Rent Withholding--A Proposal for Legislation in Ohio

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Recommended Citation
Marian F. Ratnoff and Gerald E. Magaro, Rent Withholding--A Proposal for Legislation in Ohio, 18 W. Res. L. Rev. 1705 (1967)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol18/iss5/14

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Few Americans would quarrel with President Johnson's recent observation that we are in danger of becoming two types of people: "the suburban affluent and the urban poor, each filled with mistrust and fear one for the other." The rotted core of the central city surrounded by an affluent and unconcerned suburbia is a familiar contemporary phenomenon. Citizens watch despairingly as the city becomes "a home for the economically deprived" whose race or lack of education and skill deny them the ability to bargain for a decent home and a suitable living environment. Sorely diminished by wholesale demolition in the name of urban renewal and by landlords' unwillingness or inability to halt decay, the housing supply is so sharply limited that it is commonplace to find rentals higher in the city's core than in equivalent quarters in better areas. The inner-city dweller takes what he can get — sometimes out of apathy, but usually out of resignation — haunted by the specter of eviction if he should balk at paying rent for his substandard housing. An eloquent spokesman for the urban poor has voiced the belief that merely living in the decaying houses of the inner city so maims and warps the human spirit that a defeatist "psychology of the poor" is perpetuated.

Official governmental concern for the slum tenant's inequality of bargaining power in the housing market is manifest in vast urban renewal undertakings, in low-cost rehabilitation loans and rent subsidies to certain low-income families, and in the enactment of mu-

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4 Congress announced its goal of a decent home and suitable living environment for every American as early as 1949. See National Housing Act § 2, 63 Stat. 413 (1949).
5 Cleveland Subcommittee of the Ohio State Advisory Committee to the United States Commission on Civil Rights, Cleveland's Unfinished Business 18 (1966) [hereinafter cited as UNFINISHED BUSINESS]; Note, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304, 308 n.15 (1965).
6 Robbins, Landlord-Tenant Relations and the Impoverished Tenant, in SYLLABUS, Course on Law and Poverty, Ohio State Legal Serv. Ass'n 4.03 (1966); UNFINISHED BUSINESS 19.
7 Harrington, The Other American 24 (1962).
municipal housing codes. Such efforts are indicia of an official intent and "commitment to create a new environment for human beings." However, massive governmental assaults upon the problem of substandard housing, while undeniably essential, suffer from a depersonalized bigness and an inherent paternalism which reinforces the passive dependence of the slum tenant upon his benefactors. A healthier approach would place some of the initiative for housing improvement upon the slum tenant himself. Toward this end, state legislatures could do much by providing the legal means to enable the inner-city dweller to exercise personal responsibility in correcting deficiencies in his own housing. One form of action receiving legal sanction in a growing number of jurisdictions is the rent strike, a lawful withholding of rent by tenants to force landlords to make repairs and provide services. This Note will consider a legally authorized process of rent withholding, which must be carefully distinguished from an irresponsible refusal to pay rent. Where lawful rent withholding occurs, tenants pay their rent into an escrow account to be held until their building has been made safe and habitable.

Two states, Massachusetts and Pennsylvania, have enacted rent-strike legislation this year. Similar legislation exists in one form or another in New York, California, Montana, North Dakota, South Dakota, and Oklahoma. The urgent need for these statutes arises from the appalling inadequacy of common law remedies and the failure of municipal housing codes to help the tenant. The impact of these factors and the resulting need for rent withholding legislation in Ohio and elsewhere will also be explored in this Note. Finally, consideration will be given to the constitutional and legal ramifications of a proposal for rent-strike legislation.

9 See, e.g., CLEVELAND, OHIO, HOUSING CODE (1960).
10 HARRINGTON, op. cit. supra note 7, at 145.
13 N.Y. MULT. DWELL. LAW § 302-1a (Supp. 1966); N.Y. REAL PROP. ACTIONS LAW § 755, as amended, N.Y. REAL PROP. ACTIONS LAW § 755 (Supp. 1966); N.Y. REAL PROP. ACTIONS LAW Art. 7-A (Supp. 1966); N.Y. SOC. WELFARE LAW § 143-b.
14 CAL. CIV. CODE §§ 1941-42.
15 MONT. REV. CODES ANN. § 42-201 (1947).
16 N.D. CENT. CODE §§ 47-16-12, -13 (1960).
17 S.D. CODE §§ 38.0409-10 (1939).
18 OKLA. STAT. tit. 41, §§ 31-32 (1952).
I. INADEQUACY OF COMMON LAW REMEDIES

A. Nature of the Slum Landlord-Tenant Relationship

To find a similarity between a feudal lord's fief and a cold water flat in a contemporary American city seems an anachronistic comparison. Yet the modern law of landlord and tenant derives from that feudalistic system of land tenure imposed upon England by William the Conqueror. The exchange of land for services, which marked the bargain between a feudal lord and his tenant, conveyed a direct interest in the land. In time, this fief-for-service arrangement was commuted into rent. The concept still remains that the payment of rent conveys to the occupier of real property substantially the same rights and responsibilities which are vested in the owner. This feudalistic heritage also helps to explain the often-repeated statement that a modern lease is at once a conveyance and a contract, the contractual aspect arising from express or implied covenants exchanged by landlord and tenant.

To call the informal arrangement between a slum landlord and his tenant a lease is to indulge in hyperbole. Usually, slum dwellers "rent" a space in which to live, agreeing to pay so much every week or every month. However, the parties do not bargain in the traditional sense which presupposes an equality of strength. Moreover, the landlord is often uncertain of the tenant's solvency, while the tenant hopes that something better will come along. This precarious oral relationship is best described as a periodic tenancy, terminable on notice tendered by either party.

19 CRIBBET, PROPERTY 184 (1962).
20 KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 18 (1962).
21 Ibid.
22 Id. at 19-20.
23 33 OHIO JUR. 2D Landlord and Tenant § 3 (1958); PROSSER, TORTS 465 (2d ed. 1955).
24 See, e.g., MOYNIHAN, REAL PROPERTY 69 (1962); 33 OHIO JUR. 2D Landlord and Tenant § 3 (1958).
25 MOYNIHAN, op. cit. supra note 24, at 69.
26 It has been held by some courts, however, that anything which creates a landlord-tenant relationship is a lease. See, e.g., Jones v. Keck, 79 Ohio App. 549, 552, 74 N.E.2d 644, 646 (1946).
28 Ibid. The major feature of the periodic estate is its continuity. Powell believes that the factor of continuity has procedural consequences to rent and eviction action. Where there has been an estate from period to period, a count for rent which became due during one period can be joined with a count for rent which became due in a later period; and also eviction can be secured in one period for default which occurred in an earlier period. Ibid.
complain about his quarters, the landlord's notice to vacate, however retaliatory, satisfies the only legal requirement of a periodic tenancy. The landlord cannot be held to an oral promise to provide services or to repair the premises in the absence of a statute requiring it. A century ago, Baron Parke testily advised persons who intend a lease to be void because of unfitness or defects in the premises to express that meaning in proper covenants.

B. Absent Lease, Absent Covenants

Baron Parke's advice is of small value to the periodic tenant of the central city. Long ago, a feudal lord covenanted ceremoniously that his lessee should have the right to undisturbed possession, or quiet enjoyment, of the land. The modern landlord, in the absence of a written agreement, covenants no more than his feudal predecessor. This curious survival of feudalistic law into the twentieth century strikes hardest at the slum renter, whose economic and social impotency deprives him of the ability to obtain the protective covenants he needs.

The mutuality of obligation which characterizes the most elementary contract is peculiarly absent in the oral periodic tenancy. The covenant of the landlord that his tenant shall have a right to quiet enjoyment is independent of the tenant's covenant to pay rent. The tenant's obligation continues unabated even though...

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Elements of a tenancy at will can also be seen in the slum landlord-tenant relationship. Such a tenancy has no specified duration. No formal notice is required to terminate it. MOYNIHAN, op. cit. supra note 24, at 83-85.

The difference between a three-day notice which is required by statute in Ohio (OHIO REV. CODE § 1923.04) in a tenancy at will situation and the one-week notice which would be given for a periodic week-to-week tenancy is insignificant in terms of protection for the tenant. Interview With Professor R. Robbins, Western Reserve University School of Law, in Cleveland, Ohio, March 14, 1967.

In Maine and Massachusetts any lease not in writing has the effect of a lease at will. MOYNIHAN, op. cit. supra note 24, at 80.

1 TIFFANY, op. cit. supra note 28, § 104.


2 POWELL, op. cit. supra note 27, § 253; WOODFALL, LAND OF LANDLORD AND TENANT 207 (Spencer ed. 1928).

Cribbet, op. cit. supra note 19, at 14.

Id. at 190; 1 TIFFANY, op. cit. supra note 28, § 91.

28 3A CORBIN, CONTRACTS § 686 (1960). Writers on the law of property are fond of ascribing the striking absence of mutuality of promises to Lord Coke. See, e.g., MOYNIHAN, op. cit. supra note 24, at 70, quoting Mr. Justice Holmes in Gardiner v. William S. Butler & Co., 245 U.S. 603 (1918): "The law of leases ... is a matter of history that has not forgotten Lord Coke." See also Cribbet, Fritz & Johnson, Cases on Property 318 (1960).

is deprived of beneficial enjoyment by vermin, filthy plumbing, and broken windows.\textsuperscript{37}

C. Tenants' Remedies Against Landlords

(1) Constructive Eviction.—Under one condition, however, the obligation to pay rent may be suspended. Modern authorities agree that if the tenant loses the enjoyment of the premises through an act of the landlord, the covenant of quiet enjoyment is breached and the tenant is constructively evicted.\textsuperscript{38} Since tenants who claim constructive eviction must abandon the premises,\textsuperscript{39} in the scramble for housing in the inner city "the defense of constructive eviction . . . [is] of little practical value."\textsuperscript{40}

(2) Partial Eviction.—One injury to the tenant recognized at common law which does not require abandonment of the premises is that of partial eviction.\textsuperscript{41} If the landlord deprives a tenant of a portion of his premises, the tenant may cease paying a portion of his rent.\textsuperscript{42} Although authorities differ on the question of whether a leaking roof or insufficient heat deprive a tenant of a portion of his leased space, the courts appear unwilling to recognize the defense in the absence of a written lease.\textsuperscript{43} Once again, the inescapable conclusion is that standard remedies are of little practical consequence to the slum tenant.

(3) Statutes.—Although discussion has focused upon common law, statutes which do protect tenants against truly hazardous conditions must be mentioned. Failure to provide fire escapes,\textsuperscript{44} hand-
rails, and lighting can result in criminal and civil liability to the landlord, but an obvious defense to the charge of neglect is that the items had been provided but were destroyed by the tenant. In the hands of a lessor with a bothersome lessee, this defense can be a vindictive tool.

(4) Tort Remedies.—The few principles of tort law which impose limited liability upon the lessor for hidden defects which make rented premises dangerous are dependent upon proof of the lessor's knowledge and the lessee's demonstration of actual injury. No duty is imposed upon the landlord to disclose defective conditions which are "so open and obvious that . . . [the tenant] may be expected to discover them when he takes possession." The disdainful admonition, "Let the buyer beware," which has served for so many centuries sums up the common law of landlord and tenant, but this ancient attitude is a cruel legacy for today's slum dweller. Covenants for quiet enjoyment, tort liability for hidden defects, and handrail statutes are of little value against an urban tenement's peeling paint, leaking roof, and falling plaster.

D. Landlords' Remedies

By contrast, remedies available to the landlord against the complaining or destructive tenant are swift and simple. No statute governs periodic tenancies in Ohio; the common law rule merely requires the giving of notice. Once given, notice entitles a landlord to enter the rented premises in the tenant's absence and remove the occupant's possessions without incurring liability. Tenants who withhold rent on their own initiative in order to press landlords into making necessary repairs are defenseless against eviction. The vulnerability of persons "exploited in the quest for the neces-

47 Plotkin v. Meeks, 131 Ohio St. 493, 3 N.E.2d 404 (1936).
49 Id. at 471. An exception to the generally held tort doctrine that the tenant must take the premises as he finds them lies in the landlord's affirmative duty to maintain the common passages of a multiple dwelling. Id. at 471. Despite the clarity of the law, the condition of hallways in one Cleveland tenement graphically described as blocked with old furniture, rubbish, mattresses and snow accumulation is probably not untypical. See Cleveland Plain Dealer, March 17, 1967, p. 2, col. 3.
50 2 POWELL, op. cit. supra note 27, § 255.
51 Id. § 253.
52 33 OHIO JUR. 2D LANDLORD AND TENANT § 505 (1958).
53 See OHIO REV. CODE §§ 1923.01-14. Should the tenant refuse to vacate the
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sities of life emphasizes the need for legislation to enable them to help themselves without fear of retribution.

II. INADEQUACIES OF MODERN SOLUTIONS TO THE PROBLEM OF SUBSTANDARD HOUSING

A. Housing Codes and Problems of Enforcement

For many years the federal government's answer to the problem of worn-out, inner-city housing was to tear it down and replace it with new, low-cost units. Unfortunately, the construction of these new units has not matched the destruction of old dwellings. Almost twenty years ago, recognizing that demolition was not the only answer, Congress began to ask cities applying for urban renewal funds whether they had a housing code which would enunciate basic criteria of habitability and decency. The inability of cities to contend imaginatively with the problems of the core area is reflected in their reluctance to enact such codes until prodded in this way. Today, municipal housing codes are a sine qua non and must be enforced if cities desire federal aid for housing problems.

But code enforcement is a complex phenomenon. Obviously,

premises despite an eviction notice, an action for forcible entry and detainer is easily available to the landlord. OHIO REV. CODE § 1923.02. 33 OHIO JUR. 2D Landlord and Tenant §§ 169-80 (1958).

63 Special Presidential Message to Congress, Recommendations for City Demonstration Programs, H.R. DOC. NO. 368, 89th Cong., 2d Sess. 3 (1966).

64 Note, Federal Aids for Enforcement of Housing Codes, 40 N.Y.U.L. REV. 948, 958 (1965).

65 HARRINGTON, op. cit. supra note 7, at 145.

66 National Housing Act § 101(d), 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1964). In 1949 the Housing Act instructed the Housing Administrator to consider whether cities applying for federal aid for urban renewal had undertaken any form of code enactment to set out standards for suitable living conditions.

67 See, e.g., CLINELAND, OHIO, HOUSING CODE §§ 6.1501, 6.0706 (space-occupancy ratios); § 6.0703 (fire protection features); § 6.0707 (rubbish and garbage disposal requirements); § 6.0506 (minimum sanitary facilities).

68 For example, the city of Cleveland, now notorious for its failures in urban renewal, (see, e.g., Wall Street J., March 14, 1967, p. 1, col. 1) did not enact its housing code until 1960 although Congress had been asking cities to do so since 1949. See note 56 supra.

its effectiveness depends upon adequate personnel, and, even with federal aid, the task of inspecting houses and punishing violations has been herculean. Often, inspectors must honestly conclude that a particular building is not susceptible of rehabilitation, and the inevitable demolition which follows shrinks the housing supply further.60 Once citations are issued for code violations, the possibilities for delaying compliance proliferate.61 Finally, code enforcement is a passive activity for the slum tenant who must wait for inspectors to act while roofs leak and drains overflow. Only suffering and payment of rent persist.

B. Rent Subsidies

In 1965 the federal government made rent subsidies available on a selective basis to the elderly, the handicapped, and certain low-income families to enable them to secure better accommodations in private housing.62 On May 18, 1967, however, the House of Representatives, by a substantial margin, froze further growth of the program by refusing the President's request for new funds and by appropriating funds sufficient only to honor past commitments.63 As it was originally organized, the rent subsidy program protected the tenant against arbitrary eviction and secured housing which certain beleaguered tenants could not otherwise afford, but the program has always been considered controversial and its continued existence or further expansion is now dependent upon the will of the Senate.64

61 Owners request and receive repeated adjournments and appeals of code violation cases. See N.Y. Times, Jan. 30, 1966, p. 63, col. 3. Reasonable time must be given owners to make repairs after a violation is established. See Cleveland Plain Dealer, March 17, 1967, p. 2, col. 4. In addition to delaying tactics, many owners treat slum housing as a wasting asset by using quick depreciation write-offs. In such cases, it may be cheaper to pay a fine than to undertake extensive repairs. Cleveland Plain Dealer, April 15, 1967, p. 39, col. 8; Note, supra note 60, at 318-19.
C. Low-Cost Federal Loans for Rehabilitation

One major drawback to the enforcement of housing codes is the financial inability of an owner-occupant to keep his house in repair. To condemn that house or to fine him for code violations deprives him of his slender equity and his stake in the community. The 1965 Housing and Urban Development Act authorized loans up to $1500 dollars to low-income owners in order to assist them in making the repairs and improvements necessary to bring their houses into code compliance.65

Again, the newness of the program makes it difficult to gauge its effectiveness. Like the rent subsidy plan, it is selective and does not provide financing to nonoccupying owners who may have marginal incomes.

D. Housing Courts

When housing problems do get to court, most judges are unfamiliar with housing codes. Consequently, much time is lost in giving evidence about housing technicalities.66 Given the injunctive power to halt violations, special housing courts could be extremely effective. In a New York study, it was proposed that action could be taken by a housing court against a building, enabling fines for violations to be paid by collecting rents directly from tenants.67 In effect, what is suggested is a form of rent withholding. At present, more cities are examining the possibility of establishing these specialized courts which could do much to make code enforcement meaningful.68

III. The Rent Strike

A. History of Rent Strikes

In the growing arsenal of devices designed to stop the blight of
neighborhoods, the rent strike stands out as a dramatic and often effective means by which tenants may assert their rights. In the inner-city atmosphere of hopelessness and despair, a refusal to pay for a bad housing bargain may signal a stirring toward self-help. "Hold back the rent" has been the rallying cry for groups in several cities. A housing journal commented about such groups: "Independently, they seem to have concluded that national programs and local drives haven't accomplished what they set out to do: force owners of rented property to maintain it in accordance with housing, health, safety and building codes."\(^{69}\)

Surprisingly, the rent strike is not a new device.\(^{71}\) Many such strikes occurred in this country after World War I when housing was in especially short supply.\(^{72}\) Before that, a 1914 Model Housing Law contained a rent-withholding provision which many cities considered enacting.\(^{73}\) In 1963 and 1964, perhaps as a result of the burgeoning civil rights movement, a new outburst of rent strikes occurred. In New York, the strikes began to multiply in geometrical progression like the brooms of the Sorcerer's Apprentice.\(^{74}\) Although governmental officials were sympathetic to slum tenants' needs, the strikes precipitated the passage of two bills in 1965 which set out a legal process for withholding rent.\(^{75}\) The speed with which corrective measures were taken by landlords in one county when rents were withheld is demonstrated by the eighty-percent rate of corrections which occurred in one month's time.\(^{76}\)

Sporadic strikes have occurred in Washington,\(^{77}\) Chicago,\(^{78}\) and Cleveland.\(^{79}\) The Cleveland strikes in 1963 resulted in greatly improved conditions in the buildings involved\(^{80}\) and prompted other landlords to improve their properties voluntarily.\(^{81}\)

\(^{69}\) Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, 21 J. HOUSING 67 (1964) [hereinafter cited as Withholding Rent].

\(^{70}\) Id.

\(^{71}\) Note, supra note 60, at 322-23 n.89.

\(^{72}\) Id.

\(^{73}\) Withholding Rent 68.


\(^{76}\) Withholding Rent 69.

\(^{77}\) Id. at 71.

\(^{78}\) Id. at 67.

\(^{79}\) Id. at 72.

\(^{80}\) Ibid.

\(^{81}\) Ibid.
strikes brought about a law which allows a welfare official to withhold the rent allotment of a relief client, which prompted the statement that "Cook County officials term [the] withholding of welfare rents . . . their 'most effective weapon in dealing with the slum landlord.'"

B. The Need for Legalized Rent Withholding Procedures

During a rent strike in Cleveland in March 1967, one social worker expressed the fear that tenants might cancel the effectiveness of their demonstration by spending their rent money on some frivolity rather than depositing it into an escrow account. This concern, voiced by an individual extremely sympathetic to the cause of the slum renter, succinctly underscores the reason why rent strikes must be accomplished by legal means, because capricious and unreasonable action by tenants is as reprehensible as a landlord's flagrant neglect. For persons like slum dwellers to whom money is a scarce commodity, the temptation to spend readily available cash on some longed-for luxury must be very great. Thus, to hold a sum of money without spending it requires a self-discipline which economically deprived persons seldom possess. Recognizing this fact, several states have provided legal channels for rent withholding by enacting various types of rent-strike legislation.

C. Types of Rent Withholding Legislation

(1) Rent Withholding by Public Welfare Agencies.—One type of rent withholding legislation, exemplified by New York's Speigel Law and the Illinois statute, authorizes the deduction of rental monies from allotments to welfare clients if their housing is seriously substandard. In these states public welfare departments pay rent directly to landlords in behalf of welfare recipients so that some control can be exercised over landlords. In New York a code enforcement agency must first substantiate the violation of any

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82 ILL. ANN. STAT. ch. 23 § 401.2 (Smith-Hurd Supp. 1966).
83 See text accompanying notes 87-113 infra.
84 See text accompanying notes 87-113 infra.
86 Telephone Interview With Mr. Edward L. Cabell, Field Service Director, Hough Opportunity Center, Cleveland, Ohio.
87 N.Y. SOC. WELFARE LAW § 143-b.
89 See ILL. ANN. STAT. ch. 23, § 401.2 (Smith-Hurd Supp. 1966); N.Y. SOC. WELFARE LAW § 143-b1.
law which endangers the life, health, and safety of housing occupants before a welfare official can refuse to pay his client's rent. 90  

The violation, once established, can be validly asserted as a defense to an action for rent, thus eliminating the common law obstacle which allows no defenses to an eviction action for the nonpayment of rent. 91  A welfare official is also empowered under the law to bring an action in behalf of the tenant for a rent reduction. 92  

Under the Illinois law the welfare agency which assists a particular client may withhold his rent if, in its judgment, the building in which he resides has been allowed to deteriorate below minimum health and safety standards. 93  The agency is required to report violations to the appropriate municipal authorities and to wait for proof that they have been corrected before rent allotments can be released to the landlord. 94  Unlike the New York law, however, the Illinois statute does not protect the relief client against eviction. 95  

Neither of these laws allows the tenant to initiate action in his own behalf. Thus, individual passivity may be reinforced. Nevertheless, the statutes are symbolic of the new philosophy which maintains that landlords cannot continue to ignore their moral, if not legal, duty to provide adequate housing.

(2) Repair-and-Deduct Laws.—A second form of rent withholding is the so-called repair-and-deduct law. California, 96  Montana, 97  North Dakota, 98  Oklahoma, 99  and South Dakota 100  require the lessor of a building to make it fit for human occupancy in the absence of an agreement to the contrary. Upon the landlord's failure to act after notice has been given by the tenant of the need for repairs, the tenant may undertake them himself and deduct the cost from his rent. 101  Of course, the major obstacle to this type of law is the phrase "in the absence of an agreement to the contrary." Landlords in the inner-city can easily comply with the letter of the

90 N.Y. SOC. WELFARE LAW § 143-b.
92 N.Y. SOC. WELFARE LAW § 143-b.
95 Ibid.
100 S.D. Code §§ 38.0409, .0410 (1939).
law by a take-it-or-leave-it offer to a prospective tenant. A further limitation found in some repair-and-deduct laws is that the tenant can only make repairs which do not exceed one month's rent.102

(3) Receiverships.—A third type of rent withholding enlists the aid of the courts in the cause of the tenant. In New York the most imaginative innovator of rent-strike legislation, tenants have been able since 1930 to withhold rent from a landlord and deposit it with the clerk of court until the landlord complies with housing code requirements.103 The law was expanded recently to allow tenants to secure necessary heat, utilities, and janitorial service or to correct violations on their own, if necessary and have the cost of such services paid from rent money held in escrow by the court.104 By its nature, the law requires thoughtful organization by tenants and presupposes a duration of occupancy which ignores the realities of the usual periodic tenancy of the slums. Therefore, the measure probably has more value for a long-term tenant.

Instead of awaiting official recognition by a code enforcement agency to establish the existence of violations, a second form of rent receivership law newly enacted in Massachusetts105 and New York106 allows action to be initiated by the tenants in a multiple dwelling who allege the existence of conditions dangerous to life, health, and safety. In Massachusetts the court may direct the clerk to release to the landlord whatever funds are necessary to correct violations.107 In New York tenants may deposit their rent with the court until a trial is held, at which time a determination of the truth of the tenants' allegations is made. If the landlord refuses to correct violations proven to the court, an administrator may be appointed to direct the repairs and to pay for them with funds held in escrow.108

The Massachusetts law is too new to judge its efficacy. The experience with the New York legislation, on the other hand, has shown, ironically, that it is being used by the well-to-do rather than indigent tenants. In 1965 lessees in a plush apartment residence sued their landlord, the Chase Manhattan Bank, invoking the aid of

102 See, e.g., CAL. CIV. CODE § 1942; MONT. REV. CODES ANN. § 42-202 (1947).
103 N.Y. REAL PROP. ACTIONS LAW § 755.
the statute to correct defective conditions. The law, opined the
court, was conceived to "protect the opulent as well as the indigent
tenant from the indifferent attitude of an unfriendly landlord."

(4) Rent Suspension and Abatement.—In Pennsylvania a new
statute suspends the landlord's right to collect rent without affect-
ing any other terms of the landlord-tenant relationship if a building
is certified as unfit for habitation. During this time rent is paid
into an escrow account to be released after he rectifies the unsatis-
factory condition. The statute does not specify who is to be the
escrow agent, but in New York a similar statute makes the court
the agent if the Department of Buildings certifies the existence of
"rent-impairing" violations. Tenants may stop paying altogether if
no corrections are made within six months and may recover and
keep any money held in escrow.

IV. THE NEED FOR LEGISLATION IN OHIO

The effectiveness of rent-withholding legislation in several
states demonstrates its usefulness in equalizing the rights of the
slum tenant and his landlord. In Ohio no legislative sanction for
rent withholding exists on either the municipal or state level. Al-
though some tenants have initiated rent strikes themselves, they
have done so without legislative authority, and, as a consequence,
such strikes can be effective only if the landlord cooperates. It is
hoped, therefore, that the Ohio General Assembly will take cogni-
zance of the need for legislation in this area as has been done in
other states.

Basic legal and constitutional considerations lead to the conclu-
sion that the passage of a rent-withholding law in Ohio is possible. It is necessary, however, to examine the relationship between mu-

110 Id. at 98, 262 N.Y.S.2d at 521.
112 N.Y. MULT. DWELL. LAW § 302-a (Supp. 1966).
113 In New York this time limit is six months. See N.Y. MULT. DWELL. LAW § 302-a (Supp. 1966). In Pennsylvania, the time limit is one year. See PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1966). The Pennsylvania law is still too new to determine its effectiveness.
114 Rent withholding laws exist in one form or another in New York, California, South Dakota, Montana, North Dakota, Oklahoma, Illinois, Massachusetts, and Pennsylvania. See cases and statutes cited in notes 87-113 supra.
115 See discussion accompanying notes 69-83 supra and accompanying text.
116 Notes 117-81 infra and accompanying text.
municipal and state governmental powers before proposing a plan of action. After all, it is at the local level that any workable solution would have to be made.

A. Powers of Municipal Corporations

Article XVIII, section 3 of the Ohio Constitution, known as the Home Rule Amendment, is the source of Ohio municipalities' authority to exercise local self-government. This section has been interpreted to contain two separate grants of power. The first gives municipal corporations the authority to exercise "all powers of local self-government" and is not restricted by the final clause of the section relating to conflict with general laws. The second grant enables municipalities to adopt and enforce local police, sanitary, and other similar regulations. This latter grant is limited by the phrase "as are not in conflict with general laws." Municipal ordinances enacted pursuant to this grant are generally called "police powers." To be invalid as in conflict with general laws, the local police regulation must conflict with a state statute. The legislature may not by general law deny a municipality the power to adopt such regulations, but it may enact laws which are themselves in conflict with those of the municipality.

Because article XVIII of the Ohio Constitution is the source of all local governmental power, it is not necessary for municipal corporations to look to state statutes for the authority to carry out municipal functions. Ohio decisions establish beyond a doubt that

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117 The section provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and similar regulations as are not in conflict with general laws." ORIO CONSt. art. XVII, § 3. They are such powers of government as, in view of their nature and field of operation, are local and municipal in character. State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 77, 102 N.E. 670, 673 (1913).


119 In other words, the expression "as are not in conflict with general laws," as used in the constitutional provision, modifies the words "local police, sanitary and other similar regulations" but not the words "powers of local self-government." Hugger v. Ironton, 83 Ohio App. 21, 82 N.E.2d 118, appeal dismissed, 148 Ohio St. 670, 76 N.E.2d 397 (1947); State ex rel. Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

120 For a complete discussion of police power in Ohio municipal corporations, see 3 FARRELL & ELLIS, OHIO MUNICIPAL CODE §§ 1.29-33 (11th ed. 1962).

121 City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); City of Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917).

a municipality's power of local self-government prevails in local affairs. Within the area of local self-government, a municipality can determine what is necessary for the public welfare and can adopt appropriate programs without any statutory authorization.

B. Municipal Rent-Withholding Legislation

In order to determine whether municipal corporations have the power to enact rent-withholding legislation, it is necessary to ascertain whether such an exercise of power is one of local self-government pursuant to the first grant in the Home Rule Amendment or a police power based upon the second half of the section. If a power of local self-government is involved, no state statutory authorization is necessary, because municipalities are free to enact whatever legislation is necessary to meet local needs. On the other hand, if municipal enactment of a rent-withholding ordinance or regulation is an exercise of the police power, it might be subject to conflict with general laws of Ohio. Nevertheless, even if it is considered to be an exercise of police power, as long as it is reasonable, is for the benefit of the general health, safety, or welfare of the public, and no state law deals with the problem, the ordinance should be upheld. Only a state statute directly in conflict can make the municipal ordinance invalid. In determining whether an ordinance is in conflict with general laws, the test is whether it permits or licenses that which the state statute prohibits, or, conversely,

(eminence domain); State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951) (non-debt bonds for off-street parking); Angell v. City of Toledo, 153 Ohio St. 179, 91 N.E.2d 250 (1950) (income tax).

123 See, e.g., State ex rel. Brueste v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953) where the court held that a municipality could exercise its power of eminent domain to acquire property for urban renewal without regard to an existing state urban redevelopment act. For this reason, the General Assembly, in 1961, repealed completely the Ohio urban renewal statute which purported to authorize cities to undertake urban renewal projects. OHIO REV. CODE §§ 725.01–.11. Repealed by 129 Ohio Laws, 369 (1961), effective April 24, 1961.


125 Note 122 supra and accompanying text.

126 The validity of an ordinance or regulation passed under the police power depends primarily on whether it is reasonable or arbitrary. Feldman v. City of Cincinnati, 20 F. Supp. 531, 536 (S.D. Ohio 1937).

127 Generally, municipalities may make all reasonable, necessary, and appropriate provisions to promote the health, morals, peace, and welfare of the community. Froelich v. City of Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919); City of Springfield v. Hurst, 57 N.E.2d 425 (Ohio Ct. App. 1943), aff'd, 144 Ohio St. 49, 56 N.E.2d 185 (1944).
whether the municipal ordinance prohibits that which the state law permits.\textsuperscript{128}

Many Ohio municipalities presently have housing codes enacted pursuant to the police power granted by the second half of article XVIII, section 3.\textsuperscript{129} In addition, the General Assembly has expressly given municipal corporations the authority to regulate buildings and other structures by state statute.\textsuperscript{130} Further, the statutory remedy of injunctive relief is provided to enforce such codes by preventing and correcting violations.\textsuperscript{131}

As previously shown,\textsuperscript{132} it is in the enforcement of housing codes that municipalities are experiencing considerable difficulty. Beyond the mechanical difficulties involved, much of this failure can be attributed to the inadequacy of the injunctive remedy to force landlords and building owners to comply with court orders to correct existing code violations.\textsuperscript{133}

Recently, in an unreported case in Cleveland, a municipal court utilized its equity powers conferred by statute\textsuperscript{134} to provide relief in a housing code violation case.\textsuperscript{135} The court, by its own initiative, appointed a receiver to hold the landlord's building in receivership until the necessary repairs were made to correct existing violations and nuisances. Although such a practice is arguably beyond the scope of the enforcement powers of the court, the case illustrates that without additional legislative remedies the courts must stretch their powers in order to attain justice for the slum tenant.

\textbf{C. State Rent-Withholding Legislation}

Since housing codes are enacted pursuant to the police power,
rent-withholding legislation at the municipal level could also be enacted by virtue of that power. Because there is no existing state legislation on the subject, no conflict with general laws should arise. However, the exercise of such authority might be made more effective and more widely adopted with statutory authorization by the General Assembly. A state statute permitting rent withholding by municipal courts would be an effective means of better enforcing housing codes.

If neither the General Assembly nor the municipalities enact rent-withholding legislation, tenants will be left to their existing statutory and common law remedies. A state statute could provide a remedy and procedure for rent to be withheld when housing code violations are found to exist. Such a statute should prescribe certain prerequisites for invoking the rent-withholding sanction so that there is no danger of abuse. The power to enforce its provisions should remain on the municipal level, because the landlord-tenant relationship causes local problems which can be dealt with efficiently only by local enforcement procedures.

V. CONSTITUTIONALITY OF RENT-WITHHOLDING LEGISLATION

If the General Assembly were to enact a statute granting municipal corporations the express power to enforce housing code violations by permitting rent withholding through some form of receivership, a valid argument could be made that such measures adversely affect the property rights of the landlord. Consequently, the validity of such a law will depend upon whether it is consistent with the provisions of the federal constitution. In New York, where several forms of rent withholding laws exist, their constitutionality has been upheld by at least one appellate court. In addition, several lower court decisions have upheld the constitutionality of such statutes, construing them as a valid exercise of the police power of the state. The constitutional attacks most frequently advanced

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136 These remedies are discussed at notes 38-48 supra.

137 For example, upon a tenant's failure to pay his rent, the landlord may have him evicted by forcible entry and detainer. See note 52 supra and accompanying text.

138 The constitutionality of the rent-abatement section of N.Y. SOC. WELFARE LAW § 143-b is currently being challenged in the New York appellate court. The appeal constitutes a consolidation of three cases tried in the Civil Court, County of Bronx: Farrell v. Drew, L & T 68480 (1965); Farrell v. Dorsey, L & T 84889 (1965); and Farrell v. Williams, L & T 22338 (1966).

139 See, e.g., In re Dept. of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 454, 251 N.Y.S.2d 441 (1964); Himmel v. Chase Manhattan Bank, 47 Misc. 2d 95, 262 N.Y.S.2d 515
include impairment of the obligation of contracts, deprivation of property without due process of law, and violation of the equal protection clause.\textsuperscript{140}

\textbf{A. Impairment of the Obligation of Contracts}

The United States Constitution provides that no state shall pass any law impairing the obligation of contracts.\textsuperscript{141} A lease between landlord and tenant creates contractual obligations, and the duty to pay rent is a covenant independent of any obligation the landlord may make to repair the rented property.\textsuperscript{142} Because the landlord has the right to evict a tenant for the nonpayment of rent,\textsuperscript{143} the question arises whether a rent-withholding law impairs the landlord's contract rights under his lease with the tenant in violation of the federal constitution.

In \textit{Milchman v. Rivera},\textsuperscript{144} a New York City court considered the constitutionality of that state's Speigel Law,\textsuperscript{145} which authorizes welfare agencies to withhold the rental payments of relief recipients until housing violations are corrected by the landlord. In that case a landlord brought proceedings to evict six tenants for the nonpayment of rent. The tenants interposed the defense provided by the act.\textsuperscript{146} The landlord objected on the ground that the defense would destroy his contract rights by prohibiting him from recovering a money judgment for back rent while the tenant enjoyed possession of the premises. The court found that the landlord was not permanently deprived of his rent and that the rent-abatement section of

\begin{footnotes}
\item[140] See, \textit{e.g.}, \textit{Milchman v. Rivera}, \textit{supra} note 139; \textit{In re 1531 Brooks Ave.}, \textit{supra} note 139; \textit{Schaffer v. Montes}, \textit{supra} note 139.
\item[141] U.S. CONST. art. I, § 10.
\item[142] Restatement, Contracts § 290 (1932). See also text accompanying notes 35-36 \textit{supra}.
\item[143] Note 52 \textit{supra} and accompanying text.
\item[145] N.Y. Soc. Welfare Law § 143-b. See text accompanying notes 87-95 \textit{supra}.
\item[146] The Act provides in part: It shall be a valid defense in any action or summary proceeding against a welfare recipient for nonpayment of rent to show existing violations in the building wherein such welfare recipient resides which relate to conditions which are dangerous, hazardous or detrimental to life or health as the basis for nonpayment. N.Y. Soc. Welfare Law § 143-b(5).
\end{footnotes}
the act\textsuperscript{147} was a proper exercise of the police power.\textsuperscript{148} The statute was compared with the 1920 Rent Control Law\textsuperscript{149} which had suspended all possessory actions to meet an existing emergency.\textsuperscript{150} The court also noted that the same argument of confiscation and impairment of the obligation of contracts was struck down by Judge Pound in People ex rel. Durhan Realty Corp. v. LaFetra: \textsuperscript{151} "The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of the police power, although the rights of private property are thereby curtailed and freedom of contract is abridged."\textsuperscript{152} The court relied heavily upon this rationale in upholding the Rent Control Act. It was noted that the Spiegel Law applies only when conditions exist in the building which are "dangerous, hazardous or detrimental to life and health."\textsuperscript{153} The infringement of the landlord's contract rights was held to be analogous to the abatement of a nuisance or the establishment of building restrictions and therefore within the police power of the state.\textsuperscript{154} Further, the court held that the defense is available to a tenant when a hazardous condition exists anywhere in the building, even though the tenant's particular accommodations are not affected.\textsuperscript{155}

Although \textit{Milchman} has not been appealed, the result is based on sound reasoning and should be upheld by an appellate court. The courts have long recognized the legislatures' regulatory power to require the maintenance of minimum health and safety standards in dwelling units.\textsuperscript{156} Contracts are made subject to the police power of the state, and, especially during times of war and economic de-

\textsuperscript{147} An amendment in 1965 provides that the landlord shall not be entitled to an order or judgment awarding him possession of the premises or providing for removal of the tenant, or a money judgment against the tenant, on the basis of non-payment of rent for any period during which there was outstanding any violation of law. \textit{N.Y. MUL. DWELL. LAW} § 302-a.


\textsuperscript{149} Laws of 1920, ch. 942, as cited in Durhan Realty Corp. v. LaFetra, 230 N.Y. 429, 130 N.E. 601 (1921).

\textsuperscript{150} 39 Misc. 2d at 355, 240 N.Y.S.2d at 869.

\textsuperscript{151} 230 N.Y. 429, 130 N.E. 601 (1921).

\textsuperscript{152} \textit{Id.} at 442, 130 N.E. at 605.

\textsuperscript{153} \textit{N.Y. SOC. WELFARE LAW} § 143-b(4).

\textsuperscript{154} 230 N.Y. at 444, 447-49, 130 N.E. at 606, 607-08.


\textsuperscript{156} Welch v. Swasey, 214 U.S. 91 (1909); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Health Dep't v. Rector of Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1893).
pression, the Supreme Court has upheld state legislation affecting existing contracts.\footnote{157}{Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933).} In the leading case of Home Bldg. & Loan Ass'n v. Blaisdell,\footnote{158}{Ibid.} the Supreme Court upheld the validity of an emergency statute which authorized the courts to extend the period for redemption from foreclosure sales during the economic depression of the 1930s. The Court found that the existence of a severe financial and economic depression and the frequent occurrence of mortgage foreclosure sales for inadequate prices had created an emergency situation calling for the exercise of the state's police power.\footnote{159}{Ibid.} It concluded that the statute was a reasonable exercise of the protective power of the state not violative of the contract clause.\footnote{160}{Ibid.}

Thus, while the argument might be made that rent-withholding legislation affects the landlord's contract rights, such laws should be upheld as within the requirements of the contract clause. The deplorable living conditions of the slum tenant who has no adequate remedy to force his landlord to make necessary repairs justify the exercise of the state's police power in his behalf. It is important to note, however, that after serving for many years as a major protector of the individual's rights against state action, the contract clause has fallen into virtual disuse as a constitutional weapon.\footnote{161}{See CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA -- ANALYSIS AND INTERPRETATION 361-62 (1953).} The arguments formerly based upon that clause are now usually founded on the expanded due process requirements of the fourteenth amendment.\footnote{162}{Id. at 361.} Thus, most of the cases determining the constitutionality of rent-withholding laws have turned upon whether they violate due process.\footnote{163}{See cases cited notes 167-69 infra.}

B. Deprivation of Property Without Due Process of Law

In the case of In re 1531 Brooks Ave.,\footnote{164}{38 Misc. 2d 589, 236 N.Y.S.2d 833 (1962).} proceedings were brought under the New York Receivership Bill\footnote{165}{N.Y. MULT. DWELL. LAW § 309.} to appoint a receiver of the rents and profits of a multiple dwelling in order to effect certain repairs and to prevent the building from becoming a slum dwelling. A mortgagee of the building attacked the receiver-
ship proceedings as a taking his property without due process. The court held that the requirements of due process had been satisfied because of the valid exercise of the state's police power, together with specific provisions for adequate notice to interested parties for hearings and the opportunity to make necessary repairs promptly.\textsuperscript{168}

Other lower court decisions have sustained the constitutional validity of receivership laws,\textsuperscript{166} welfare rent withholding laws,\textsuperscript{166} and rent abatement laws\textsuperscript{169} on the ground that they represent reasonable exercises of the police power for the benefit of the general welfare or to combat a housing emergency which is known to exist. These cases do not explore the constitutional rationale to any great depth; the courts merely justify the laws on the ground that the state may exercise its police power to promote the general welfare, even if the landlord is temporarily deprived of certain property rights.

In Trozze\textit{ v. Drooney},\textsuperscript{170} however, a New York City court found that the Spiegel Law was unconstitutional because it destroyed the landlord's contract rights and took away his property rights without due process of law. The court held that other city and state laws prescribed elaborate procedures to effect compliance with the housing code.\textsuperscript{171} Further, the court held that under the constitution an owner of property may maintain his property in any manner he may choose, and his right of ownership may not be taken from him.\textsuperscript{172}

The Trozze decision is obviously in direct conflict with the overwhelming majority of lower court cases\textsuperscript{173} and, in addition, is contrary to sound constitutional principles. In appraising the constitutionality of state police power regulations, the Supreme Court in\textit{ Ferguson v. Skrupa}\textsuperscript{174} recently stated that it has "returned to the original constitutional proposition that courts do not substitute their

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\item[166] 38 Misc. 2d at 591, 236 N.Y.S.2d at 835-36.
\item[170] Id. at 1060, 232 N.Y.S.2d 139 (Binghampton City Ct. 1962).
\item[171] Id. at 1063, 232 N.Y.S.2d at 142.
\item[172] Id. at 1064, 232 N.Y.S.2d at 143.
\item[173] See cases cited note 139 \textit{supra}.
\end{enumerate}
\end{footnotesize}
social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."\textsuperscript{175}

C. Equal Protection of the Laws

The welfare type of rent-withholding legislation has also been challenged on the ground that it allegedly denied equal protection of the laws to the landlord.\textsuperscript{176} The argument is made that since such laws apply only to welfare recipients, they result in an unfair classification which discriminates against a landlord with welfare tenants. In \textit{Shaffer v. Montes},\textsuperscript{177} however, a New York court found that the Spiegel Law was not arbitrary and was based upon a legitimate public purpose, which may always be served without regard to the constitutional limitations of due process and equal protection.\textsuperscript{178} Further, the sanction's applicability only to landlords accommodating welfare recipients is probably a reasonable classification, since the state has an interest in seeing that its funds are not expended to subsidize slums.\textsuperscript{179}

The reasoning of the New York court is sound and is supported by existing constitutional standards relating to the equal protection clause. Generally, a classification within a statute does not violate the fourteenth amendment as long as the distinction rests upon a substantial basis and is not arbitrary.\textsuperscript{180} Only "invidious discrimination" decreed by statute offends the Constitution.\textsuperscript{181}

VI. CONCLUSION

Mr. Justice Holmes once remarked that no more foolish reason
exists for sustaining a principle of law than that it is an entrenched part of the common law. In the case of the slum tenant, this observation is singularly apt because he has been brought to his unequal bargaining position by the inadequacy of the common law. It is time that Ohio joined the growing procession of progressive states which have come to the realization that additional remedies must be afforded the tenant through legislative enactment.

This Note has explored the variations of rent-withholding legislation and the strengths and weaknesses of each type. For example, the type of legislation which empowers welfare agencies to withhold rent would be impractical where rent allotments are made directly to tenant-clients rather than to landlords. Further, rent suspension and abatement laws tend to penalize the landlord rather than correct existing violations because, unless the landlord has rental funds available to make necessary repairs, housing code violations will continue to exist. Therefore, it appears that the best form of law should combine some form of rent receivership preceded by an appropriate court proceeding to satisfy due process requirements. Consequently, the following bill is proposed for enactment by the Ohio General Assembly. It permits tenants to petition a municipal court to receive rents and direct necessary repairs. The use of the municipal court for such a proceeding is an efficient means of enforcing existing municipal housing codes. Furthermore, the bill allows rent to be used for constructive rather than punitive purposes in order to achieve the primary object of housing codes — the creation of a decent living environment for tenants who previously had no adequate remedy at law.

A BILL

To enact section of the Revised Code to enable tenants of multiple dwellings to deposit rental funds into a court of proper jurisdiction and to enable the court to use such funds in order to remedy housing conditions in dwellings which are dangerous to the life, safety, or health of the occupants.

Be it enacted by the General Assembly of Ohio:

SECTION 1. That section of the Revised Code be enacted to read as follows:

SECTION 2. The tenants of any multiple dwelling in any munici-

182 Holmes, Collected Legal Papers 187 (1920).
palty in the State of Ohio may petition the municipal court or other proper court for an order directing the deposit of rents to a receiver appointed by the court and to use such rents to remedy conditions within that multiple dwelling which are dangerous to the life, health, or safety of the occupants when:

a. proper proof is made that a notice or order to remove a violation of the applicable municipal housing code has been issued by the appropriate agency to the owner of the multiple dwelling; or

b. one third or more of the tenants of the multiple dwelling determine that conditions exist which are dangerous to the life, health, or safety of the occupants and are in violation of the housing code.

SECTION 3. The petition shall be filed in the municipal court or other proper court as defined in section 1907.01.1 of the Revised Code in which jurisdiction the building is located. The petition shall contain: (1) facts showing conditions dangerous to the life, health, or safety of the occupants; (2) a brief description of the nature of the work required to remove said conditions; (3) a statement of the amount of rent due from each of the petitioning tenants; and (4) a statement of the relief sought.

SECTION 4. The owner, lienor, or mortgagee of such multiple dwelling may prove, and it shall be a valid defense to such petition and subsequent proceedings, that (1) the conditions alleged in the petition do not exist or that they have been removed; or (2) that such conditions have been caused by the negligence or actions of the petitioning tenants; or (3) that the conditions alleged in the petition are not dangerous to the life, health, or safety of the occupants.

SECTION 5. If the court finds, after hearing, that the allegations of the petition are true, it may by written order direct that the rents due from the date of the petition and rents due thereafter be deposited with the court-appointed receiver and that such deposited rent moneys be used, subject to the receiver's discretion, to the extent necessary to remedy the conditions alleged in the petition.

Upon completion of the necessary repairs, the receiver shall return any surplus moneys to the owner, together with an accounting of the rents received and costs incurred.

SECTION 6. The right of any owner of the multiple dwelling affected by the petition to collect rent moneys from any petitioning tenant on or after the date of the petition shall be unenforceable upon demonstration that rent money has been deposited with the
court-appointed receiver. Proof of such payment to the receiver shall be a valid defense to any action by the landlord to recover possession of the premises for the nonpayment of rent.

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