towns with and without rent control commissions. Increased costs that are due to conversion as opposed to increase of services or amenities are not permitted (2A:18-61.1 NJSA). In addition to inclusion of increased rents in the definition of retaliatory action (Sec. 45-1654 D.C. Code), D.C. approaches this problem through its package of industry intervention, which combines eviction laws with rent control.

A summary of the status of just cause eviction compiled by the

National Housing Law Project reports that the majority of "second generation" rent controls in the United States contain just cause protections. D.C. is one of the examples given. D.C. Rental Accommodations Commissioner Marie Nihikian describes eviction control as the most important part of the industry intervention package. If forced to choose between just cause protection and rent control, she would choose the former.

Attorney Don Buck suggests that rent control would have greatest impact on "in-place rehabilitation" (rehabilitation performed while tenants remain in the building). He anticipates that "fair rent" would inhibit in-place renovation and destroy that market in the same way that just cause would, in his view, destroy the substantial rehabilitation market.

TAX CODES

Although not a part of just cause eviction legislation per se, the impact of the tax codes was mentioned by virtually every person contacted. The impact of the IRS code was described as so pervasive that it must be considered in any inquiry into effects of any other issue in the real estate industry. Traditionally, tax regulations were shaped to subsidize rental housing. In the marginal rental industry, tax shelters and equity accumulation were the basic stimuli to investment. A series of changes in the IRS code culminating in the Kennedy Reform Act made it less lucrative to invest in the rental market. The Economic Recovery Act of 1981 contains some provisions that may be beneficial to real estate investors, particularly those involved in rehabilitation. One provision is an accelerated depreciation allowance schedule. Hugh McGuire of our office will be studying the effect of this act in greater depth and we will forward pertinent information.

In part due to the tax codes, D.C. Rental Accommodations Commissioner Nihikian finds investors less willing to invest in rentals with their long-term gains than in projects with short-term profits. This would appear to be part of the Connecticut environment, since, according to Attorney Buck, the landlord in a conversion always sells to a professional converter.

ES:fs

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September 30, 1983

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Chairman, Senate Committee on State Affairs
1024 West Sixth Avenue, Suite 204C
Anchorage, Alaska 99501

Re: Rental housing needs

Dear Senator Fischer:

Recently I returned from an extended vacation to find your July 19th request for information concerning Alaska's rental situation and specifically HB 1. Thank you for the opportunity to comment on both.

Taking HB 1 first, I have the following section by section observations:

Section 1

The proposed AS 09.45.085 would permit landlords to try to forcibly evict tenants after they have obtained a judgment for possession without seeking the assistance of the police. It is a terrible idea.

Under present law, landlords must not only obtain a court order, but also obtain a writ of assistance to be served by the Alaska State Troopers if the tenant does not peaceably vacate as the court has directed. This means that in those situations where physical confrontation is most likely, an Alaska State Trooper is already on the scene. The proposed delegation of authority to landlords creates a situation similar to a forcible entry, which is a crime in many states. A forcible entry occurs where the landlord, without resort to legal process, attempts to remove the tenant from possession. The necessity of first obtaining a court order under the proposed amendment addresses some of the policy considerations against permitting forcible entries, but not the concern with public safety at the root of the concept that the state, not private citizens, should evict people.

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Delegating responsibility for enforcement of court orders to private citizens raises several interesting questions. By doing so, does the legislature intend to grant landlords the privilege of using reasonable force in executing eviction orders? How much force is reasonable? If the landlord uses excessive force, is the privilege of using reasonable force lost? If excessive force is used, is the tenant privileged to respond with force reasonable in the situation as a matter of self defense? What are the rights and potential liabilities of third parties who witness an altercation and intervene on one side or the other? What if the landlord jumps the gun, and tries to oust the tenant after obtaining an order but before the deadline for vacating expires?

Private enforcement of eviction orders is a bad idea. It implies that the legislature approves of the use of intimidation or force on the part of one private citizen against another. The proposed amendment contains no requirement that attempts at private enforcement occur at a reasonable time. The question of a landlord's liability for the property of a tenant removed from the premises is not addressed. The question of whether unannounced lock-outs are a permissible means of enforcement is not addressed, nor is the issue of whether locking a tenants property into the apartment constitutes an illegal distraint for rent under AS 34.03.250.

Not only would the proposed legislation encourage abuses against tenants, it may also make it more difficult for landlords to obtain police assistance with evictions, since present procedures concerning writs of assistance may be abolished. Finally, adoption of the proposed amendment would only encourage litigation to determine the scope of the landlord's privilege and remedy abuses. For reasons of public safety, personal dignity and administrative convenience the proposed amendment should be rejected.

Section 2

This section seems to be intended for purposes of clarification. It makes no substantive change in the law, since landlords may already bring a forcible entry and detainer action upon the expiration of a periodic tenancy. I am not sure what is meant by the last three words "determining the tenancy". Perhaps "determining" is meant to be "terminating".

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Section 3

This section imposes punitive damages on the tenant for wilfully or in bad faith failing to give timely notice to the landlord of his or her intention to terminate the tenancy. It also establishes a presumption that failure to give such notice is wilful and not in good faith.

Creation of a presumption that failure to give timely notice is wilful and in bad faith is simply not warranted. Most people tend to regard housing as a personal necessity rather than a business matter, and landlords and tenants alike are frequently ignorant of specific legal requirements, particularly when notices must be given to be effective. Creation of such presumption could put tenants in the position of having punitive damages awarded against them without the issue of wilfulness or bad faith ever explicitly having been raised. Landlords would neither have to plead or prove either issue, but tenants could suffer punitive damages simply by neglecting through ignorance to raise the issue.

As to the imposition of punitive damages itself, no corresponding penalties are imposed upon a landlord for giving untimely notice or for trying to enforce an untimely notice. Imposing such a penalty on tenants thus seems a bit one-sided. A better idea would be to follow the example of AS 34.03.300 (regarding abuse of access) and impose the same liability on landlords and tenants for similar violations.

Imposing punitive damages for failing to give timely notice upon either landlords or tenants make little sense. Present law already imposes liability for compensatory damages. The drafters of the Uniform Residential Landlord and Tenant Act (1972) from which Alaska's URLTA was adopted, saw no need for punitive damages in this situation, and the need probably does not exist.

Section 4

I am opposed to adoption of this section because it would be a significant change in the amount of time necessary to terminate a tenancy without cause. Under present law, the landlord must give the tenant one full rental period's notice be-

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fore terminating the tenancy or raising the rent. As most Anchorage rental agreements are month to month tenancies, as a practical matter this generally means thirty (30) days notice for the tenant. The significance of the proposed change is that it would permit material changes in the rental agreement, such as termination or a rent increase, to take place in the middle of the rental period.

At common law, when a lease is entered into the tenant obtains a right to possession upon performance of certain conditions for the duration of the leasehold interest. In the absence of breach by the tenant, neither the terms of the lease agreement nor the duration of the possessory interest may be altered, unless the parties have made some agreement to the contrary. Section 4 would change that relationship by permitting material changes during a time for which the tenant had already paid for possession.

Changing that relationship would raise some interesting questions not addressed by the bill. If the landlord increases the rent during the middle of a rental period, when is the increased rent due? If the tenant decides to leave rather than pay the increase, can he or she remain until the date the increase becomes effective? Should tenants pay only a prorated portion of the prior rent to cover the period they intend to stay, and would doing so violate the terms of their lease and give cause for a termination for breach? If the tenant pays the full month's rent and elects to leave, what are the landlord's responsibilities with regard to returning the unused portion of the rent? If cleaning or damage charges are claimed, may the landlord deduct such charges from the unused portion of the rent as well as any damage deposit held? If so, do the provisions of AS 34.03.070 control the itemization of such deductions and the time in which notice must be given? If the landlord gives notice which would terminate the lease in the middle of a rental period, how much money should the tenant pay at the beginning of the month? Again, if the tenant pays the full rental amount, how much time does the landlord have to return the unused portion?

The proposed Section 4 would give legislative approval to what are considered under present law to be breaches of con-

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tract, that is, material changes in the rules of the game during a time for which the tenant has already paid for possession. It is not unreasonable to demand of landlords a full rental period's notice before such changes are made. Under present law, there is at least some uniformity in when apartments change hands. With the proposed change, apartment turnover could take place on any day of the month, and tenants could face increased difficulty in finding a new apartment which would be available without interruption. Since the only interest to be protected by the proposed section is a landlord's desire to end a tenancy without cause, the burden such a change would impose on tenants should outweigh the minimal convenience to be gained by landlords. The proposed amendment should be rejected.

Section 5

This section amends present language to permit the landlord to bring an action for recovery of actual damages as well as possession, and lowers the standard for recovering punitive damages. As to the former change, landlords already have the right to sue for actual damages, so such an amendment seems pointless. However, if inclusion of the additional language is intended to permit the landlord to recover damages in a summary forcible entry and detainer proceeding, serious due process problems would arise.

An FED takes place on only two (2) to four (4) days notice. The sole issue to be tried is that of possession. Damages are put off for decision in the course of a normal civil lawsuit. It is difficult enough to prepare for an FED hearing in the limited time available without the necessity of investigating damages claims as well. Frequently, discovery is necessary to ascertain the legitimacy of the amount claimed, and time is needed to evaluate and gather evidence concerning available defenses. Combining the damages and possession issues into one summary proceeding would raise significant questions as to whether the hearing afforded a tenant under such circumstances could be called meaningful.

The second change, reducing the standard for recovery of punitive damages from a "wilful and not in good faith" to a

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"wilful or not in good faith" standard is in line with the proposed standard for punitive damages contained in Section 3 of the bill. It is subject to the same arguments. A high standard of proof should be required before punitive damages are imposed. Lowering the standard in this instance to not require bad faith would expose tenants to punitive damages in all instances where they elected to fight an eviction in court, no matter what the merits of their position. By electing to stay, tenants could be said to have "wilfully" held over beyond the termination of the tenancy, and if they lost in court, landlords could request the punitive damages permitted by the proposed amendment. Such a risk may well have a chilling effect upon tenants' willingness to challenge unlawful terminations, even in cases where the eviction is clearly retaliatory. Furthermore, this chilling effect may have a disparate impact upon low income tenants.

A standard which would expose tenants to punitive damages for insisting upon their day in court should not be adopted.

Section 6

This and Section 7 seem to be only tenant oriented provisions in the entire bill. The changes contained in the proposed Section 6 are mainly cosmetic, except for explicitly including termination of the rental agreement or providing notice of termination to the list of retaliatory conduct. Specific inclusion of both is a good idea.

Section 7

The sixty (60) day presumption created by this section would avoid some of the proof problems inherent in raising a claim of retaliatory eviction. Considering that the presumption would only arise in the four (4) situations enumerated in AS 34.03.310(a), the potential for abuse seems minimal. Also, it is reasonable to attach a retaliatory motive to evictions occurring within sixty (60) days of a tenant's engaging in one of the four (4) categories of protected activity, something which cannot be said of the presumption proposed in Section 2 of the bill.

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This section is a good idea, but it does not go far enough, particularly considering the punitive damages against tenants recommended in Sections 3 and 5 of the bill. For the sake of consistency and fairness, if landlords are to be awarded punitive damages when the tenant breaches, so should tenants be awarded punitive damages in the event of a landlord's retaliation. Since if the tenant wins a retaliation claim there are likely to be no actual damages beyond attorney's fees, an appropriate statutory amount would be one and one-half (1 1/2) times the monthly rent. Adding teeth to the retaliation statute would also serve the salutary purpose of actively discouraging interference with the exercise of protected rights as opposed to merely preventing such interference when it is brought to the attention of the court.

Other Matters

That concludes my comments regarding HB 1. As far as Alaska's rental situation in general, what I have to say falls more under the heading of ideas than suggestions.

Tenants in Alaska have little security when it comes to rental increases. Rents can usually be raised on only one (1) month's notice, and there is no limit on the amount of the increase. This factor combined with the current shortage of housing in the Anchorage area makes for a very strong sellers market, and this is hurting low income people quite a bit. I would like to see some limits on the use of month to month rental agreements, some restrictions on the availability of evictions without cause in the absence of sale or changes in the use of the property, and some limits on how often and by how much rent can be increased.

I note that AS 34.06.010 - .060, which expired July 1, 1977, used to authorize the governor to declare a state of housing emergency if conditions warrant it. Upon such a declaration, residential rents came under regulatory control. One possibility would be reactivating Title 34 Chapter 6, to make rent control available in housing emergencies. The problem with this or any other course of action raising the specter of rent control is that as soon as the issue arises, rents go

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up. I don't know how to get around this problem, but I suspect that one way would be a gradual increase in the rights of tenants, and in particular getting rid of no-cause evictions.

Thank you again for the opportunity to comment. Please do not hesitate to ask again in the future.

Sincerely,

ALASKA LEGAL SERVICES CORPORATION

Joseph D. O'Connell /gh
Joseph D. O'Connell
Attorney at Law

JDO/gh

cc: John

Alaska State Legislature

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HOUSE MAJORITY WHIP

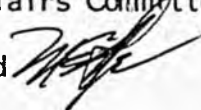
CHAIRMAN
STATE AFFAIRS

MEMBER
TRANSPORTATION
LEGISLATIVE COUNCIL

Representative Mitch Abood
HOUSE DISTRICT 11

MEMORANDUM

TO: Senator Vic Fischer
Chairman, Senate State Affairs Committee

FROM: Representative Mitch Abood 

RE: Committee Substitute for Sponsor Substitute for House Bill
No. 1 (House Judiciary)
"AN ACT RELATING TO LANDLORDS AND TENANTS"

DATE: Synopsis as of April 30, 1983

The Alaska Statutes governing Landlords and tenants is not entirely clear in defining certain areas of concern to both the landlord and the tenant. Both the landlord and the tenant hold certain unalienable rights in the property they own as a landlord or rent as a tenant. With the 0% to 4% vacancy rate in most of Alaska, and because over 35% of the population in Alaska rent their dwellings, it is necessary to update the laws to answer the needs of the landlord and tenant. I introduced House Bill No. 1 to answer some of these needs. I feel that it is fair and equitable to both parties.

Section 1: This provision authorizes enforcement of a judgment for the restitution of real property obtained in an action for forcible entry or detention. No other order to enforce the judgment may be required. (This simply means that the landlord does not have to go through an additional step to rightfully acquire his property.)

Referring to Section 2. of CSSH 1, the landlord's rights are more clearly defined in relation to termination of a "periodic tenancy" held by a tenant. As the law stands now, it refers only to a lease or agreement, (a predetermined period of time) or an "estate at will", (for which the tenant is at the mercy of the landlord, and has no say in how long the tenancy will last). A "periodic tenancy" refers to a month to month period of time. Unlike a lease or agreement, it can be indefinite, and a good majority of rental arrangements today are based on a periodic tenancy. By inserting this new paragraph, it assists the landlord in enforcing his rights, should any conflicts arise due to termination.

Section 3 of CSSSHB 1 was added by the Labor and Commerce Committee to further clarify AS 34.03.290 (c) relating to the 30 day notice. If the tenant fails to give notice of termination, then the landlord is entitled to an amount not to exceed one and one-half times the actual damages.

Section 4 provides for a 30 day notice. I feel that this is an equitable time frame to both tenants and landlords. Due to the tight rental market in Alaska at the present time, it is quite difficult to find adequate housing, especially for those families with children or pets, not to mention the elderly and minorities. "Rental due date" refers to the date on the same day each month that rent is to be paid. The landlord may wish to give notice of termination to the tenant before the "rental due date", and replacing "rental due date" with the word "termination" date provides for either time frame. It does not restrict either party to the exact date the rent is due when giving a termination notice. The question arises, "What if the tenant gives notice on, say May 17th?" This means that the termination date would be June 16th, (or 30 days). The landlord would not lose any rental income even though the termination date falls after the "rental due date".

Section 5 provides for recovery of "actual damages", as well as one and one-half times the actual damages as compensation to the landlord. This deters the tenant from staying on past termination or the expiration of the rental agreement and in effect, is incentive to the tenant to vacate the premises.

An improper hold-over by a tenant has caused landlords financial difficulties. If a tenant continues to occupy a dwelling after his tenancy expires, he is causing the landlord loss of potential income needed to make mortgage payments, as well as the loss of time to make necessary repairs before renting the unit to the next party. Alaska law allows landlords to sue for damages, but the time, effort and money involved is not always feasible to pursue.

Section 6 adds terminating a rental agreement or providing notice of termination to the list of the actions that a landlord may not take when a tenant attempts to enforce his rights.

Section 7 was included in this bill to protect the tenant from landlords who abuse the right to access or evict the tenant for retaliatory reasons. The tenant has a right to his/her privacy, and the landlord must give "reasonable" notice to the tenant before entering the property. This new subsection also provides that the tenant may not be evicted because they have made a complaint, (for just causes), against the landlord, as long as they abide by the laws governing landlords and tenants. Sixty days is a sufficient amount of time to correct a problem or answer a complaint.

This bill is intended to update the present laws governing both the landlord and tenant. I feel that it provides both parties with fair and equal provisions to answer some of the overwhelming problems that have arisen over the past several years, due to the increase of the Alaskan population.

* * * * *

(It should be noted here that an increase in rents well as substantial or material changes in the existing rental agreement may also constitute a form of termination. This is, in effect, terminating the rental agreement then in existence and offering a new rental agreement at different terms. If the tenant does not accept the "new terms", then he must vacate 30 days after the receipt of notice of changes in the existing rental agreement. If the tenant does not respond to the landlord's notice of changes, then at the end of the 30 day period, the new rental agreement takes effect.)

Original sponsor: Abood

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

SENATE CS ~~CS~~ FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to landlords and tenants."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 09.45 is amended by adding a new paragraph to read:

9 Sec. 09.45.085. ENFORCEMENT. A judgment for the restitution of
10 real property rendered in an action for forcible entry or detention
11 may be enforced by the plaintiff without further judicial action and
12 the plaintiff may not be required to obtain a writ of assistance or
13 other order to enforce the judgment.

(after line 13, insert)

* Sec. 2. AS 34.03 is amended by adding a new section to read:

Sec. 34.03.015. PROHIBITED PRACTICES. A landlord or other person having the right to lease or rent real property may not refuse to execute a rental agreement or may not terminate a rental agreement to lease or rent the real property to a person solely because of sex, marital status, changes in marital status, pregnancy, parent hood, race, religion, color or national origin.

20 (b) If the rental agreement is terminated by the tenant, the
21 tenant fails to provide the notice required under AS 34.03.290(a) or
22 (b), and the failure to provide the notice is wilful or not in good
23 faith the landlord may recover an amount not to exceed one and one-
24 half times the actual damages. Failure by the tenant to provide the
25 notice required under AS 34.03.290(a) or (b) is presumed to be wilful
26 and not in good faith.

27 * Sec. 4. AS 34.03.290(b) is amended to read:

28 (b) The landlord or the tenant may terminate a month to month
29 tenancy by a written notice given to the other at least 30 days before

1 the termination [RENTAL DUE] date specified in the notice.

2 * Sec. ^{5.4} AS 34.03.290(c) is amended to read:

3 (c) If the tenant remains in possession without the landlord's
4 consent after expiration of the term of the rental agreement or after
5 its termination, the landlord may bring an action for possession and
6 recovery of actual damages. If [IF] the tenant's holdover is wilful
7 or [AND] not in good faith the landlord, in addition, may recover an
8 amount not to exceed one and one-half times the actual damages. If
9 the landlord consents to the tenant's continued occupancy, AS 34.03.-
10 020 applies.

11 * Sec. ⁸ AS 34.03.310(a) is amended to read:

12 (a) Except as provided in (c) and (d) of this section, a land-
13 lord may not retaliate by increasing rent, [OR] decreasing services,
14 terminating the rental agreement or providing notice of termination,
15 or by bringing or threatening to bring an action for possession after
16 the tenant has

17 (1) complained to the landlord of a violation of AS 34.03.-
18 100;

19 (2) endeavored to enforce [AVAIL HIMSELF OF] rights and
20 remedies granted to a tenant [HIM] under the provisions of this
21 chapter;

22 (3) organized or become a member of a tenant's union or
23 similar organization; or

24 (4) complained to a governmental agency responsible for
25 enforcement of governmental housing, wage, price or rent controls.

26 * Sec. ⁸ AS 34.03.310 is amended by adding a new subsection to read:

27 (f) A landlord is presumed to have violated (a) of this section
28 if the landlord increases rent, decreases service, terminates the
29 rental agreement or provides notice of termination, or brings or

- 1 threatens to bring an action for possession within 60 days after a
2 tenant has engaged in an action listed under (a)(1) - (4).

STATE OF ALASKA
FISCAL NOTE

Revision Date March 21, 1983

I. REQUEST

Bill/Resolution No.: CSHB 1 (Judiciary)
Title: Landlords and Tenants
Sponsor: Representative Abood
Requestor: House Finance Committee

II. FISCAL DETAIL

Agency Affected: Dept. of Law
Program Category Affected: Public Protection
BRU, Program of Subprogram(s) Affected:
Consumer Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		5.0				
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	5.0	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	5.0	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

No information provided.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues Director
Division: Administrative Services Division

Phone: 465-3672
Date: March 21, 1983

Approved by Commissioner: Norman C. Gorsuch Attorney General
Department: Department of Law Date: March 21, 1983

Distribution:

Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)

ANALYSIS
CSHB 1

The committee substitute does not change the department's involvement in landlord/tenant matters where we are only permitted to provide information on landlord and tenant rights.

This bill amends the state's existing statutes setting out the private rights and remedies accorded to both landlords and tenants, and in so doing the bill modifies some of those rights and remedies. Alaska law does not provide for government intervention or enforcement and any remedial action is a private civil matter of either landlord or tenant, or both. AS 44.23.020(b)(8) does provide, however, that the Attorney General shall prepare, publish and revise an information packet on landlord and tenant rights. Enactment of this bill will require the revision of existing landlord/tenant handbook, the costs for which (\$5,000) are included in this fiscal note.

WHERE HAVE ALL THE CHILDREN GONE?

TODAY, THROUGHOUT THE U.S., 27% OF ALL RENTAL HOUSING IS NOT OPEN TO PARENTS WITH MINOR CHILDREN. IN JUNEAU THE FIGURE IS MUCH HIGHER. WE ARE WORKING TO GIVE ALL FAMILIES THE SAME OPPORTUNITIES THAT SINGLES AND COUPLES WITHOUT CHILDREN HAVE.... BELOW ARE A FEW QUESTIONS AND ANSWERS ABOUT FAIR HOUSING.... PLEASE GIVE IT SOME THOUGHT.

2 br. apt., adults only, no pets. \$500 plus \$150 cleaning deposit. Call between 7-9 p.m. Available Nov. 1st.

from, JUNEAU EMPIRE 10/9/80



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COZY 2-3 BR. 1 1/2 bath, excellent cbnd. near West High. fireplace, carpet, w/d, dw, gd. \$650/mo no pets or child. Call Joyce, 276 8010, or 344-1061.

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Apartments in newly renovated building. 1 blk from park Strip, off street parking and laundry room for your convenience. no dogs or children.
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from, JUNEAU EMPIRE 10/15/80

2 br. unfurnished and 1 br. furnished, in West Juneau. Carpeting, dishwasher, garbage disposal, off street parking. No pets or children. Mature adult preferred. 586

- Q: AREN'T MAINTAINENCE COSTS HIGHER WHEN YOU RENT TO FAMILIES WITH CHILDREN?
- A: ACCORDING TO A NEW YORK COMPANCY WHICH SUPPLIES THE INSURANCE INDUSTRY WITH NATIONWIDE STATISTICS ON DAMAGES, THERE IS NO EMPIRICAL DATA TO PROVE THAT THE PRESCENCE OF FAMILIES RESULTS IN GREATER DESTRUCTION TO PROPERTY.
- Q: WOULDN'T A FAIR HOUSING LAW FORCE LANDLORDS TO OVERCROWD THEIR APARTMENTS?
- A: NO. FAIR HOUSING LAWS ARE REASONABLE AND ARE NOT WRITTEN IN AN ARBITRARY MANNER. A LANDLORD WOULD NOT HAVE TO RENT A ONE BEDROOM APARTMENT TO A PARENT OR PARENTS WHO HAD THREE CHILDREN. OR, A PROJECT DESIGNED FOR THE ELDERLY OR HANDICAPPED WOULD NOT BE FORCED TO ACCEPT TENANTS WHO HAD CHILDREN. A FAIR HOUSING LAW WOULD BE REASONABLE AND GIVE EQUAL OPPORTUNITIES TO PARENTS AND INSURE THAT AN ADEQUATE SIZED APARTMENT WOULD NOT BE DENIED TO THEM BECAUSE OF PARENTHOOD.
- Q: ISN'T THE SOLUTION TO BUILD MORE HOUSING?
- A: THIS SOLUTION IGNORES THE FACT THAT OFTEN NEW BUILDINGS WILL NOT RENT TO FAMILIES WITH CHILDREN. ALSO, THERE IS NOTHING TO PREVENT EXISTING BUILDINGS TO ADOPT NEW RULES BANNING CHILDREN. IN THE LAST TWO MONTHS TWO APARTMENT BUILDINGS IN JUNEAU HAVE CHANGED THE RULES AND NOW EXCLUDE CHILDREN.
- Q: DON'T INSURANCE COMPANIES CHARGE HIGHER RATES FOR BUILDINGS THAT ALLOW CHILDREN?
- A: NO. PRUDENTIAL, SAFECO, AETNA, REPUBLIC, NORTHWESTERN, AND CONNENTIAL INSURANCE COMPANIES SAY THAT IT IS THE CONDITION OF THE BUILDING THAT DETERMINES THE RATES, NOT THE AGE OF THE TENANTS. (IT IS IMPORTANT TO NOTE THAT IF TENANT AGE WERE A FACTOR IN SETTING ACCIDENT LIABILITY RATES, THE HEAVIEST BURDEN MIGHT FALL ON THE ELDERLY).
- Q: WOULDN'T FAIR HOUSING LAWS FORCE LANDLORDS TO ACCEPT CHILDREN IN BUILDINGS THAT ARE UNSAFE FOR THEM?
- A: THIS ISSUE IS MISLEADING. ACCORDING TO OUR STATE AND LOCAL BUILDING CODES, ANY BUILDING WHICH IS UNSAFE FOR A CHILD IS ALSO UNSAFE FOR ADULTS. THE REAL SAFETY ISSUE IS THAT ANTI-CHILD RENTAL POLICIES FORCE MANY FAMILIES TO LIVE IN THE MOST DILAPIDATED, UNSAFE, AND OVERCROWDED HOUSING.
- Q: ARE THERE FAIR HOUSING LAWS IN OTHER AREAS OF THE COUNTRY?
- A: YES. LAWS TO PROTECT RENTERS WITH CHILDREN HAVE BEEN PASSED IN MANY AREAS THROUGHOUT THE UNITED STATES. ARIZONA, MICHIGAN, ILLINOIS, NEW JERSEY, NEW YORK, DELAWARE, CONNECTICUT, MINNESOTA, AND THE DISTRICT OF COLUMBIA HAVE PASSED FAIR HOUSING LAWS. NUMEROUS CITIES HAVE ENACTED LAWS THAT PROTECT FAMILIES AND CHILDREN, THEY INCLUDE SAN FRANCISCO, SPOKANE, LOS ANGELES, OAKLAND, AND SEATTLE.

The Alaska Statutes governing Landlords and tenants is not entirely clear in defining certain areas of concern to both the landlord and the tenant. Both the landlord and the tenant hold certain unalienable rights in the property they own as a landlord or rent as a tenant. With the 0% to 4% vacancy rate in most of Alaska, and because over 35% of the population in Alaska rent their dwellings, it is necessary to update the laws to answer the needs of the landlord and tenant. I introduced House Bill No. 1 to answer some of these needs. I feel that it is fair and equitable to both parties.

Referring to Section 1. of CSSHB 1, the landlord's rights are more clearly defined in relation to termination of a "periodic tenancy" held by a tenant. As the law stands now, it refers only to a lease or agreement, (a predetermined period of time) or an "estate at will", (for which the tenant is at the mercy of the landlord, and has no say in how long the tenancy will last). A "periodic tenancy" refers to a month to month period of time. Unlike a lease or agreement, it can be indefinite, and a good majority of rental arrangements today are based on a periodic tenancy. By inserting this new paragraph, it assists the landlord in enforcing his rights, should any conflicts arise due to termination.

Section 2 of CSSHB 1 was added by the Labor and Commerce Committee to further clarify AS 34.03.290 (c) relating to the 45 day notice. If the tenant fails to give notice of termination, then the landlord is entitled to an amount not to exceed one and one-half times the actual damages.

Section 3 provides for a 45 day notice. I feel that this is a more equitable time frame to both tenants and landlords. Due to the tight rental market in Alaska at the present time, it is quite difficult to find adequate housing, especially for those families with children or pets, not to mention the elderly and minorities. General termination, (30 days), on the part of the landlord in a time of a severe housing crunch does not always give the tenant sufficient time to find suitable housing. A 45 day notice would also be beneficial to the landlord, in as much as it gives him time to locate a new tenant, and gives him an adequate time frame to make necessary repairs and alterations before the new tenant moves in. Also, in the case of condo conversion, this gives the tenant sufficient notice to vacate or purchase their unit.

"Rental due date" refers to the date on the same day each month that rent is to be paid. The landlord may wish to give notice of termination to the tenant before the "rental due date", and replacing "rental due date" with the word "termination" date provides for either time frame. It does not restrict either party to the exact date the rent is due when giving a termination notice. The question arises, "What if the tenant

gives notice on, say May 17th?" This means that the termination date would be July 2nd. Therefore, the tenant would be obligated to pay the landlord for rent through May, all of June, (and two days in July, which would be prorated). The landlord would not lose any rental income even though the termination date falls after the "rental due date". By the time the 45 day period is up, the landlord has had adequate time to find a new tenant and the tenant has been given a more equitable amount of time to find a new dwelling.

The new clause in Section 4 provides for recovery of "actual damages", as well as one and one-half times the actual damages as compensation to the landlord. This deters the tenant from staying on past termination or the expiration of the rental agreement and in effect, is incentive to the tenant to vacate the premises.

An improper hold-over by a tenant has caused landlords financial difficulties. If a tenant continues to occupy a dwelling after his tenancy expires, he is causing the landlord loss of potential income needed to make mortgage payments, as well as the loss of time to make necessary repairs before renting the unit to the next party. Alaska law allows landlords to sue for damages, but the time, effort and money involved is not always feasible to pursue.

Section 5 was included in this bill to protect the tenant from landlords who abuse the right to access or evict the tenant for retaliatory reasons. The tenant has a right to his/her privacy, and the landlord must give "reasonable" notice to the tenant before entering the property. This new subsection also provides that the tenant may not be evicted because they have made a complaint, (for just causes), against the landlord, as long as they abide by the laws governing landlords and tenants. Sixty days is a sufficient amount of time to correct a problem or answer a complaint.

This bill is intended to update the present laws governing both the landlord and tenant. I feel that it provides both parties with fair and equal provisions to answer some of the overwhelming problems that have arisen over the past several years, due to the increase of the Alaskan population.

(It should be noted here that an increase in rents well as substantial or material changes in the existing rental agreement may also constitute a form of termination. This is, in effect, terminating the rental agreement then in existence and offering a new rental agreement at different terms. If the tenant does not accept the "new terms", then he must vacate 45 days after the receipt of notice of changes in the existing rental agreement. If the tenant does not respond to the landlord's notice of changes, then at the end of the 45 day period, the new rental agreement takes effect.)

A Letter of Intent was attached to SSHB 1 with the Labor and Commerce Committee Substitute to explain AS 34.03.290 (b) in detail regarding the 45 day notice as it applies to a rental increase. I would like to offer to the Judiciary Committee the Amendment found in your packets in place of the Letter of Intent to further clarify what transpires if a landlord or tenant makes substantial or material changes to a rental agreement. This is keeping in line with AS 34.03.290 (b). It should be inserted as a new Section 2, AS 34.03.025 as follows:

Page 1, after line 12, insert:

*Sec. 2, AS 34.03 is amended by adding a new section to read:

Section 34.03.025. CHANCES IN TERMS AND CONDITIONS OF RENTAL AGREEMENTS.

The landlord and tenant may change the terms and conditions of a rental agreement if the changes are not prohibited by law. Unless both the landlord and the tenant agree to a change in a rental agreement, the agreement remains in effect under its original terms and conditions, including provisions relating to rent and the rights and obligations of the parties, until the agreement is terminated under AS 34.03.290 or other law."

Renumber the following sections accordingly.

TO: Don

FROM: Jan

DATE: 2/17/83

RE: House Bill 1 - An act relating to landlords and tenants

Changes in the Landlord-Tenant Act proposed:

1. Increases time to give notice of termination from 30 days to 45 days
2. The termination date can be any date, not just end of period
3. Tenant is penalized if he fails to give proper notice = one and one-half damages (not in act now)
4. Tenant is penalized if he holds over willfully or not in good faith (now you must show both)
5. Landlord can sue for damages as well as possession in one action (now they are two separate suits - there will probably still be two separate proceedings, one summary unlawful detainer action and one regular trial on damages)
6. A landlord has presumptively retaliated against tenant for exercising his rights in he acts within 60 days to increase the rent, etc.

BACKGROUND

The cooperative extension services approached Abood. Apparently the cooperative is the only organization that deals with L-T on a steady basis.

The following people testified at the Labor and Commerce Committee: Abood, Tamara Cook of legal services, Barbara Eichner of CES, and Dave Donnelly of Josephson's staff. Dave was roped in at the last minute to discuss the word "willful". Dave stated that J. Andrews has interpreted the word to mean more than intentionally holding over.

There is a letter of intent coming out of labor and commerce on the bill. I haven't seen it. Ann Bly of Abood's office says that it contains a mistake. It's supposed to make clear the fact that the 45 day notice also must be given when changing the rent. Please review the letter.

Issues - thoughts on the bill

1. it is not clear what willful is, this might become more important now that that factor alone can become the sole basis for punitive damages.

2. Requiring 45 days notice and then punishing the tenant for failure to give notice seems harsh. If the tenant is 15 days late, does that really warrant punishment since that was the original time required? Donnelly says that its very hard to get the judges to impose punitive damages and that's why they did this.
3. Right now the landlord must file two complaints to get possession and damages. The change would require only one. It's not clear that the tenant has a right to trial on the damages issue. Dave and J. Andrews both believe that the court will interpret the law as such but it's not clear.
4. The presumption against the L.Lis great .

I've contacted Don Surgeon(?) of Anchorage Legal Services and Janine Reep of Juneau L.S. I left a message with Anchorage Tenants Union.

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (L&C)

"An Act relating to landlords and tenants."

OFFERED TO JUDICIARY
COMMITTEE 3/14/83

We have reworked HB 1 to reflect some of the changes recommended in the Judiciary meeting of February 25th.

The Bill has been re-drafted to reflect the three amendments and the sections have been renumbered to correspond to the Amendments. Also, note Page 2, Line 15 of the re-draft "AS 34.20.020" should be "AS 34.03.020".

Please refer to the re-draft of HB 1:

(Amendment No. 1)

New Section 1 - AS 09.45.085 is amended by adding a new paragraph to read:

ENFORCEMENT. A judgement for the restitution of real property rendered in an action for forcible entry or detention may be enforced by the plaintiff without further judicial action and the plaintiff may not be required to obtain a writ of assistance or other order to enforce the judgment.

This Amendment is offered to assist the plaintiff in settling his case. As it stands now, if a landlord (for example), wins his suit against the tenant who is holding over without the landlord's permission needs to first receive a judgment from the court, and then go to the Court or State Troopers to fill an additional form or forms to enforce the judgment. In some cases, a delay in action results in the tenant disappearing before the correct forms can be served upon him, and would alleviate the additional costs of filing additional forms.

Section 3 - Page 1, Line 16 through 23 - (Amendment No. 2)

"AS 34.03 is amended by adding a new section to read:

Sec. 34.03.025. CHANGES IN TERMS AND CONDITIONS OF RENTAL AGREEMENTS. The landlord and tenant may change the terms and conditions of a rental agreement if the changes are not prohibited by law. Unless both the landlord and tenant agree to a change in a rental agreement, the agreement remains in effect under its original terms and conditions, including provisions relating to rent and the rights and obligations of the parties, until the agreement is terminated under AS 34.03.290 or other law.

I offered this as Amendment No. 1 to the Judiciary committee on February 25. In order to correspond to the Bill Sections, I am now offering this as Amendment No. 2. This is simply in place of the Letter of Intent by the Labor & Commerce Committee to define AS 34.03.290 (b) in detail regarding the 45 day notice as it applies to a rental increase. It gives further clarification to what transpires if a landlord or tenant makes substantial or material changes to a rental agreement. It does not change the bill, but defines AS 34.03.290 (b). If the landlord (for example), gives a tenant a notice of rental increase, and the tenant does not approve of the increase, then the tenant can give his notice as defined in AS 34.03.290 (b).

(Amendment No. 3)

(See Page 1, Line 26 and 27, and Page 2, Line 1,2 and 3)

Section 4 (was Section 2) AS 34.03.270 is amended by adding a new subsection to read:

(b) If the rental agreement is terminated by the tenant [and] ; and the failure to provide the notice is wilful or not in good faith, the landlord may recover an amount not to exceed one and one-half times the actual damages. Failure by the tenant to provide the notice required under AS 34.03.290 (a) or (b) is presumed to be wilful and not in good faith.

These changes are offered as Amendment No. 3. The key word here is "presumed". The burden of proof lies with the tenant to prove that his intentions were in good faith. This shortens the judicial process in some circumstances. It is up to the tenant to explain why he did not give notice or had a good reason for not giving notice, (i.e. an emergency operation, a death in the family, etc.). Until that time, the court presumes that the tenant failed to give notice and the landlord can proceed with recovery of the premises.

Alaska State Legislature

INTERIM OFFICE:
1024 WEST SIXTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 274-2843
HOME (907) 274-3102

IN SESSION:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4947



HOUSE MAJORITY WHIP

CHAIRMAN
STATE AFFAIRS

MEMBER
TRANSPORTATION
LEGISLATIVE COUNCIL

Representative Mitch Abood
HOUSE DISTRICT 11

February 23, 1983

Jeanne M. Fortier
Coalition for Economic Justice
204 East Fifth Avenue, Suite 201
Anchorage, Alaska 99501

Re: CSSSHB 1
"An Act relating to Landlords
and Tenants"

Dear Ms. Fortier:

In response to your letter to Representative Don Clocksin dated February 17, 1983, I have enclosed a copy of the synopsis of the Committee Substitute for the Sponsor Substitute for House Bill 1. I am also enclosing a copy of this bill for your reference.

The Bill was drafted to update the Landlord-Tenant Act. It is fair to both the landlord and the tenant.

I am not sure what you are referring to when you cite "Section 1 (b); assuming you mean "Section 1" of CSSSHB 1, this Section was added to stipulate a "periodic tenancy". A lease agreement or an "estate at will" are noted in AS 09.45.090, but a month-to-month, or "periodic" tenancy is not listed. This just brings the Statute up to date as far as periodic tenancy is concerned.

Section 2, AS 34.03.270 (b) was added by the Labor and Commerce Committee to more specifically clarify AS 34.03.290 (c). (See enclosed Summary.)

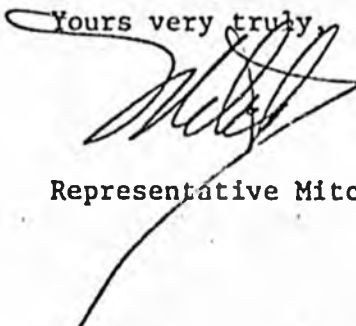
Section 3 - AS 34.03.290 (b) provides a more equitable time frame to both the tenant and the landlord. It requires the landlord to notify the tenant of a raise in rent, or a substantial or material change in the rental agreement 45 days before it takes effect. The tenant may chose not to accept the higher rent, or new terms and then must vacate the premises at the end of the 45 day period. If the tenant does not acknowledge the changes, then at the end of the 45 day period, the new changes go into effect as a new rental agreement. The tenant, on the other hand, must give a 45 day notice to the landlord if he intends to vacate the dwelling.

Jeanne M. Fortier
Coalition for Economic Justice
February 23, 1983
CCSSHB 1
Page Two

If you refer to Section 5, AS 34.03.310, this new subsection has been included to protect the tenant from the landlord who abuses the right to access or evicts the tenant for retaliatory reasons. This provides that the tenant may not be evicted because they have made a complaint against the landlord, (for just cause), i.e. complained to a government agency regarding unfair rent hikes, or requesting that certain necessary repairs be made to the premises or common area. The tenant is given 60 days to go through the process of filing a complaint and receiving action on that complaint. The landlord may not evict the tenant during that 60 period, provided the tenant uses the proper procedures listed in AS 34.03.140. Once the 60 day period has expired, the landlord should refer to AS 34.03.220 and the tenant should refer to AS 34.03.160 for remedies to their problem(s).

Please read over the enclosed summary, and give my office a call if you have further questions. Thank you for your interest in this Bill.

Yours very truly,



Representative Mitch Abood

encl.
MA/ab

cc: Representative Clocksin



Coalition for Economic Justice

204 East Fifth Ave., Suite 201 • Anchorage, Alaska 99501 • 907-276-7788/272-6113

February 15, 1983

Don Clocksin, House Representatives
Pouch V
Juneau, Alaska 99811

Dear Mr. Clocksin:

I appreciate your prompt response to the telegram I sent! I would like to respond to some of the changes being proposed in House Bill #1 in order to clarify our concern as tenants.

Section 1 (b) is of concern to us, as tenants, because it leaves the required 30 day written notice to raise rent or make a major change in the rental agreement untouched, while increasing the eviction notice to 45 days.

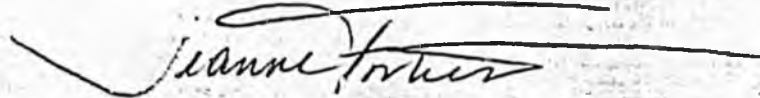
This enables the landlord to not only give an eviction notice, but also to substantially change the rental agreement without increasing legal protection to the tenant. I'd like to suggest that the Legislature, particularly the Labor and Commerce Committee, consider amending their current proposal in a manner more adequately protective of tenants during this 45 day period. I think there should also be legislative clarification regarding the extent of the tenant's responsibility for paying rent should she/he be evicted mid-month.

In addition, Section 4 (f) creates a problem for actively unionized or unionizing tenants insofar as the 60 day time specification is concerned. I appreciate that this portion of the law is attempting to protect us, as tenants, but it doesn't go far enough. Sixty days allows the landlord enough time to get good and angry before slapping a 30-45 day notice on his/her renters. Tenants are scared stiff, as it is, to take any action, even when their apartments are infested with roaches and mice, or have serious heating or plumbing problems. I have mixed feelings about this section, Don, and would appreciate your consideration as far as improving it. What may be needed is the establishment of municipal or state panels to review whether substantial changes in the rental agreement, which occur after organizing or grievance efforts, are retaliatory or just cause.

PAGE TWO

Thanks for your interest and consideration, Don. I appreciate your much needed assistance.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jeannie Fortier', with a long horizontal flourish extending to the right.

Jeannie Fortier

P.S. Thanks for straightening me out on HB131. Yes, of course, it's an improvement!

JF/ttb



COOPERATIVE EXTENSION SERVICE

UNIVERSITY OF ALASKA, USDA & SEA GRANT COOPERATING

ANCHORAGE DISTRICT, 2651 PROVIDENCE AVENUE, ANCHORAGE, ALASKA 99508

NOTE: SSHB 1 TESTIMONY GIVEN BY BARBARA EICHNER
TO LABOR AND COMMERCE COMMITTEE ON
2/10/83. THE BILL HAS BEEN UPDATED BY
THE LABOR AND COMMERCE COMMITTEE ---
BARBARA EICHNER WILL SPEAK TO THESE CHANGES
AT THE JUDICIARY MEETING 2/25/83.

Testimony on House Bill 1
Barbara G. Eichner
District Home Economist - Cooperative Extension Service
February 10, 1983

Good morning and thank you for providing the opportunity for me to testify on one of the most important bills before the 1983 legislature.

This is Barbara Eichner speaking. I am district home economist for the Cooperative Extension Service in Anchorage. Briefly, our agency is the non-credit educational arm of the land-grant university in every state, which includes the University of Alaska. Our job is to disseminate practical information to consumers on a wide variety of topics such as gardening, nutrition, agriculture and housing.

Three years ago because of a fluke answer to a consumer newspaper column, the Cooperative Extension Service was propelled to the forefront as the only impartial agency or organization who would and could answer landlord-tenant questions quickly, simply and at no charge. I am not an attorney and I do not give legal advice. All I can do is give people an idea of their rights and responsibilities under the law and yet despite that, over 4000 landlords and tenants have sought my advice through telephone counseling and seminars. In addition, over 14,000 copies of our landlord-tenant handbooks have been distributed statewide and 9 hours of radio and television time have been used to discuss landlord-tenant issues. In short, the concerns relating to rental housing are numerous and the effect of inadequate assistance is widespread. People in Bethel, Kodiak, Nome, Dutch Harbor and North Pole all want the same thing according to my statistics - available and affordable housing managed in a business-like manner. People in 26 Alaskan communities have all said the same thing - change the law.

You all know the history of rental housing in the boom and bust economy of Alaska's towns and villages. In good times housing has responded well to the laws of supply and demand. In poor times, landlords and tenants alike have asked for help in keeping housing available, affordable and soundly managed. Despite the steady growth of Alaska's overall economy, the supply of rental housing in the last 3 years has remained the same while the population increased. Anchorage alone has experienced a rental vacancy rate of less than 1% for almost 2 years. Newspaper headlines like "Tenants Feel Pinch of Escalating Rents", "Anchorage Renters May Form Union" and "Man Sues Landlady for \$2.8 million" only underscore the tension prevalent in the rental market.

Continued...

The stories that didn't capture headline attention are the sometimes unbelievable but everyday problems the Extension Service has faced such as:

- the tenant who hasn't had heat for 6 months and whose landlord says if she doesn't like it she can move
- the landlord who is left with a \$3000 outstanding bill in damages and back rent when the tenant moves out in the middle of the night
- the tenant whose rent has been raised \$350 in just one month
- the landlord who needs to evict 8 people who are living in a one-bedroom apartment
- the tenant who was physically assaulted by his landlord, and
- the landlord who must replace a whole bedroom wall section because the permeating odor of a previous tenant's pet snake that crawled into the wall and died. (Yes, it is a true story).

If consumers are to act as responsible citizens in the marketplace, then our laws must reflect the needs of our citizens. It really doesn't matter whether you are a landlord or a tenant, the fact is that Alaska's Uniform Residential Landlord and Tenant Act is out-of-date and unclear. Many issues such as those just named, are not addressed at all.

In the three years that I have dealt with rental housing questions, the problems that have loomed largest include evictions, improper holdover, lack of written rental agreements, abuse of the right to access, retaliation, security deposits and forceable entry and detainer without due process.

I am pleased to see that House Bill 1 makes an effort to address four of these issues.

Section 1 and Section 3 make it clearer for landlords in knowing when they can prosecute for improper possession. Far too many tenants have told me that they feel landlords are obliged to house them until it is convenient for them to move. Not only has this attitude complicated the rights of landlords to negotiate new deals with new tenants, it has been held with little consequence or risk.

I believe Section 2 will be a welcome relief to both landlords and tenants in outlining a clearer way of determining when a tenant will move. The 45-day proviso is a compromise on just-cause eviction which is fairer to landlords. At the same time, I don't know how many landlords and tenants have been stuck with nearly 60 days notice when they have accidentally missed a rental due date. Almost everyone should be able to count 45 calendar days.

Page three
H.B.1

And finally, in Section 4, I believe it is appropriate to shift the burden of proof for retaliatory measures to the landlord without sticking them with an enforced lease behind which unsavory tenants could hide. Retaliatory action is clearly illegal in our current statute but my experience indicates that it is practically impossible for tenants to prove. Landlords, by virtue of their position, have the greater power here and therefore I believe should have the greater burden. It is a question of social equity for tenants who see themselves as helpless victims and should create no hardship for the vast majority of our landlords who are straight-forward business people.

Housing issues have deep psychological roots. The fiber of the good life in this country appears to weigh heavily on access to shelter. We must give consumers the tools with which to manage their own affairs at a satisfactory level. Even though there are many issues yet to address, House Bill 1 has taken an equitable stance on at least 4 of these and I urge your serious consideration of this proposed legislation.

Thank you.

Offered: 3/16/83
Referred: Rules

Original sponsor: Abood

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to landlords and tenants."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 09.45 is amended by adding a new paragraph to read:

*only State Troopers
Can evict.*

9 Sec. 09.45.085. ENFORCEMENT. A judgment for the restitution of
10 real property rendered in an action (for forcible entry or detention
11 may be enforced by the plaintiff without further judicial action and
12 the plaintiff may not be required to obtain a writ of assistance or
13 other order to enforce the judgment.

14 * Sec. 2. AS 09.45.090 is amended by adding a new paragraph to read:

15 (4) when, after a notice to terminate the tenancy as pro-
16 vided in AS 34.03.290 with reference to termination of a periodic
17 tenancy, a person continues in possession of a dwelling unit after
18 expiration of the time for determining the tenancy.

19 * Sec. 3. AS 34.03.270 is amended by adding a new subsection to read:

20 (b) If the rental agreement is terminated by the tenant, the
21 tenant fails to provide the notice required under AS 34.03.290(a) or
22 (b), and the failure to provide the notice is wilful or not in good
23 faith the landlord may recover an amount not to exceed one and one-
24 half times the actual damages. Failure by the tenant to provide the
25 notice required under AS 34.03.290(a) or (b) is presumed to be wilful
26 and not in good faith.

27 * Sec. 4. AS 34.03.290(b) is amended to read:

28 (b) The landlord or the tenant may terminate a month to month
29 tenancy by a written notice given to the other at least 30 days before

1 the termination [RENTAL DUE] date specified in the notice.

2 * Sec. 5. AS 34.03.290(c) is amended to read:

3 (c) If the tenant remains in possession without the landlord's
4 consent after expiration of the term of the rental agreement or after
5 its termination, the landlord may bring an action for possession and
6 recovery of actual damages. If [IF] the tenant's holdover is wilful
7 or [AND] not in good faith the landlord, in addition, may recover an
8 amount not to exceed one and one-half times the actual damages. If
9 the landlord consents to the tenant's continued occupancy, AS 34.03.-
10 020 applies.

11 * Sec. 6. AS 34.03.310(a) is amended to read:

12 (a) Except as provided in (c) and (d) of this section, a land-
13 lord may not retaliate by increasing rent, [OR] decreasing services,
14 terminating the rental agreement or providing notice of termination,
15 or by bringing or threatening to bring an action for possession after
16 the tenant has

17 (1) complained to the landlord of a violation of AS 34.03.-
18 100;

19 (2) endeavored to enforce [AVAIL HIMSELF OF] rights and
20 remedies granted to a tenant [HIM] under the provisions of this
21 chapter;

22 (3) organized or become a member of a tenant's union or
23 similar organization; or

24 (4) complained to a governmental agency responsible for
25 enforcement of governmental housing, wage, price or rent controls.

26 * Sec. 7. AS 34.03.310 is amended by adding a new subsection to read:

27 (f) A landlord is presumed to have violated (a) of this section
28 if the landlord increases rent, decreases service, terminates the
29 rental agreement or provides notice of termination, or brings or

1 threatens to bring an action for possession within 60 days after a
2 tenant has engaged in an action listed under (a)(1) - (4).

An Overview of
Committee Substitute for Sponsor Substitute for HOUSE BILL NO. 1 (L&C)
"AN ACT RELATING TO LANDLORDS AND TENANTS"

The Alaska Statutes governing Landlords/Tenants, (Title 34- Property), has not been clear in defining certain areas of concern to both the landlord and the tenant. Whether oral or written, both the landlord and tenant hold certain unalienable rights in the property they own as a landlord or rent as a tenant. With the 0% to 4% vacancy rate in most of Alaska, and because over 35% of the population in Alaska rent their dwellings, it is necessary to update the laws to answer the needs of the landlord and tenant. The following is a summary of CSSHB 1, and how it answers some of these needs.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS 09.45.090 is amended by adding a new paragraph to read:

(4) when, after a notice to terminate the tenancy as provided in AS 34.03.290 with reference to termination of a periodic tenancy, a person continues in possession of a dwelling unit after expiration of the time for determining the tenancy.

This new paragraph is being added to stipulate a "periodic tenancy" termination. AS 09.45.090 (3) cites termination of an "estate at will" tenancy, which can be defined as a tenancy that transpires on a day to day basis or an indefinite term at the will of the lessor. In this case, the tenant has no say in the matter of how long the tenancy will last. The landlord may, at any time, terminate the tenancy and the tenant has no right to a notice. (This type of tenancy was developed in a few hundred years ago in England, and rarely applies "modern day" tenancy.) For this reason, it is necessary to add Paragraph 4, as periodic tenancy, (month to month), is not referenced in the present context.

Section 2. AS 34.03.270 (b) was added by the Labor and Commerce Committee to more specifically clarify AS 34.03.290 (c), to read:

(b) If the rental agreement is terminated by the tenant and the tenant fails to provide the notice required under AS 34.03.290 (a) or (b), the landlord may recover an amount not to exceed one and one-half times the actual damages.

If the tenant decides to cancel his rental agreement, but does not notify the landlord, the landlord may collect one and one-half times the damages incurred, (i.e. rent). The tenant is obligated to give the landlord written notice of his intention to vacate the premises 45 days before termination, (See AS 34.03.290 (b)). If it is a case where the tenant remains in possession of the dwelling past the termination date

without the landlord's permission, then the landlord is entitled to one and one-half times the damages PLUS the actual damages, (2½X the actual damages), as compensation. (See AS 34.03.290 (c)).

Section 3. AS 34.03.290 (b) is amended to read:

(b) The landlord or the tenant may terminate a month to month tenancy by a written notice given to the other at least 45 [30] days before the termination [RENTAL DUE] date specified in the notice.

This amendment provides a more equitable time frame to tenants and landlords. The vacancy rate for apartments at the present time in the Anchorage, Fairbanks, Ketchikan and Juneau markets ranges from 0% to 4%. Because of this tight rental market, it is sometimes quite difficult for low income families, minorities, pet owners, families with children, and the elderly, (to name a few), to find adequate and habitable housing. General termination, (30 days), on the part of the landlord, in a time of a severe housing crunch does not always give the tenant sufficient notice to find other adequate housing. Also, in the case of a condo conversion, this gives the tenant sufficient notice to vacate or purchase their unit. In a future situation where the rental market is not so tight, this 45 day notice allows the landlord adequate time to make necessary repairs and alterations, as well as locate a new tenant.

"Rental due date" refers to Sec. 34.03.020 (c) which is the date on the same day each month that rent is to be paid. The landlord or the tenant may wish to give notice of termination on either side of the "rental due date", and replacing "rental due" with "termination" date provides for either time frame. It does not restrict either party to the exact day the rent is due when giving a termination notice.

The question arises, "What if the tenant gives notice on, say March 19?" This means that the termination date would be May 2nd. Therefore, the tenant would be obligated to pay the landlord for rent through March, all of April, (and two days in May, which would be prorated). The landlord would not lose any rental income even though the termination date falls after the "rental due date". By the time the 45 day period is up, the landlord has had adequate time to find a new tenant and the tenant has been given a more equitable amount of time to find a new dwelling.

(It should also be noted here that an increase in rent may also constitute a form of termination, as well as new rules put into effect by the landlord, i.e. no pets, adults only, etc. This is, in effect, terminating the rental agreement then in existence and offering a new rental agreement at different terms. If the tenant does not accept the "new terms", then he must vacate 45 days after the receipt of notice of substantial or material changes from the landlord. If the tenant does not respond to the landlord's notice of substantial or material changes, at the end of the 45 day period, the new rental agreement takes effect.)

Section 4. AS 34.03.290 (c) is amended to read:

(c) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or after its termination, the landlord may bring an action for possession and recovery of actual damages. If [IF] the tenant's holdover is wilful [and] or not in good faith the landlord, in addition, may recover an amount not to exceed one and one-half times the actual damages. If the landlord consents to the tenant's continued occupancy, AS 34.20.020 applies.

An improper hold-over by a tenant has caused landlords financial hardships. If a tenant continues to occupy the dwelling after his tenancy expires, he has caused the owner loss of income needed to make mortgage payments, as well as loss of time to make necessary repairs, alterations, etc., before renting the unit to the next party. Alaska law allows landlords to sue for damages, but the time, effort and money involved is not always feasible to pursue.

The new clause noted above provides for recovery of actual damages, (i.e. lost rent income, lost time needed to make necessary repairs, etc.), as well as one and one-half times the actual damages as compensation to the landlord. This deters the tenant from staying on past termination or the expiration of the rental agreement and in effect is incentive to the individual(s) to vacate the premises. (Also see AS 34.03.270 (b)).

Section 5. AS 34.03.310 is amended by adding a new subsection to read:

(f) A landlord is presumed to have violated (a) of this section if the landlord increases rent, decreases service, or brings or threatens to bring an action for possession within 60 days after a tenant has engaged in an action listed under (a)(1) - (4).

This new subsection protects the tenant from landlords who abuse the right to access or evict the tenant for retaliatory reasons. The tenant has a right to his/her privacy, and the landlord must give "reasonable" notice to the tenant before entering the premises, (See AS 34.03.010). This new subsection also provides that the tenant may not be evicted because they have made a complaint using the proper procedures, (See AS 34.03.140), i.e. complained to a government agency regarding unfair rent hikes, or requesting that certain necessary repairs be made to the premises or common area. Sixty days is a sufficient amount of time to correct a problem or answer a complaint. After the 60 day period has expired, the tenant should refer to AS 34.03.160 and the landlord should refer to AS 34.03.220 for remedies to their problem(s).

SOME ANCHORAGE HOUSING UNITS, BY LEGISLATIVE DISTRICT

	<u>Mobile Hms. in Parks</u>	<u>On Lots</u>	<u># of Apts.</u>
District 7 (Szymanski, partial)	29	316	830
District 8 (Cowdery and Pestinger)	497	394	828
District 9 (Hayes and Flood)	0	87	1805
District 10 (Busse11 and Lindauer)	1543	144	5222
District 11 (Abood and Tischer)	109	42	1546
District 12 (Clocksin and Uehling)	130	8	5904
District 13 (Ward and Martin)	858	31	4481
District 14 (Barnes and Furnace)	2862	211	4362
District 15 (Phillips and Liska, partial)	187	381	650
District D (P. Fischer, Gilman, partial)	29	316	830
District E (Pettyjohn, Faiks)	97	481	2633
District F (Sturgulewski, Rodey)	1652	186	6768
District G (Josephson, Fischer)	988	39	10385
District H (Halford, Kelly, partial)	187	381	650

Information compiled from the Municipal Housing Survey, undertaken summer of '83. The Community Planning Dept. originally compiled the info. by Community Council. AkPIRG reorganized it according to legislative districts. Boundaries of the two types of areas are not congruent, though we attempted to make them as compatible as possible. Only housing units within Community Councils are tallied, though only 200 apartments, 416 mobile homes in parks and 3 on lots are not included in the figures because of this. Additional methodology available from AkPIRG.

Municipality of Anchorage	6484	1723	26009
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ALASKA PUBLIC INTEREST RESEARCH GROUP

Post Office Box 1093/Anchorage, Alaska 99510/(907) 278-3661

October 18th, 1983

Rep. Don Young
US House
Washington, DC 20515

Dear Rep. Young:

I am writing in support of Section 208 of the HR 1, dealing with the "Fair Market Rent" for Section 8 housing.

As you probably know, certain low-income renters are given Section 8 certificates to participate in federal housing assistance programs. Provided they can locate housing under the Fair Market Rent determined for their area, these renters pay 26-30% of their incomes towards rent and the federal government picks up the balance up to the rent level. The current "FMR" is that level below which 40% of the state's rental units fall, with certain exclusions.

Unfortunately, the national Fair Market Rent formula is not appropriate to Alaska. According to the AK State Housing Authority, over a quarter of the Section 8 certificate holders in the state are unable to find housing renting at less than the "FMR". Some landlords in Anchorage have started taking rent under the table from tenants so the landlords appear to rent at below the FMR--the State Ombudsman's Office will soon be receiving a formal complaint on the issue.

If Section 208 remains intact, it will increase the FMR from 40% to the 50% level. It's a step in the right direction, and will allow more tenants to take advantage of the federal programs already funded but not being fully utilized here in Alaska. (The FMR for a two bedroom apartment is \$512, while the HUD office here in Anchorage quotes \$650-700 a month as an average low-income rent for the same sized apartment.)

Can we count on your support of the present working of Section 208 in HR 1?

Sincerely,

Maureen Kennedy
Director

In holdover situation, rent is determined at fair market value.

gore

easy

Red. from security

if Landlord ~~believes~~ wanted to evict person ~~due~~ to rent increases. Doesn't hold water (see above).

1/2 times actual damages for deciding to go to court.
- will full decision to holdover based on a good faith agreement.
*subject to punitive damages

~~Making~~
treating people differently because tenants ^{than other} in ~~the~~ financial proceedings.

Landlord does not suffer economic loss.

10,000
11,000

Files in
master file

Section 5:

DUE PROCESS ISSUE. WANT FED
TRADING TO COVER getting kicked out
& actual damages.

— Serve tenant summons & complaint:
— 1st count: possession
FED

absorbs
will would
settle actual
damages. counterclaim.

Under present law,
landlord renting

← Damages.
20 days to
claim.
counterclaim.

going to be
heard before you
file your answer.
question of whether person
should be kicked out

landlord, suffering loss, landlord should get award of FET, proceeding.
Due process problem, equal protection problem

procedural
due
process

(A) Has there been adequate notice of claim?

(B) Has there been meaningful opportunity to be heard?

Someone being hauled to court on 2 to 4 days notice. Is that enough time for (A) & (B).

(B) ~~other side of~~ what do you do in other similar circumstances, are you doing same thing here.

Is there a fair and substantial relationship between what you are doing and the purpose of the law (legitimate state purpose)?

= Any other time re: money, you always have 20 days.

- for this party, we give relief on 2 to 4 days notice.

? FORCIBLE ENTRY OR DETENTION.

MEMO:

MEMO HB1

TO: JIL

FROM: S. 2/

RE: HB1

Section 1:

WOULD ALLOW LANDLORD OR LANDLADY TO
ENFORCE A JUDGEMENT FOR RESTITUTION
OF REAL PROPERTY. ~~HE~~ CURRENTLY THE
LANDLADY MUST OBTAIN A WRIT OF ASSISTANCE
TO BE SERVED BY THE STATE TROOPERS
IF THE TENANT DOES NOT PEACEABLY
VACATE AS THE COURT HAS DIRECTED. THE

PROPOSED SECTION 1 WOULD ALLOW LANDLORDS TO TRY TO
— THOUGHTS ON SECTION 1, FORCIBLY EVICT A TENANT.

1) PLACES THE POWER OF STATE INTO HANDS
OF INDIVIDUALS (LANDLORDS), AND PLACES
THEM IN CONFRONTATIONAL SITUATION.

2) IF THE STATE IS GOING TO ~~ALLOW~~
CONDONE THE USE OF FORCE. SHOULDN'T
THE ^{CONDITIONS + THE} LEVEL OF FORCE BE DEFINED.

FOR EXAMPLE, WHEN WOULD IT BE OK FOR
THE TENANT TO USE FORCE TO
PROTECT THEMSELVES.

3) WHO IS LIABLE FOR INJURIES?

4) WOULD THE TENANT HAVE TO BE PRESENT TO HAVE POSSESSIONS REMOVED FROM RENTAL UNIT?

5) WHO WOULD BE RESPONSIBLE FOR POSSESSIONS IF THE TENANT WAS NOT PRESENT, AND SOME WERE STOLEN?

6)

SECTION 2

SECTION 3: STATES THAT IF THE RENTAL AGREEMENT IS ⁽¹⁾TERMINATED BY THE TENANT, ⁽²⁾THE TENANT FAILS TO GIVE NOTICE (AND FAILURE IS WILLFUL & NOT IN GOOD FAITH, THE LANDLORD MAY AN AMOUNT NOT TO EXCEED $1\frac{1}{2}$ TIMES THE ACTUAL DAMAGE.

we deny them the opportunity
to ~~do~~ of discovery.

Is this something we can do,
considering constitutional
equal protection.

Can we treat tenants
differently than others
concerning money.

→ Landlords are one upon
process.

- give property back
- give damages w/out
allowing other civil
case proceedings.

Landlord doesn't want to go to

← ^(B) damages hearing.

← Economic loss

← There is no economic cost.

← The landlord is entitled rent.

← Rent owed can be deducted
from security deposit.

←

CHAPTER 1307

An act to add Section 527.6 to the Code of Civil Procedure, relating to harassment.

[Approved by Governor September 26, 1978. Filed with Secretary of State September 26, 1978.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3093, Egeland. Harassment.

Under existing law, a court may enjoin certain acts of harassment. This bill would provide for an expedited procedure to obtain such an injunction.

The Judicial Council would be required to promulgate forms and instructions, and rules for the service of process and related matters. The plaintiff could obtain a temporary restraining order.

Upon filing of the petition, a hearing for an injunction would be held within 15 days. If granted, the injunction would be in force for up to 3 years, unless renewed. The prevailing party could receive attorney's fees.

The bill would define harassment as knowing and willful conduct which would cause substantial emotional distress by seriously alarming, annoying, or harassing a person, as specified.

A violation of the injunction would be a misdemeanor.

The bill would provide for the transmittal of specified information to law enforcement agencies.

The bill would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant to the bill.

The people of the State of California do enact as follows:

SECTION 1. The Legislature intends by this act to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution.

SEC. 2. Section 527.6 is added to the Code of Civil Procedure, to read:

527.6. (a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order, and an injunction prohibiting harassment as provided in this section.

(b) For the purposes of this section, "harassment" is a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys or harasses such person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.

HARRASSMENT

"Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(c) Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order in accordance with the provisions of subdivision (a) of Section 527 of the Code of Civil Procedure. A temporary restraining order may be granted with or without notice upon an affidavit which, to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff. A temporary restraining order granted under this section shall remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the court.

(d) Within 15 days of the filing of the petition, a hearing shall be held on the petition for the injunction. The defendant may file a response which explains, excuses, justifies or denies the alleged harassment. At the hearing, the judge shall receive such testimony as is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting such harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under this section.

(e) Nothing in this section shall preclude either party from representation by private counsel or from appearing on his or her own behalf.

(f) Upon filing of a petition for an injunction under this section, the defendant be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition.

(g) The clerk shall transmit a copy of each temporary restraining order or injunction or modification or termination thereof, granted under this section, by the close of the business day on which such order was granted, to such law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency may make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported harassment.

(h) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

(i) Any willful disobedience of any temporary restraining order or injunction granted under this section shall be a misdemeanor pursuant to Section 166 of the Penal Code.

(j) This section shall not apply to any action covered by subdivision

(b) of Section 527 of this code, or by Title 1.6C (commencing with Section 1788) of the Civil Code. Nothing in this section shall preclude a plaintiff's right to utilize other existing civil remedies.

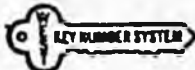
(k) The Judicial Council shall promulgate forms and instructions therefor, rules for service of process, scheduling of hearings, and any other matters required by this section. The petition and response forms shall be simple and concise.

SEC. 3. No appropriation is made by this act, nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency or school district for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

could properly conclude, however, that such destruction of records should not in itself automatically defeat the maintenance of a class action. (Cf., e. g., *Appleton Electric Co. v. Advance-United Expressways* (7th Cir. 1974) 494 F.2d 126, 139.) Defendants may, of course, raise specific objections to any remedial mechanism which the court may hereafter fashion to cope with the problems posed by the absence of such records. Given the trial court's considerable flexibility in the management of a class action (see, e. g., *Vasquez v. Superior Court*, *supra*; 4 Cal.3d at pp. 820-821, 94 Cal.Rptr. 796, 484 P.2d 964), and—as we explained in our recent decision in *Green v. Obledo*, *supra*, 29 Cal.3d at pp. 142-143, 127 Cal.Rptr. 206, 624 P.2d 256—its discretion in fixing an appropriate "starting date for the payment of retroactive benefits to class members," our intervention at this stage of the proceedings is clearly unwarranted.

The alternative writ is discharged and the peremptory writ is denied.

BIRD, C. J., and TOBRINER, MOSK, RICHARDSON, NEWMAN and BROUSARD, JJ., concur.



Alice BARELA, Petitioner,

v.

The SUPERIOR COURT OF ORANGE COUNTY, Respondent;

Leonardo VALDEZ, Real Party in Interest.

L.A. 31444.

Supreme Court of California.

Nov. 27, 1981.

Tenant filed petition for writ of mandate requesting that the Superior Court,

Orange County, Harmon G. Scoville, J., be ordered to vacate order granting landlord restitution of premises and back rent in unlawful detainer action. The Supreme Court, Bird, C. J., held that: (1) record demonstrated that tenant was evicted by landlord in retaliation for her complaint to the police that landlord had sexually molested her nine-year-old daughter, and (2) such eviction violated statutory prohibition against evictions in retaliation for the exercise of any rights under the law, and also the common-law defense of retaliatory eviction.

Writ of mandate issued with directions to vacate judgment and enter judgment for tenant.

1. Landlord and Tenant — 298(3)

Record in unlawful detainer action demonstrated that tenant was evicted by landlord in retaliation for her complaint to the police that landlord had sexually molested her nine-year-old daughter. West's Ann.Penal Code § 647(a).

2. Landlord and Tenant — 298(1, 2)

Unlawful detainer actions are summary proceedings, and only issues directly relevant to the ultimate question of possession may be raised in defense of unlawful detainer action; generally, counterclaims, cross complaints and affirmative defenses cannot be considered.

3. Landlord and Tenant — 298(1)

Eviction by landlord of tenant in retaliation for tenant's complaint to the police that the landlord had committed a crime in sexually molesting her nine-year-old daughter violated the statutory prohibition against evictions in retaliation for the exercise of any rights under the law, and also the common-law defense of retaliatory eviction. West's Ann.Civ.Code, § 1942.5(c); West's Ann.Penal Code § 647(a).

Katherine R. Wolff, Encino, for petitioner.

Ronald S. Javor, Long Beach, Los Angeles, Ronald Robert Klotz, Santa Ana, petitioner.

No appearance for respondent.
Paul G. Mast, Santa Ana, in interest.

BIRD, Chief Justice.

In an unlawful detainer action, a renter raises as an affirmative claim that a landlord seeks action for the tenant's crime, like that the landlord is a crime?

I.

On April 12, 1980, petitioner, called the Santa Ana Police to complain that her landlord, Valdez (real party in interest), molested her nine-year-old daughter.

Seven days later, on April 19, 1980, Valdez served Barela with a three-day "Pay Rent or Quit." He demanded \$650 per month, rather than the \$500 per month she had been paying. She filed a complaint to the police, and he moved out of the house from him for four years.

In May of 1980, Valdez filed a detainer action against Barela for failure to pay \$650 per month. That action was dismissed, because Valdez had never served notice of rent increase on her. However, in late May he served a 30-day notice of termination on the month-to-month tenancy. She moved. On July 21, 1980, Valdez filed a new unlawful detainer on the 30-day notice of termination. She responded with an answer:

1. The record indicates that on July 21, 1980, Valdez pleaded guilty to a violation of Code section 647, subdivision (a) (molestation in public).

2. Unless otherwise noted, all references are to the Civil Code.

Ronald S. Javor, Long Beach, Fred Okrand, Los Angeles, Ronald R. Talmo and Robert Klotz, Santa Ana, amici curiae for petitioner.

No appearance for respondent.

Paul G. Mast, Santa Ana, for real party in interest.

BIRD, Chief Justice.

In an unlawful detainer action, may a renter raise as an affirmative defense the claim that a landlord seeks to evict in retaliation for the tenant's complaint to the police that the landlord has committed a crime?

I.

On April 12, 1980, petitioner, Alice Barela, called the Santa Ana Police Department to complain that her landlord, Leonardo Valdez (real party in interest), had sexually molested her nine-year-old daughter.¹

Seven days later, on April 19, 1980, Valdez served Barela with a three-day notice to "Pay Rent or Quit." He demanded rent of \$650 per month, rather than the \$200 per month she had been paying. Prior to her complaint to the police, she had rented the house from him for four years without any problem.

In May of 1980, Valdez filed an unlawful detainer action against Barela, based on her failure to pay \$650 per month rent in May. That action was dismissed, apparently because Valdez had never served the 30-day notice of rent increase required by law. However, in late May he served Barela with a 30-day notice of termination of her month-to-month tenancy. Barela did not move. On July 21, 1980, while criminal charges were pending against him, Valdez filed a new unlawful detainer action, based on the 30-day notice of termination. Barela responded with an answer alleging as an

affirmative defense that she was being evicted in retaliation for her exercise of constitutionally protected rights.

After trial, the court issued the following findings of fact: (1) "[t]his eviction of the defendant by the plaintiff was caused by the complaint of the defendant against the plaintiff to the police," and (2) "[t]he pending criminal trial against the plaintiff which was the result of defendant's complaint to the police led to a breakdown of the parties' ability to live peacefully in the same community."

In addition, the court issued conclusions of law, holding that the eviction was not protected by section 1942.5 of the Civil Code² or by the standards of *S.P. Growers Assn. v. Rodrigues* (1976) 17 Cal.3d 719, 181 Cal.Rptr. 761, 582 P.2d 721. The court granted Valdez the relief sought, including restitution of the premises and back rent. This result was held to be equitable.

The appellate department of the superior court upheld the trial court's decision, without issuing an opinion, and refused to certify the case to the Court of Appeal. (Code Civ.Proc., § 911.) Barela filed a petition for a writ of mandate in the Court of Appeal. She requested that the superior court be ordered to vacate its order and to either enter judgment for petitioner or rehear the case, giving proper consideration to the defense of retaliatory eviction.³ The Court of Appeal summarily denied her petition. Barela then filed a petition for a writ of mandate before this court and an alternative writ of mandate was issued.

II.

[1] This case involves one basic issue—whether an affirmative defense is available in an unlawful detainer action if it is based on the allegation that the landlord seeks to evict in retaliation for the tenant's report to

1. The record indicates that on August 25, 1980, Valdez pleaded guilty to a violation of Penal Code section 647, subdivision (a) (lewd or disoluate conduct in public).

2. Unless otherwise noted, all statutory references are to the Civil Code.

3. Relief by means of writ of mandate is appropriate under these circumstances. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 622, fn.5, 111 Cal.Rptr. 704, 517 P.2d 1169; *Schweiger v. Superior Court* (1970) 3 Cal.3d 507, 517-518, 90 Cal.Rptr. 729, 476 P.2d 97.)

the police that the landlord has committed a crime.⁴

[2] Unlawful detainer actions are summary proceedings. Only "issues directly relevant to the ultimate question of possession" may be raised in defense of an unlawful detainer action. (*Green v. Superior Court*, *supra*, 10 Cal.3d 616, 634, 111 Cal. Rptr. 704, 517 P.2d 1168.) Generally counterclaims, cross-complaints and affirmative defenses cannot be considered. (*Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 721, 84 Cal.Rptr. 756.)

The defense of "retaliatory eviction" has been firmly enshrined in this state's statutory law and judicial decisions for many years. (See, e.g., § 1942.5; *S.P. Growers Assn. v. Rodriguez*, *supra*, 17 Cal.3d 719, 724, 131 Cal.Rptr. 761, 552 P.2d 721; *Schweiger v. Superior Court*, *supra*, 3 Cal.3d 507, 517, 90 Cal.Rptr. 729, 476 P.2d 97.) "It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding. [Citations.]" (*S.P. Growers*, *supra*, 17 Cal.3d at p. 724, 131 Cal.Rptr. 761, 552 P.2d 721.) The retaliatory eviction doctrine is founded on the premise that "[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason"

4. Real party in interest argues that the trial court did consider the defense of retaliatory eviction and rejected it. He claims petitioner failed to show that the eviction was actually retaliatory.

Since neither party has supplied a complete transcript of the proceedings below, this court must rely on the trial court's findings of fact. The trial court made two key factual findings: (1) petitioner's eviction was caused by her complaint to the police; and (2) the complaint to the police also caused "a breakdown of the parties' ability to live peacefully in the same community."

Relying on the second of these two findings, real party in interest asserts that the trial court decision was based solely on the factual determination that the landlord and tenant were unable to live in the same community. He argues that this is a legally permissible, nonre-

(*Id.*, at p. 780, 131 Cal.Rptr. 761, 552 P.2d 721.)

The affirmative defense of retaliatory eviction was first recognized by this court in *Schweiger v. Superior Court*, *supra*, 3 Cal.3d 507, 90 Cal.Rptr. 729, 476 P.2d 97. There, the statutory "repair and deduct" provision (§ 1942) was construed so as to include protection against eviction for those tenants who exercised their statutory rights. The same year, the Legislature codified this protection in section 1942.5. The statute prohibited landlords from evicting a tenant in retaliation for the tenant's exercise of the right to repair and deduct or the tenant's complaint to the authorities about housing code violations.

In 1976, this court extended the scope of the common law retaliatory eviction defense beyond mere complaints about conditions of tenancy. (*S.P. Growers Assn. v. Rodriguez*, *supra*, 17 Cal.3d 719, 728, 131 Cal.Rptr. 761, 552 P.2d 721.) In *S.P. Growers*, this court held that an eviction in retaliation for the filing of a federal lawsuit charging violations of a federal farm labor statute was improper. The test set down in *S.P. Growers*, *supra*, is quite simple. A valid defense of retaliatory eviction may be advanced if, on balance, the public policies furthered by protecting a tenant from eviction outweigh the state's interest in ensuring that unlawful detainer proceedings are truly summary. (*Id.*, at pp. 728-729, 131 Cal.Rptr. 761, 552 P.2d 721.)

Retaliatory ground for evicting a tenant. However, he conveniently ignores the crucial link between the two findings of fact. The trial court found that the tenant's allegedly protected activity, her complaint to the police, caused the breakdown in relations. If real party in interest's argument were accepted, the defense of retaliatory eviction would be precluded, since in every case a landlord could assert that a tenant's exercise of protected rights was so infuriating that they could no longer live or work together. As a result, the statutory and common law protections against retaliatory evictions would be rendered nullities.

The facts of this case clearly demonstrate that petitioner was evicted in retaliation for her complaint to the police. Therefore, this court must assume that the trial court found such a factual showing insufficient as a matter of law to support a retaliatory eviction defense.

The Legislature rep 1979 and reenacted i (Stats. 1979, ch. 652, statutory retaliatory greatly expanded. Tl which a tenant is pr and the grounds for prohibited were enlar. (a) and (c). In addi ments added a specif statutory remedies 1942.5 are in addition

2. Section 1942.5 curru

"(a) If the lessor rei because of the exerc rights under this ch. complaint to an appr antability of a dwelli dwelling is not in defi his rent, the lessor m of a dwelling in any as the lessee to quit in rent, or decrease any

"(1) After the date good faith, has given 1942, or has made 1 lessor regarding tena

"(2) After the date good faith, has filed 1 oral complaint which recorded in writing, 1 cy, of which the lesa pose of obtaining co relating to tenantability

"(3) After the dat suance of a citation, 1 described in paragra did not have notice;

"(4) After the fili ments commencing proceeding involving or

"(5) After entry of of an arbitration an judicial proceeding 1 tenantability is deten sor.

"In each instance, run from the latest 1 in paragraphs (1) to

"(b) A lessee may of subdivision (a) 11 month period.

"(c) It shall be u crease rent, decrease quit involuntarily, 1 possession, or threa for the purpose of r because he or she participated in a les ganization advocat lawfully and peace

The Legislature repealed section 1942.5 in 1979 and reenacted it with amendments.⁶ (Stats. 1979, ch. 652, § 2, p. 2006.) The statutory retaliatory eviction defense was greatly expanded. The time period during which a tenant is protected was extended, and the grounds for which retaliation is prohibited were enlarged. (§ 1942.5, subds. (a) and (c).) In addition, the 1979 amendments added a specific statement that the statutory remedies provided by section 1942.5 are in addition to any other remedies

provided by statutory or decisional law. (*Id.*, subd. (b).)

(3) Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine.

Section 1942.5 is a remedial statute aimed at protecting tenants from certain types of abuses. It is to be "liberally construed to

B. Section 1942.5 currently provides as follows:

"(a) If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days:

"(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability; or

"(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

"(3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice; or

"(4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability; or

"(5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

"In each instance, the 180-day period shall run from the latest applicable date referred to in paragraphs (1) to (5), inclusive.

"(b) A lessee may not invoke the provisions of subdivision (a) more than once in any 12-month period.

"(c) It shall be unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of such acts, for the purpose of retaliating against the lessee because he or she has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights

under the law. In an action brought by or against the lessee pursuant to this subdivision, the lessee shall bear the burden of producing evidence that the lessor's conduct was, in fact, retaliatory.

"(d) Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his rights under any lease or agreement or any law pertaining to the hiring of property or his right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his rights under this section shall be void as contrary to public policy.

"(e) Notwithstanding the provisions of subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If such statement be controverted, the lessor shall establish its truth at the trial or other hearing.

"(f) Any lessor or agent of a lessor who violates this section shall be liable to the lessee in a civil action for all of the following:

"(1) The actual damages sustained by the lessee.

"(2) Punitive damages in an amount of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each retaliatory act where the lessor or agent has been guilty of fraud, oppression, or malice with respect to such act.

"(g) In any action brought for damages for retaliatory eviction, the court shall award reasonable attorney's fees to the prevailing party if either party requests attorney's fees upon the institution of the action.

"(h) The remedies provided by this section shall be in addition to any other remedies provided by statutory or decisional law."

effect its objectives and to suppress, not encourage, the mischief at which it was directed. [Citation.] (*Kris v. Taylor* (1979) 92 Cal.App.3d 802, 811, 154 Cal.Rptr. 824.)

Subdivision (c) of section 1942.5 provides that it is unlawful "for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of such acts, for the purpose of retaliating against the lessee because he or she has . . . lawfully and peaceably exercised any rights under the law." (Emphasis added.) This subdivision was added to the statute in 1979. (Stats. 1979, ch. 652, § 2, pp. 2006-2006.) It has been denominated a "boilerplate" provision because of its broad prohibition against retaliation by a landlord when a tenant has exercised valid legal rights under the law. (See *Review of Selected 1979 California Legislation* (1979) 11 Pacific L.J. 601, 602.)

Petitioner argues that in reporting a crime to the police, she was exercising a legal right protected by section 1942.5, subdivision (c). She notes that, "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States." (*In re Quarles and Butler* (1896) 158 U.S. 532, 535, 15 S.Ct. 959, 1900, 39 L.Ed. 1180.)

California has a long history of protecting those citizens who report violations of the criminal laws. "It is for the best interests of society that those who offend against the

laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender." (*Bail v. Rawles* (1892) 93 Cal. 222, 228, 28 P. 987.)

Implicit in the passage of any remedial legislation is a general intent to protect from intimidation those who report violations of the law. (*Edwards v. Habib* (D.C. Cir. 1968) 397 F.2d 687, 701-702; see also *Schweiger v. Superior Court*, supra, 8 Cal.3d 507, 518, 90 Cal.Rptr. 729, 476 P.2d 97.) Laws which define certain acts as criminal would be meaningless if citizens who reported crime were not protected from vindictive retaliation. This fundamental principle is embodied in Penal Code section 136.1, which declares that it is a misdemeanor to dissuade or attempt to dissuade any victim of crime from reporting the crime to the police. (Pen. Code, § 136.1, subd. (b)(1).)⁶

Thus, every citizen has a right protected by state law to report criminal violations to the police. Since petitioner merely engaged in a peaceful and lawful exercise of this basic right when she reported her landlord's crime to the police, her eviction violated the statutory prohibition against evictions in retaliation for the exercise of any rights under the law. (§ 1942.5, subd. (c).)⁷

An analysis of the common law defense of retaliatory eviction leads to a similar conclusion. "In evaluating whether defendants have raised a valid defense of retaliatory eviction, we must engage in a balance-

right to petition the government for redress of grievances "is an attribute of national citizenship," arising from "[t]he very idea of government, republican in form." (*United States v. Cruikshank* (1875) 92 U.S. (2 Otto) 542, 552, 23 L.Ed. 588.) This right has been considered "among the most precious of the liberties safeguarded by the Bill of Rights." (*Mines Workers v. Illinois Bar Assn.* (1967) 389 U.S. 317, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426; see also *Strom v. United States Gypsum, Inc.* (7th Cir. 1977) 547 F.2d 1329, 1342.) However, the right to report violations of criminal statutes to the police is protected by state law. Therefore, it is not necessary to reach petitioner's constitutional claims.

6. Under subdivision (a) of Penal Code section 136.1, it is a misdemeanor to attempt to dissuade a witness or victim from testifying at any trial or other proceeding. At the time of respondent's repeated attempts to evict appellant, criminal charges were still pending against him.

7. Petitioner also argues that her right to complain to the police about a violation of the criminal law is protected by section 1942.5, subdivision (c) because it is a right included within the provisions of the state and federal Constitutions governing free speech and the right to petition the government for the redress of grievances. (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 2 and 3.) She notes that the

ing process. We must deter the public policies furthered defendants from eviction out of interests in preserving the rule of unlawful detainer procedure.] (S.P. Growers Assn. supra, 17 Cal.3d 719, 724, 131 552 P.2d 721.)

The important public policy petitioner is clear. Citizen and a duty to report violation the authorities. The effect of this state's criminal law: the willingness of victims a report crime and to participate in justice process.

The Legislature has registered its concern for victims adopting programs designed to victims (Gov. Code, §§ 18962-18963) and to render their criminal justice system more effective (Code, §§ 18835-18846). On these programs is to encourage report crime. "Unreported more than twice the rate of and the reasons people giving indicate that they with the criminal justice Code, § 18835, subd. (e)."

In light of the strong encouragement the reporting, inconceivable that the have countenanced the usually created summary evictions punish a tenant who reports police. To hold otherwise create a special class of crime also happen to be landlord

8. In an analogous area of held that an employer can punish employee in retaliation for the of a legally protected right (*Richfield Co.* (1980) 27 Rptr. 839, 610 P.2d 1330 employer's "generally uncharge an employee" (P. National Brotherhood of T Cal.App.2d 184, 189, 344 could not discharge an refused to commit a Cal.3d at pp. 172-178, 1 P.2d 1330. See also *Glen*

ing process. We must determine whether the public policies furthered by protecting defendants from eviction outweigh the interests in preserving the summary nature of unlawful detainer proceedings. [Citation.] (S.P. Growers Assn. v. Rodriguez, supra, 17 Cal.3d 719, 724, 181 Cal.Rptr. 761, 552 P.2d 721.)

The important public policy asserted by petitioner is clear. Citizens have a right and a duty to report violations of the law to the authorities. The effective enforcement of this state's criminal laws depends upon the willingness of victims and witnesses to report crime and to participate in the criminal justice process.

The Legislature has repeatedly demonstrated its concern for victims of crime by adopting programs designed to compensate victims (Gov. Code, §§ 13959-13969, 29631-29636) and to render their contacts with the criminal justice system less painful (Pen. Code, §§ 18833-18846). One of the goals of these programs is to encourage victims to report crime. "Unreported crimes occur at more than twice the rate of reported crimes and the reasons people give for not reporting indicate that they are disenchanted with the criminal justice system." (Pen. Code, § 18835, subd. (e).)

In light of the strong policy reasons for encouraging the reporting of crime, it is inconceivable that the Legislature could have countenanced the use of the statutorily created summary eviction proceedings to punish a tenant who reported a crime to the police. To hold otherwise would be to create a special class of criminals—those who also happen to be landlords—with a legally

sanctioned means of punishing the victims or witnesses of their crime.⁸

This case is an even stronger one than S.P. Growers, supra, wherein this court stressed the importance of preventing retaliatory evictions where a remedial scheme depends upon private initiative for enforcement. (17 Cal.3d at pp. 725, 728, 181 Cal.Rptr. 761; 552 P.2d 721.) In that case, a landlord was prohibited from evicting a tenant in retaliation for the tenant's filing of a lawsuit alleging violations of the federal farm labor statute, since that law depended for its enforcement on the willingness of individual workers to initiate litigation to vindicate their rights. This court held that to allow evictions in retaliation for such lawsuits would "frustrate the purposes of that act." (*Id.*, at p. 724, 181 Cal.Rptr. 761, 552 P.2d 721.)

The public policy served in this case is clear and even more compelling. The landlord here was accused of a sexual assault on a child. This state has repeatedly emphasized that its citizens have a duty to protect children from sexual abuse. (See, e.g., Pen. Code, § 11166 [adults who work with children must report suspected cases of child abuse to the police, the sheriff, the probation department or the welfare department].)

The strong public policy interests in preserving the summary nature of the unlawful detainer proceeding will not be significantly impaired if the affirmative defense of retaliatory eviction is allowed here. (S.P. Growers, supra, 17 Cal.3d 719, 728-729, 181 Cal.Rptr. 761, 552 P.2d 721.) Deciding whether an eviction is in retaliation for a tenant's exercise of basic legal rights

8. In an analogous area of law, this court has held that an employer cannot discharge an employee in retaliation for the employee's exercise of a legally protected right. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330 held that despite the employer's "generally unlimited right to discharge an employee" (*Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 189, 344 P.2d 25), the employer could not discharge an employee because he refused to commit a crime. (*Tameny*, 27 Cal.3d at pp. 172-178, 164 Cal.Rptr. 839, 610 P.2d 1330. See also *Glenn v. Clearman's Gold-*

en Cock Inn (1961) 182 Cal.App.2d 783, 13 Cal.Rptr. 769 [no right to fire an employee because he had joined a union].) Although no statute specifically prohibited employers from discharging employees for these reasons, the courts found the prohibition implicit in the policies underlying the protected rights. "*Glenn*[,] *Petermann* [and *Tameny*] persuasively instruct us that one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy." (*Schweiger v. Superior Court*, supra, 3 Cal.3d 507, 516, 90 Cal.Rptr. 729, 476 P.2d 97.)

presents no great burden for the trial court. This issue involves none of the "complex and protracted" questions of law that have previously moved the courts to reject certain defenses in unlawful detainer actions. (See *Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 726, 84 Cal.Rptr. 756; *S.P. Growers, supra*, 17 Cal.3d 719, 729, 131 Cal.Rptr. 761, 552 P.2d 721.)

Some delay may occur if the defense is raised. However, any additional time spent is surely justified by the important public policy furthered by this defense. "[A]s the Supreme Court has noted, 'Some delay, of course, is inherent in any fair-minded system of justice.... Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man [or woman] is evicted from his [or her] home.'" (*S.P. Growers, supra*, 17 Cal.3d 719, 730, 131 Cal.Rptr. 761, 522 P.2d 721, quoting *Pernell v. Southall Realty* (1974) 416 U.S. 363, 385, 94 S.Ct. 1723, 1734, 40 L.Ed.2d 198.)⁹

III.

Let a peremptory writ of mandate issue directing the superior court to vacate the Orange County Superior Court judgment entered in the case of *Valdez v. Barela*, No. AP-8097, and instructing the court to enter judgment for petitioner.

TOBRINER, MOSK, RICHARDSON,
- NEWMAN, KAUS and BROUSSARD, JJ.,
concur.



9. In light of this disposition of the case, this court need not reach petitioner's claim that her eviction constituted state action in violation of her constitutional right to free speech and to petition the government for redress of griev-

Richard L. GILARDI, et al., Plaintiffs
and Respondents,

v.

Gary L. HALLAM, et al., Defendants
and Appellants.

S. F. 24325.

Supreme Court of California,
In Bank.

Dec. 3, 1981.

Defendants appealed from judgment of the Superior Court, Nevada County, Harold F. Wolters, J., which quieted plaintiffs' title to certain lot, rejecting defendants' prescription and adverse possession claims to a portion of the lot. The Supreme Court, Broussard, J., held that: (1) possession of defendants, who took possession of the disputed land mistakenly believing they were the owners and who did not expressly or implicitly show that they recognized potential claim of the record owners or that they intended to renounce their claim if they did not have record title, was hostile and adverse for purposes of establishing prescriptive easement or title by adverse possession, and (2) defendants, adjoining landowners who were assessed taxes by lot number, were not entitled to title of portion of adjoining lot by adverse possession despite fact that their use of such property was hostile and adverse where they failed to pay taxes on the property.

Reversed.

— Opinion of Court of Appeal, 120 Cal. App.3d 647, 174 Cal.Rptr. 651, vacated.

1. Adverse Possession c-68

Title to property by adverse possession may be established either under color of title or by claim of right. West's Ann.C. P. §§ 822-825.

(See *Edwards v. Habib, supra*, 397 F.2d 687, 690-698; *S.P. Growers, supra*, 17 Cal.3d 719, 730-731, fn. 5, 131 Cal.Rptr. 761, 522 P.2d 721.)

2. Adverse Possession

Elements necessary for establishment of adverse possession: open and notorious, continuous and unitary, true owner and under Ann.C.P. § 825.

3. Easements c-9(1)

A prescriptive easement is established by claim of right, necessary to establish claim of right of tax is required. Payment has been separate. Ann.Civ.Code § 1007.

4. Adverse Possession

Requisite hostile possession or use of right may be established by hostile possession or use of right.

5. Adverse Possession

To show that possession was not hostile, established by hostile possession recognized record owner and reflected intent not to land if record title.

6. Adverse Possession

When enacting statutes, legislature substantially modify the adverse possession. §§ 822-825, 871.1 et

7. Adverse Possession

When it appears the land is mistaken owner, possession is established by hostile possession recognized potential owner and expressed intent to claim record title was in *Berry v. Sbraga*, Cal.Rptr. 318, disapp

1. In the superior court, joined, but the prescriptive period was 10 years. 178 Cal.Rptr.—14

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May 7, 1982

Tom Stanton
5410 Lambeth Road
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Dear Tom:

Due to our tight budget, I am enclosing a rough draft of the Introduction to the report for your review prior to its being retyped. I would like to discuss this Introduction with you next week. It incorporates the suggested changes of the reviewers.

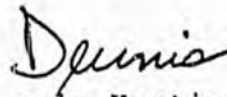
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I will omit our survey from the appendices. Unlike the prior report dealing with landlord-tenant law, I prefer to include the suggested sample criminal and civil complaints, rather than prepare model complaints.

Assuming that we agree on the format and the revised Introduction is acceptable, the final report can be completed and submitted by the end of this month.

Sincerely yours,


Dennis Keating

WDK:kc
cc: Richard Blumberg
Enclosure

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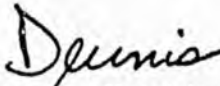
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Condominiums Can't Bar Minors, California Rules

By a WALL STREET JOURNAL Staff Reporter

SAN FRANCISCO — The California
Supreme Court ruled that children can't
be prohibited from living in condomini-
ums. The 5-2 decision extends a similar
ruling last year that barred landlords
from refusing to rent to families with
children under 18.

The suit was filed by John and De-
nise O'Connor, who bought a unit in a
Los Angeles condominium in 1975. Four
years later, when their son was born,
the complex's owners' association told
the O'Connors that they had violated a
rule prohibiting anyone under 18 from
living in the complex. The O'Connors
were told to move, and Mr. O'Connor
filed suit.

In the earlier case involving rentals,
the court found that a "landlord's blan-
ket exclusion of children from residency
was prohibited" by the state's Civil
Rights Act. The act bans housing dis-
crimination by "all business establish-
ments of every kind whatsoever."

The condominium owners' associa-
tion, a nonprofit organization, contended
that it isn't a "business establishment,"
and that it therefore shouldn't be in-
cluded under the act. The court rejected
that argument, saying nothing in the act
"calls for excluding an organization
from its scope simply because it is non-
profit."

May 11, 1983 Wall St. Journal

Rep. Malone

[2] It is a denial of due process to commit a person to prison for contempt who has no personal notice or knowledge of the show cause hearing at which he was held in contempt. *Ex Parte Herring*, 438 S.W.2d 801 (Tex.1969). This is true even though substituted service is accomplished through compliance with Tex.R.Civ.P. 106. The issue is not whether relator was served in compliance with the rules, but rather whether he was afforded due process. We are not faced with deciding if one who deliberately avoids process is charged with constructive notice of the contents of the process because there is no evidence or suggestion that relator deliberately avoided the service of process.

[3, 4] A recitation in the order adjudging relator in contempt to the effect that relator was duly cited and notified to appear is not controlling on the due process issue even though it is the general rule in this State in civil cases that a recitation of due service in a judgment cannot ordinarily be impeached by collateral attack. *Ex Parte Cardwell*, 416 S.W.2d 382 (Tex.1967). It is the duty of this Court to consider the entire record to determine whether due process has been accorded relator and it would be unconscionable for us to hold that a trial court could order the seizure and incarceration of a citizen with no notice and then deprive him of a right to relief in a habeas corpus proceeding by reciting in its judgment that the person had been duly served. *Ex Parte Cardwell*, supra.

[5] It is the duty of this Court to order the release of persons illegally restrained upon an order of commitment for the violation of a court order. Tex.Rev.Civ.Stat. Ann. art. 1824a (Supp.1978). The pendency of a motion to purge in the district court does not relieve us of this duty and Gail Moore's suggestion that this Court lacks jurisdiction in the premises because of the pendency of such a motion is not well taken.

It is ordered that relator be discharged.

Willie SIMS

v.

CENTURY KIEST APARTMENTS.

No. 19368.

Court of Civil Appeals of Texas,
Dallas.

May 5, 1978.

Rehearing Denied May 31, 1978.

Suit was brought against former landlord for damages for retaliatory eviction. The 14th District Court, Dallas County, Fred S. Harless, J., rendered summary judgment for landlord on the pleadings, and tenant appealed. The Court of Civil Appeals, Guittard, C. J., held that former tenant had cause of action for alleged termination of his periodic tenancy and eviction by forcible detainer proceedings in retaliation for his reporting of code violations to city authorities.

Reversed and remanded.

Akin, J., filed a dissenting opinion.

1. Landlord and Tenant $\Rightarrow$ 292

Former tenant had cause of action for alleged termination of his periodic tenancy and eviction by forcible detainer proceedings in retaliation for tenant's reporting of code violations to city authorities.

2. Constitutional Law $\Rightarrow$ 90.1(1)

Citizen has right to be free to report violations of law without intimidation or coercion; such right need not be expressly provided by statute but is implied from very existence of remedial legislation.

3. Appeal and Error $\Rightarrow$ 918(1)

Although terms of municipal housing, building and health codes were not before the court on appeal from summary judgment,

ment on pleadings in suit against former landlord for damages for retaliatory eviction, court had to presume that petition could have been amended to include specific allegations of ordinances alleged to have been violated and that these allegations could have been supported by proof.

4. Judgment $\approx$ 185(2)

In order to prevail on motion for summary judgment, defendant landlord had burden to meet tenant's case as pleaded; tenant had no burden to produce ordinances relied on in response to motion but rather landlord had burden as moving party to produce them if it contended that they did not support allegations of petition seeking damages for retaliatory eviction.

5. Health and Environment $\approx$ 32

Statute expressly authorizing enactment of ordinances that require demolition or repair of dilapidated, substandard or unfit buildings constitutes recognition by Legislature that public welfare may require that dwellings offered for rental be safe and fit for habitation. Vernon's Ann. Civ.St. art. 1175, subd. 35.

6. Landlord and Tenant $\approx$ 180(1)

Fact that municipal housing, building and health codes, presumably enacted under authority of city's home-rule charter, were effective only within city, rather than throughout state, did not preclude such ordinances from providing basis for cause of action against landlord for interference with tenant's reporting of code violations. Const. art. 11, § 5; Vernon's Ann.Civ.St. arts. 1175, 1175, subd. 35.

7. Landlord and Tenant $\approx$ 116(1)

Recognition of landlord's power to terminate periodic tenancy, whether common law or statutory, does not establish that landlord has legal right to do so for purpose of retaliation against tenants for reporting landlord's violations of the law. Vernon's Ann.Civ.St. art. 5216a.

8. Landlord and Tenant $\approx$ 116(1)

Tenant has legal right to be free of interference with his reporting of violations of laws enacted for his benefit and landlord

has correlative duty not to interfere with tenant's exercise of that right, and, accordingly, although landlord may have legal power to terminate tenancy, law recognizes no legal right to do so for sole purpose of retaliation when otherwise landlord would have permitted tenant to continue tenancy.

9. Landlord and Tenant $\approx$ 180(1)

Tenant who probably would not have been evicted had he not reported violations of regulations enacted for his benefit has action for damages against landlord for such eviction.

Michael M. Daniel, Dallas, for appellant.

Dan W. Shieder, Jr., Dallas, for appellee.

GUITTARD, Chief Justice.

[1] Willie Sims brought this suit against Century Kiest Apartments, his former landlord, for damages for a retaliatory eviction. The principal question is whether a former tenant has a cause of action for termination of his periodic tenancy and eviction by forcible detainer proceedings in retaliation for the tenant's reporting of code violations to city authorities. We hold that such a cause of action, if established by evidence, does exist, and, consequently, that the trial court erred in rendering summary judgment for the landlord on the pleadings.

Sims alleged that he had been a tenant at Century Kiest Apartments for approximately nine years under an oral tenancy from week to week; that during his occupancy the condition of the premises had steadily deteriorated; that he had repeatedly complained to the management about the problem and had helped organize a tenants' council; that acting on his own and as officer of the council, he had reported to city authorities violations of various housing, building and health codes; that although his rent was fully paid, he had received from the landlord a written notice to vacate the apartment within ten days; that his tender of the full rent due on the next rent-payment date was refused; that the landlord had filed a forcible detainer suit

against him and recovered judgment for possession of the premises in the justice court and also, on appeal, in the county court at law; that the landlord's termination of the tenancy was done with specific intent to retaliate against him for organizing and belonging to the tenants' council, complaining to the management about needed repairs and maintenance, and reporting code violations to various departments of the city; and that as a result of the termination of the tenancy, he was injured by being forced to move out of his home and "has suffered a chilling effect of his exercise of his First Amendment rights." He seeks recovery of his moving expenses, the additional rent he had to pay for a comparable apartment, damages for "deprivation of his First Amendment rights," punitive damages, and his attorney's fee.

The landlord filed a motion for summary judgment on the sole ground that plaintiff was a tenant from week to week, that the landlord had "an absolute right to terminate a tenancy at will when proper notice is given to the tenant of such termination," and that it was undisputed that such a notice had been given. Although the motion was not accompanied by affidavits or any other summary-judgment proof, the tenant filed an opposing affidavit tending to support the allegations of his petition.

The landlord attempts to justify the summary judgment in its favor on the ground that it has an absolute right to terminate the tenancy on proper notice at the end of any week, and then to recover possession of the premises, and that its motive in doing so does not give rise to an action for damages. The tenant recognizes the rule that ordinarily a landlord may terminate a periodic tenancy without cause, but contends that if it does so for the purpose of interfering with the tenant in the exercise of his constitutional rights of free speech and free assembly, or in retaliation for his exercise of those rights, a legal wrong has been done for which an action for damages will lie.

We agree with the tenant that the petition is sufficient to state a cause of action

for damages. Although no reported decision in Texas has dealt with the question, the legal consequences of a retaliatory eviction have been considered in a number of other jurisdictions. A crucial consideration is whether the tenant's rights are infringed. The leading case holding that the tenant's rights are infringed is *Edwards v. Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969), in which the United States Court of Appeals for the District of Columbia Circuit allowed a defense of retaliation in a summary-possession proceeding on the ground that the policy of Congress in directing the promulgation of housing regulations in the District of Columbia for the benefit of tenants would be contravened by allowing evictions for reporting violations of such regulations. By resting its decision on the public policy implicit in the statute, the court avoided a decision based solely on constitutional grounds. Acknowledging that the summary-possession statute made no provision for such a defense, the court said:

"It is true that in making his affirmative case for possession, the landlord need only show that his tenant has been given the 30-day statutory notice, and he need not assign any reason for evicting a tenant who does not occupy the premises under a lease. But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted." [130 U.S.App.D.C. at 409, 397 F.2d at 699]

Concerning the practical effect of permitting eviction in retaliation for reporting code violations, the court observed:

"There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant

for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment, but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid." [Id. 130 U.S.App.D.C. at 412, 397 F.2d at 701]

This decision has been followed in a number of cases in the state courts.¹

Relief against retaliatory eviction has also been granted in the federal courts. There, the main consideration has been whether "state action" was involved so as to provide a right of action under the Fourteenth Amendment of the United States Constitution and under the Civil Rights Act, 42 U.S.C. § 1983. In at least one case, it has been held that invocation of a state remedy for summary possession, such as our forcible detainer procedure, is in itself sufficient state action to establish a violation of federal constitutional rights if the landlord is motivated solely by retaliation against the tenant for reporting violations of housing regulations. *Hosey v. Club Van Cortlandt*, 299 F.Supp. 501, 506 (S.D.N.Y.1969). Other federal courts have required some kind of special state support of the landlord's position other than merely providing a "neutral" remedy available to all landlords before state action has been recognized. *McQueen v. Druker*, 438 F.2d 781, 785 (1st Cir. 1971); *LaVoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972); *Walton v. Darby*

Town Houses, Inc., 395 F.Supp. 553, 559 (E.D.Pa.1975). In all of the federal cases cited, the courts recognized that an eviction in retaliation for the tenants' complaints to public officials had a seriously adverse effect on the tenant's rights because of the practical problem posed to the tenant in requiring him either to forego his constitutional rights of free speech and free association or to vacate his rented home and seek other accommodations.

We need not, however, determine whether a retaliatory eviction without state action is an actionable violation of the tenant's constitutional rights if any other ground exists to hold it to be a legal wrong. In *Edwards v. Habib*, *supra*, the court found such a ground to exist in the policy of the housing regulations to protect tenants from unsanitary and unsafe housing conditions. Such regulations cannot be effectively enforced, the court said, if tenants, who are the principal persons interested in reporting violations, are intimidated by threats of eviction; consequently, eviction for the sole purpose of retaliation for reporting such violations cannot be permitted and must be considered wrongful.

The public policy recognized in *Edwards v. Habib* is a particular application of the general policy to encourage, rather than discourage, the reporting of violations of law to proper authorities. The leading case on this point is *In re Quarles*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1016 (1895). There the petitioner was charged with conspiracy to injure or intimidate a citizen in the free exercise of a right under the Constitution

1. *Schweiger v. Superior Court of Alameda County*, 3 Cal 3d 507, 90 Cal Rptr. 729, 476 P.2d 97 (1970) (tenant exercising statutory repair-and-deduct remedy is protected against retaliatory rent increase and eviction); *E & E Newman, Inc. v. Hallock*, 116 N.J.Super. 220, 281 A.2d 544, 546 (1971) (retaliatory eviction allowed as defense to dispossession action under statute making such reprisal a misdemeanor); *Markese v. Cooper*, 70 Misc.2d 478, 333 N.Y.S.2d 63, 73 (Monroe County Ct. 1972) (defense of retaliatory eviction allowed in summary possession action); *Dickhut v. Norton*, 45 Wis.2d 389, 173 N.W.2d 297 (retaliatory eviction allowed as defense to unlawful detainer action in view of urban renewal statute compa-

table to Tex.Rev.Civ.Stat. Ann. art. 1269I-3 (Vernon 1965). See also *Robinson v. Diamond Housing Corp.*, 150 U.S.App.D.C. 17, 463 F.2d 853 (1972) (extending holding in *Edwards v. Habib* to protect from retaliatory eviction a tenant who had successfully interposed housing code violations as defense in previous eviction proceeding). See generally *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 Vanderbilt L.Rev. 689, 708-709 (1973); Annot., 40 A.L.R.3d 753 (1971). A contrary decision, *Aluli v. Trusdell*, 54 Haw. 417, 508 P.2d 1217, 1220 (1973), has been overruled by statute. Haw.Rev.Stat. § 521-74 (1976).

or laws of the United States by interfering with the reporting of violations of the federal internal revenue laws. The Supreme Court rejected the contention that a private citizen had no federally protected right to report such violations and quoted the principle stated in the earlier case of *Ex parte Yarborough*, 110 U.S. 651, 662, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1884), as follows:

[I]t is the duty of [the] government to see that he may exercise this right freely, and to protect him from violence while so doing or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself

The court observed that this right does not depend on any particular amendment to the Constitution but "arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." We recognize that the interference in *Quarles* was violent, and, therefore, in itself a violation of local law. It was held to be a violation of federal law, however, not because of any express enactment, but only because of the essential public policy to protect persons who report violations.

The same public policy exists in all states. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972). It has been expressly recognized in Texas and has been found more compelling than a competing policy favoring the use of grievance procedure in labor-management disputes. Thus, it had been held to invalidate a provision in a collective-bargaining agreement tending to deter prompt reports of criminal offenses by the persons immediately affected. *Goodyear Tire & Rubber Company v. Sanford*, 540 S.W.2d 478, 484 (Tex.Civ.App.—Houston [14th Dist.] 1976, no writ). In that case, the court said:

For the orderly functioning of our society, people must be completely free from all forms of coercion against reporting violations of the law. Indeed, it is their duty to do so.

[2] Under these authorities, a citizen has a right to be free to report violation of

the law without intimidation or coercion. This right need not be expressly provided by statute because it is implied from the very existence of the remedial legislation. This principle was stated in *Edwards v. Habib*, *supra*, as follows:

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation, even if it is not expressed in the statute itself. [Emphasis added.] 397 F.2d at 701.

We need not consider whether a cause of action exists generally in favor of any informant who suffers reprisals for reporting violations of the law. The question here is whether a member of the class for whose benefit remedial legislation has been enacted has such a cause of action. In this situation, the public policy against interference with reports of violations is particularly strong. Effective enforcement of such legislation depends largely on reports of violations by the persons most directly affected, and if those persons are so intimidated or coerced by fear of retaliation as to prevent their reporting of violations, the violator is enabled to persist in his violations without suffering whatever civil or criminal penalties may be provided.

[3,4] In the present case, we have no statute before us comparable in all respects to that found in *Edwards v. Habib* to imply a prohibition against retaliatory eviction. Plaintiff alleges only that his tenancy was terminated with the specific intent to retaliate against him for reporting violations of "various housing, building and health codes of the city of Dallas." Although the terms of these codes are not before us, we must presume on this appeal from a summary judgment on the pleadings that the petition could have been amended to include specific allegations of the ordinances alleged to have been violated and that these allegations could have been supported by proof. See *Texas Department of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex.1974). In

order to prevail on its motion for summary judgment, defendant had the burden to meet plaintiff's case as pleaded. *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751 (Tex.1976). Plaintiff had no burden to produce the ordinances in response to the motion; rather, defendant had the burden, as a moving party, to produce them if it contended that they did not support the allegations of the petition. *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967). See also *Cook v. Brundidge, Fountain, Elliott & Churchill*, *supra*. The only ground alleged in the motion for summary judgment is that the landlord had an absolute right to terminate the tenancy at will when proper notice is given. Thus, our question on this appeal is not whether there are such ordinances, but whether such ordinances, if proved, would establish that a tenant is within the class of persons for whose benefit such ordinances were enacted, so as to provide a basis for a cause of action against the landlord for interference with his reporting of violations.

[5,6] The ordinances alleged presumably were enacted under the authority of the city's home-rule charter, which is authorized by article XI, § 5, of the Texas Constitution. Moreover, article 1175, § 35, Tex. Rev. Civ. Stat. Ann. (Vernon Supp.1977) expressly authorizes enactment of ordinances which require "the demolition or repair of buildings which are dilapidated, substandard, or unfit for human habitation and which constitute a hazard to the health, safety, or welfare of the citizens." This statute is a recognition by the legislature that the public welfare may require that dwellings offered for rental be safe and fit for habitation. *Kumarath v. Bennett*, 568 S.W.2d 658 (Tex., 1978). Although article 1175 does not in itself provide a comprehensive system of housing regulations like the statute under consideration in *Edwards v. Habib*, we must presume that the ordinances alleged in the petition, enacted under the

authority of this statute or otherwise, did provide such a system and did impose various duties on the owners of rental property, as well as others, for the health, safety and welfare of occupants of such property, including tenants and their families. Thus, there is the same reason here to imply a prohibition against retaliation against a tenant for reporting violations as in *Edwards v. Habib*. The fact that the codes in question are effective only within the city of Dallas, rather than throughout the state, as in the case of a general statute, does not affect the problem. The controlling principle is the policy against intimidation or coercion that would discourage or inhibit reports of violations of the law by persons for whose benefit the law has been enacted.

[7] Defendant contends that regardless of any public policy against interference with reporting of violations of the law, he has an absolute right to terminate a periodic tenancy by giving the notice prescribed by article 5236a, Tex. Rev. Civ. Stat. Ann. (Vernon Supp.1978), which provides that a monthly tenancy may be terminated on one month's notice, and, if the rent is payable at periods of less than a month, the period of notice is sufficient if it is equal to the interval between the times of payment. This statute is consistent with the common-law rule that the landlord has the power to terminate a periodic tenancy on reasonable notice, as recognized in cases such as *Holcombe v. Lorino*, 121 Tex. 446, 79 S.W.2d 307 (1935), but it defines more particularly the period of the notice and provides that the tenancy may be terminated on such notice before the end of a rent-paying period, with a proportionate abatement of the rent. Recognition of the landlord's power to terminate the tenancy, whether common-law or statutory, does not establish that he has a legal right to do so for the purpose of retaliation against the tenant for reporting the landlord's violation of the law.² Our

2. This distinction between a "right" and a "power" is consistent with the classical analysis of legal relations by Professor Hohfeld in his well known article, *Some Fundamental Legal*

Conceptions as Applied in Legal Reasoning, 23 Yale L. J. 16 (1913). The same analysis is adopted in Restatement of Property §§ 1, 3 (1936). These authorities recognize that a

question is whether his termination for that purpose is a legal wrong for which an action for damages will lie.

[8] We conclude that the tenant has a legal right to be free of interference with his reporting of violations of laws enacted for his benefit and that the landlord has a correlative duty not to interfere with the tenant's exercise of that right. If the tenant had no such right, the public policy to encourage reports of violation of the law would be substantially frustrated. Accordingly, although the landlord may have the legal power to terminate the tenancy, in our opinion the law recognizes no legal right to do so for the sole purpose of retaliation when otherwise he would have permitted the tenant to continue his tenancy. On this basis, we hold that retaliatory eviction is a legal wrong for which an action for damages will lie.

Defendant insists that to recognize such a cause of action would create a defense of retaliatory eviction in a forcible detainer case and thus, in effect, would extend the tenancy indefinitely, contrary to law and contrary to the agreement of the parties. Although we rely on *Edwards v. Habib* and the other eviction cases cited as authority for the view that retaliatory eviction is wrongful, our present holding does not go so far as to hold that it would constitute a defense in forcible detainer. An argument can be made to the effect that the power to terminate exists, notwithstanding violation of the tenant's right to be free of interference in reporting violations, since the tenant has no privilege to continue his occupancy if the tenancy on which that privilege depends has terminated. There is force also to the argument that whether such termination is wrongful cannot properly be decided in a forcible detainer proceeding, which determines only who shall have the immediate possession and cannot be appealed beyond the county court. The rule is settled that a judgment for the landlord in forcible detainer does not bar a later action

for damages for wrongful eviction. *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493, 494 (Tex.Civ.App.—Dallas 1977, writ ref'd n. r. e.); *McCloud v. Knapp*, 507 S.W.2d 644, 647 (Tex.Civ.App.—Dallas 1974, no writ). Since forcible detainer is a summary remedy, the issues should be narrow and uncomplicated. Thus we do not decide the question of whether retaliatory eviction would be a defense in a forcible detainer case.

[9] Since our holding is based on the public policy of the state implicit in its statutes and in ordinances, we need not confront the question of whether a cause of action for retaliatory eviction exists based on public policy against interference with the exercise of the constitutional rights of freedom of speech, freedom of assembly, and freedom to petition for redress of grievances. Tex.Const., art. 1, §§ 8, 27; U.S.Const., Amends. I, XIV. Neither do we hold that this kind of wrong is a "prima facie tort," based simply on harm intentionally caused without justification or excuse. See Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Corn.L.Q. 465 (1957); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 Geo.L.J. 519, 548 (1966). In deciding such an eviction to be wrongful, we hold only that if the evidence shows that the tenant probably would not have been evicted had he not reported violations of regulations enacted for his benefit, then such an eviction is an affirmative wrong for which an action for damages will lie in favor of the aggrieved tenant.

The scope of this holding is quite narrow. It would not extend, for example, to a case in which the evidence shows that the tenant's complaints were not made in good faith, or to a case in which the landlord had affirmative grounds for eviction, such as nonpayment of rent. The question of damages may also be difficult, but it is not now before us. Consequently, we do not pass on whether any of the elements of damages

power may be exercised effectively, but nonetheless wrongfully, if exercised in violation of a duty. Hohfeld, *op. cit.*, at 52, 53; Restatement

of Property § 3, Comment a, Illustrations 2, 3 (1936).

alleged in the tenant's petition are recoverable, even if the elements of a retaliatory eviction are shown.

The objection is made that this court is engaging in judicial legislation by creating a cause of action for retaliatory eviction, and that such a course should be left to the legislature, which can strike a more delicate balance of the competing interests and can impose precise limitations appropriate to those interests. We agree that a well-drawn statute would be a superior solution to this problem for future cases. Such a solution, however, is not available in this case. The legislature cannot determine whether this particular plaintiff has stated in his petition a cause of action for damages on which he is entitled to present his evidence at a trial. That is a question which we have the responsibility to decide, subject to review by the Supreme Court of Texas.

Of course, we must consider the effect of our decision as a precedent until the supreme court rules, but we do not regard it as a legislative decision except in the sense that the decision in any case of first impression sets a precedent. In that sense, a decision denying relief would be no less legislative. We cannot accept the view that if the question before us has never been decided before, our decision must always be to deny relief. That view is opposed to the whole development of the common law. Our decision overrules no precedents and disregards no established rules. If legislation is needed to govern future cases of this sort, it may be enacted, regardless of this decision.

Our former opinion is withdrawn and this opinion is substituted. Otherwise, defendant's motion for rehearing is overruled. The judgment of the trial court is reversed and the cause is remanded.

AKIN, Justice, dissenting.

I cannot agree that a cause of action for retaliatory eviction exists based upon public policy as advanced by the majority. Those of us in the judiciary may think that we perceive that which is in the public interest better than the elected legislators of the

people; nevertheless, it is the function of our legislature, rather than the courts, to declare the public policy of this state. *Carpenter v. Sheppard*, 135 Tex. 413, 145 S.W.2d 562, 565 (1940); *Scarborough v. Payne*, 198 S.W.2d 917, 919 (Tex.Civ.App.—San Antonio 1947, writ ref'd); *Houston-American Life Insurance Co. v. Tate*, 358 S.W.2d 645 (Tex.Civ.App.—Waco 1962, no writ). In my view, the holding of the majority usurps the function of the legislature by the judiciary, and contradicts the basic concepts of our form of government embodied in the Constitution of the United States and of the State of Texas, both of which sharply delineate the functions of the legislature, the executive, and the judiciary. The function of the legislature is to enunciate the public policy, the duty of the executive to execute that policy, and the duty of the judiciary to construe those statutes passed by the legislature and to determine whether they contravene the constitutions of the State of Texas or of the United States. It is not the function of the judiciary to usurp the legislative function under the guise of public policy. As Mr. Justice Jackson stated in *Collins v. Hardyman*, 341 U.S. 651, 663, 71 S.Ct. 937, 942, 95 L.Ed.2d 1253 (1951), "It is not for this Court to compete with Congress or attempt to replace it as the nation's law-making body." If, as some think, the landlord-tenant relationship need be changed, the legislature is the place to obtain that change, rather than in the courts.

The judiciary should not act where the legislative branch has apparently chosen not to do so. The legislature in both 1973 and 1975 revised substantially the landlord-tenant statutes in this state, giving tenants far more rights than they had under prior law. Nevertheless, the legislature apparently chose not to grant tenants a cause of action based on retaliatory eviction. Thus, the majority has chosen to ignore the legislature's obvious will as well as the historic distinction in the functions of the legislature and the judiciary. It is never the judiciary's function to declare that public policy it thinks desirable or just; rather it

is our duty to apply those policies clearly expressed by the legislature through statutes. The majority opinion establishes a dangerously oligarchic precedent.

The opinion of the majority reflects the Platonic view that philosopher kings know that which is best for the people, rather than the people themselves. Hopefully our judiciary is blessed with such philosophers, but I cannot accept this contravention of the traditional functions of the legislature and the judiciary.

The sound logic behind the sharp delineation between the function of the legislature and that of the judiciary is best illustrated by the very question decided by the majority of this court. If a bill granting a tenant a cause of action for retaliatory eviction was introduced into the legislature for consideration, interested people in the State of Texas would have an opportunity to express their wishes to their legislators, who, in turn, could fully debate all aspects of the question. The legislature could then determine by vote whether the proposed bill would become law, thus expressing the public policy. Such an opportunity for input is not afforded the people of this state when the majority of an appellate court, composed of three members, makes the determination of what is in the interest of the public and effectively legislates through judicial decree a remedy for an assumed wrong. In granting a cause of action in tort for retaliatory eviction, the majority of this court has gone further than any court, state or federal.

The public policy apparently relied on by the majority to justify its novel holding is the particular application of the general policy to encourage, rather than discourage, the reporting of violations of the law to proper authorities. They rely primarily on the Supreme Court's decision in *In Re Quarles*, 158 U.S. 532 (1895). I cannot agree that that case is applicable to the facts presented here. *Quarles* was an original writ of habeas corpus where the relators sought release from prison, having been convicted of conspiracy for injuring and intimidating a person because the victim

had reported violations of the internal revenue laws. The actions of relators violated a federal statute prohibiting anyone from conspiring "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." In holding that relators violated this statute, the Court found that the threatened right of the victim was the right of every citizen to assist in prosecuting and in securing punishment of any breach of the peace of the United States. *Quarles* is not authority to support the majority's public policy predicate. In the first place, the right of a citizen in reporting violations of the laws is to secure punishment for a breach of peace. Here, no breach of the peace exists. Second, the actions of the relators in *Quarles* violated a statute which provided punishment of conspiracies to oppress citizens from reporting violations of federal law; no such statute exists here. Thus, it was from this statute that the court in *Quarles* found a public policy, whereas here we have no such declaration of public policy by our legislature. Public policy of the state cannot be found in city ordinances. It would be specious to state that the public policy of the City of Dallas is the public policy of the State of Texas. Thus, in the absence of a clear declaration of public policy by the state legislature, I do not regard *Quarles* as authority to find the public policy to support the majority's holding.

The majority also states that this public policy has been expressly recognized in Texas in the case of *Goodyear Tire and Rubber Co. v. Sanford*, 540 S.W.2d 478 (Tex.Civ. App.—Houston [14th Dist.] 1976, no writ). However, *Goodyear Tire*, also is distinguishable. In *Goodyear Tire*, *supra*, an employee successfully sued to set aside an arbitrator's award under a union contract affirming the employee's discharge by the company because the employee had filed criminal assault charges against his supervisor. In affirming the trial court's judgment vacating the arbitrator's decision, that court held that a labor agreement which provided that

court action could not be taken until all grievance procedures had been exhausted was inapplicable where the employee had filed both a grievance and criminal assault charges against his supervisor. The rationale of the court was that it would be a violation of public policy to enforce the labor contract in that it would obstruct the enforcement of the laws of the state. Although I agree that this is the law, the case does not apply to our facts. Here the only contract was an oral one providing for a week to week tenancy and there was no prohibition in the contract against reporting housing code violations. Consequently, unless there is a contractual prohibition against reporting of these housing code violations there is no violation of public policy. Additionally, since the allegations here are reported violations of city ordinances, not state statutes, there can be no violation of the public policy of the State of Texas.

The majority apparently rests its holding on the rationale of *Edwards v. Habib*, 130 U.S.App.D.C. 120, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1018, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969). That case is distinguishable from the case here in that Congress had enacted extensive housing codes for the District of Columbia, thus expressing the public policy of the Congress with respect to the question before that court. In fact, even the quotations from *Edwards* in the majority opinion establish that statutory construction was a ground for that decision. *Id.* 130 U.S.App.D.C. 138, 140-141, 397 F.2d 699, 701-702. No such extensive and specific codes have been enacted by our legislature. This distinction is poignantly enunciated by the concurring opinion in *Edwards* which notes that a Congress which enacts a housing code together with its enforcement cannot be taken to have excluded retaliatory eviction as a defense to a routine statutory eviction statute also promulgated by Congress. *Edwards v. Habib*, *supra*, rested its decision on the ground that Congress by enacting the housing code with enforcement provisions implicitly intended to permit retaliatory eviction as a defense to a forcible detainer action to effectuate that legislation.

Nevertheless, I do not agree with the rationale of either the majority opinion or the concurring opinion in that case, instead, I agree with the view, expressed by the dissent, that a specific act of Congress was required to legislate retaliatory eviction as a defense to a forcible detainer action. The dissent also poses the question, unanswered by the majority, that such judicial legislation permits the landlord to be deprived of his property without due process of law. In *Edwards*, the majority opinion's basis of divining the congressional intent with respect to enforcement of the housing codes by permitting retaliatory eviction as a defense is weakened, if not indeed contradicted, by footnote 52 which notes that three bills had been introduced in Congress dealing specifically with retaliatory eviction, but none were reported out of committee. *Edwards*, 130 U.S.App.D.C. at 141, 397 F.2d at 702. In my view, this shows a congressional intent contrary to that intent derived in the majority's opinion. Consequently, I do not regard *Edwards v. Habib*, *supra*, as persuasive authority to hold that a suit may be maintained in tort for an alleged retaliatory eviction.

The majority opinion observes that the ordinances in question were presumably enacted under the authority of the city's home rule charter and they specifically point to Article 1175 § 35, Tex.Rev.Civ.Stat. Ann. (Vernon Supp.1978) which gives home rule cities the authority to enact ordinances requiring the demolition or repair of buildings. They state that this shows that the legislature has recognized that the public welfare may require that dwellings offered for rental must be safe and fit for habitation. In my view, reliance on this article is misplaced in that it in no way establishes a particular public policy. Indeed, in no way can it be read as adopting a public policy for the entire state when Article 1175 itself applies only to home rule cities. Is the majority holding that only home rule cities have this policy to encourage the reporting of violations? Even under Article 1175, home rule cities may adopt conflicting ordinances to deal with identical subjects.

Thus, it is absurd to maintain that diverse local ordinances express a single legislative policy.

In nearly all jurisdictions, where either a cause of action for retaliatory eviction exists or where such may be asserted defensively, a specific statute so stating was enacted by the legislature. Texas has no such statute. Accordingly, in my view, the rights of the parties here are controlled by Article 5236a, Tex.Rev.Civ.Stat.Ann. (Vernon Supp.1978), which is the only provision concerning termination of tenancies in Texas. It provides:

[W]hen the rent reserved in a lease is payable at periods of less than a month, the time of the notice of termination is sufficient if it is equal to the interval between the times of payment

The notice here was timely since it gave Sims ten days when the pay period was weekly. Since the landlord-tenant relationship is one of contract, the tenant may remain in the premises only until such time as the landlord terminates the lease. The landlord's right to possession is an incident of ownership, while the tenant's right of possession is dependent upon the agreement with the landlord. Thus, Sims merely had an expectancy that his lease would be extended for only another week. *Holcombe v. Lorino*, 124 Tex. 440, 19 S.W.2d 307 (1935). To hold, as the majority does, that there is a limitation of the landlord's right to terminate, not only alters the contract between landlord and tenant, but is also in conflict with this explicit statute. Consequently, I would hold, as did the trial court, that the landlord's motive in evicting Sims was immaterial.

Ex parte Shelley McBRIDE, Relator.

No. 19602.

Court of Civil Appeals of Texas,
Dallas.

May 10, 1978.

Upon former wife's motion for contempt based upon former husband's disobedience of Oklahoma support decree, former husband was held in contempt with commitment suspended upon certain conditions, and, after former husband failed to comply with conditions, suspension was revoked and he was imprisoned. Former husband brought habeas corpus proceeding challenging his detention. The Court of Civil Appeals, Robertson, J., held that where Oklahoma had enacted Uniform Reciprocal Enforcement of Support Act, Oklahoma child support decree could not be enforced by contempt proceedings in Texas without compliance with procedures set forth in Act.

Former husband discharged.

Divorce — 403(9)

Where support decree is rendered in state which has enacted Uniform Reciprocal Enforcement of Support Act, that decree cannot be enforced by contempt proceedings in Texas without first complying with procedures set forth in Act. V.T.C.A., Family Code §§ 21.01, 21.61–21.66, 21.64.

Stephen F. Hefner, Sherman, for appellant.

Richard A. Danna, Dallas, for appellee.

ROBERTSON, Justice.

This is a habeas corpus proceeding under Article 1824a of the Texas Revised Civil Statutes. Shelley McBride, relator, seeks discharge from the custody of the Sheriff of Dallas County. He was detained pursuant to a commitment order issued by the judge of the 302nd District Court, who found rela-

