Redrafting Municipal Housing Codes

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Redrafting Municipal Housing Codes

BARLOW BURKE, JR.*

Housing codes create several types of expectations for some interest groups in our cities today. Tenants expect their housing to be put into decent, sanitary shape. Officials expect to be relieved of the pressure of citizen complaints by referring people to the code enforcers. Construction people expect specifications in the codes to create work. So it goes. And it is not too much of an exaggeration to say that some landlords expect to be put out of business by the codes. Recent litigation has fulfilled some of the tenants' hopes and probably some of the landlords' fears. Thus the system of rights and remedies which codes create should be considered anew.

I. INTRODUCTION

Reformers and muckrakers have long attacked poor housing as one of the worst problems of our cities.1 Slums have long been seen as “breeders” of ill-health and disorderliness. Some of this concern doubtless is a mistaking of the symptom for the disease. Housing is the most obvious feature of our cities. Highly visible, durable, and costly to demolish, it is the scene of many social problems. It is perhaps natural to mistake the scene for the problem.

But poor diet might as easily explain ill-health. Drug addiction and an unstable family structure are likely causes of poor house-keeping.2 Yet, at the same time that city officials have come to realize that housing programs are only a partial solution to a larger problem of environment, city councils have persisted in enacting many different types of housing codes: structural, fire, sanitary, health, and electrical codes are the most common. Often each is enforced by a different agency. Laws have been piled on laws: each generation over the past 100 years in New York City, for example, has seen a different city code enacted.3

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1. FRIEDMAN, GOVERNMENT AND SLUM HOUSING, Chap. 2 (1968), chronicles this concern with particular reference to N.Y.C.; Comment, Building Codes, Housing Codes, and the Conservation of Chicago's Housing Supply, 31 UNIVERSITY OF CHICAGO L. REV. 180 (1965), does the same for Chicago.

2. See SHORR, SLUMS AND SOCIAL INSECURITY, Social Security Administration, Washington, D.C. (1965), examines the correlation between social problems and housing in many more aspects than are here enumerated.

Currently codes seem to be creating more problems than they alleviate. They are proving cumbersome to administer. Dwelling units outnumber inspectors on a ratio of 20,000 to 1.\textsuperscript{4} Most enforcement is complaint-initiated, slow, and involves the delegation of large amounts of discretion to housing inspectors.\textsuperscript{5}

Enforcement is also, perhaps as a result of the situation just described, selective.\textsuperscript{6} Nominally applicable to an entire urban jurisdiction, codes are used only in certain areas of our cities. Enforcement is selective for many reasons, but generally which housing is chosen for enforcement depends upon the type of ownership, the preferences of enforcement personnel, and the economics of the housing market.

First, codes are most likely to be enforced against landlords and not against owner-occupants. The reason is that, lacking an adequate budget and numbers of inspectors, most code administrators do little more than work on a complaint-initiated system of enforcement. Of course, tenants are more likely to complain than are householders.\textsuperscript{7} Area inspections are not unknown, but they are not the usual practice.\textsuperscript{8}

Second come the preferences and predilections of the enforcement officials.\textsuperscript{9} Housing code offices have seldom gotten the best of the talent available to local government.\textsuperscript{10} The role of the office, understaffed or not, is viewed in several ways, depending on the professional attitudes of the incumbents. Some see their job primarily as the improvement of the housing stock. Others feel that they are supposed to be bringing the worst landlords "to justice"—after all, they are in many cities administering codes with criminal sanctions. Their emphasis is on those who exploit their tenants, collecting rent and not providing them with proper consideration for value received. This type of administrator is

\begin{itemize}
  \item \textsuperscript{4} This figure represents the author's computation based on statistics for cities like Cleveland and New Orleans. For larger cities, like N.Y.C., the ratio is probably higher.
  \item \textsuperscript{5} See Note, \textit{Enforcement of Housing Codes}, 78 \textit{HARV. L. REV.} 801, 806-7, for a description of the complaint process.
  \item \textsuperscript{6} Note, \textit{Municipal Housing Codes}, 69 \textit{HARV. L. REV.} 515 (1956).
  \item \textsuperscript{7} Here I am referring to a complaint made to government, not just a propensity to complain to the janitor or the landlord. Upper and moderate income tenants are just as likely to complain if dissatisfied with housing conditions, but, having more bargaining power with their landlords and perhaps greater skill at complaining effectively, they are more likely to have to go no further. Their landlord is more likely to be in a position to afford the requested repairs, too. Lower class and income tenants are more likely, because of the reverse of all these factors, to have to take the next step and complain to government.
  \item \textsuperscript{8} Of area inspections, more \textit{infra}.
  \item \textsuperscript{9} By preferences, I mean the propensity of an inspector to look for a given type of violation. For example, an inspector with experience in plumbing would notice violations of the sanitary code before other types of violations. A mason is similarly more likely to notice defects in a stone or brick wall. And so on. By predilections, I mean the inspector's view of his job, and it is with that aspect this paragraph is mainly concerned.
  \item \textsuperscript{10} Perhaps the streets department is consistently less fortunate in this regard.
\end{itemize}
concerned with the *mens rea* of the landlord. He has usually all but forgotten about the standards of the code, which talk exclusively about the condition of the housing, not the intentions of the landlord. Still other enforcers are inclined to see the codes as viable tools only in certain areas of their city. These are the so-called "gray areas", deteriorating or transitional zones, but not yet slums.

A third general problem of enforcement involves the economics of the housing market. In many of our larger cities today, the vacancy rate is very low. Public programs, like urban renewal, have cleared densely populated land and intensified the need for housing. The private construction industry either cannot meet this demand or finance its projects in the present high-interest, capital market. Rising land, materials, and maintenance costs make every aspect of rental development less profitable. Rent control, where in force, further limits profits for rentable premises. Slum housing in particular is much less profitable than it formerly was. Code enforcement, increased property taxes, complaining tenants, rent withholding and strikes, and falling resale prices are some of the reasons for this. Indeed, many slum buildings are being abandoned because of this profit squeeze. Not even non-profit corporations can run slum housing effectively today. Increasing numbers of buildings are being abandoned by their owners. Over the past two years, owners have walked away from some 30,000 buildings in New York City. Thereafter, their physical deterioration is even more rapid. Eventually the city becomes the landlord or the building is vacated. New York City has thus become the unwilling landlord of some 77,000 people in 1968-70. This process only tightens the local housing market.

On the other hand, where the landlord agrees to improve the condition of his housing, he is eventually forced to accept less profits

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11. This third view is often held by city planners.
12. In this regard, it is generally assumed that codes are required where, for various ill-defined reasons, the market fails to provide decent premises. Thus codes are needed to repair flaws in the market system, and the market itself is deemed socially useful when thus "corrected". GALBRAITH, THE NEW INDUSTRIAL STATE 366 (Signet Books Edition 1968). Edward C. Banfield provides the antidote for this notion: he says that it is the market itself that provides poor housing, and that the market for slum housing exists because of a demand for it. BANFIELD, THE UNHEAVENLY CITY, 42-44 (1970).
16. *Id.* All large United States cities are experiencing this situation.
17. This estimate is probably conservative. See note 15 and see Shipler, Experts Attribute Housing Decay Here to Landlords' Fears and Fantasies as Well as Economic Realities, NEW YORK TIMES (March 22, 1970), 69, col. 1.
18. *Id.*
until his margin is too low; then he feels compelled to raise rents. Thus is the housing priced out of the range of low-income groups who are then forced to find other accommodations.\textsuperscript{19}

II. THE ORIGINS OF CODES

The legal basis of housing codes lies in a concept of the police power that has two aspects: (1) a regard for the effects of poor housing on the surrounding neighborhood and (2) a concern for the lives of the tenants in poor quality housing.\textsuperscript{20} The latter has been briefly discussed, but it is the first purpose of these codes that is emphasized here. This emphasis is areal, and the aim is to alleviate the burden of social costs or the externalities of poor housing. Codes were originally aimed at selected areas of our cities.\textsuperscript{21} Only later did they apply to an entire city. The danger of fires spreading from a poorly-built dwelling to the surrounding community justified structural requirements. The fear of a communicable disease sweeping through densely populated neighborhoods justified health and sanitary districts in which the number of occupants per dwelling unit was limited. These were 19th century attempts to deal with the housing problems of the "ghetto" areas of our cities.

So codes have two justifications: the welfare of the occupants and a community-regarding concern for the third-party effects of poor housing and crowding living. But the initial, areal aspect of codes continues to this day.

In 1954, the "workable program" requirements for Urban Renewal stated, \textit{inter alia}, that the community receiving renewal grants draw up a housing code.\textsuperscript{22} Some 1200 codes were enacted as a result of this encouragement.\textsuperscript{23} The Federal government wanted to insure that localities had the means to preserve the condition of housing adjacent to Renewal projects.\textsuperscript{24} Grants were made available to finance code enforcement programs in such contiguous areas. These program requirements were later liberalized to permit programs in areas

\textsuperscript{19} Id.

\textsuperscript{20} FRIEDMAN, \textit{supra} note 1. Another way of saying that codes express a concern for the tenants in substandard housing is to read them as a means of shifting the duty to repair from tenant to landlord. \textit{E.g.}, Walsh, \textit{Slum Housing: The Legal Remedies for Connecticut Towns and Tenants}, 40 CONN. BAR J. 539 (1966). \textit{See also} Note, \textit{Private Enforcement of Municipal Housing Regulations}, 54 IA. L. REV. 581 (1966).


\textsuperscript{22} Note, \textit{Federal Aid for Enforcement of Housing Codes}, 40 N.Y.U.L. REV. 948 (1965).

\textsuperscript{23} MANDELKER, \textit{MANAGING OUR URBAN ENVIRONMENT} 655-685 (1966).

\textsuperscript{24} 42 U.S.C. § 1451 (c).
unattached to Renewal projects. Eventually, different code enforcement standards were required by the Federal government in different areas of our cities, depending on how these areas fitted into the locality's Urban Renewal plan. There were different standards for demolition, conservation, and maintenance areas.

Federal funds induced many local officials to undertake area-inspections to enforce the codes on a comprehensive basis. By and large, these inspections produced enforcement statistics which made the administrators "look good". But problems arose as well.

Since housing is an unstandardized product, equal enforcement is very difficult if not impossible. Often what is looked for depends on the particular inspector involved. This quickly becomes apparent in any area-wide inspection. Such enforcement also makes more obvious some of the implicit uses of codes. They can be utilized to: (1) drive down the price of land and improvements soon to be condemned under the city's eminent domain power, (2) drive the worst slumlords out of business, (3) improve the tax base incrementally, and (4) provide a cheap substitute for Urban Renewal.

Law Reviews have dealt feebly with the inadequacies of codes as social policy tools. After 1954, many proposals for amending codes were made. Their purpose was to improve enforcement, which, from the beginning, appeared lax.

The first reforms aimed at improving judicial enforcement. The suggestions might have been equally applicable to any use of judicial process. A recitation of some of the enforcement problems will illustrate this.

(1) Because many codes imposed criminal sanctions, personal...
jurisdiction over defendants was necessary, and hard to get. Also, the state’s burden of proof in such cases tended to be higher. In effect, many judges required the state to prove *mens rea*. *Malum in se*, rather than *malum prohibitum*, standards were used. Judges also tended to postpone sentencing until subsequent compliance mooted the case.

(2) Fines were small when finally imposed.
(3) These proceedings tended to involve two parties: the landlord and the code authorities. The tenant was regularly left out.
(4) A lack of money, administrative machinery, and personnel was (and is) omnipresent. Inspectors, for example, cannot be on the job and testifying in court at the same time.
(5) In toto, the process was too time-consuming.

For these problems, civil *per diem* fines were proposed,\(^1\) enforced in a special housing court.\(^2\) Cities gradually increased the number of inspectors and instituted new programs.\(^3\) Receiverships for slum building were created. Repair-and-deduct laws allowed tenants to correct sub-standard conditions with what would otherwise be rent-money; sometimes rent abatement was permitted in order to create an escrow fund for eventual repairs. In some instances, repair crews were city personnel or were paid with city funds. The jurisdiction later sought repayment from the landlord. OEO and Model Cities’ programs often employed target neighborhood residents as enforcement aides to ferret out violations and investigate complaints.

Other problems remained.

(6) Inspection warrants were necessary in some instances for the inspector to gain entry.
(7) Corrupt officials prevented comprehensive enforcement.\(^4\)

\(^1\) Gribetz and Grad, *Housing Code Enforcement*, 66 Colum. L. Rev. 1254 (1966) (the fullest statement which puts the problem in these procedural terms).


Another component of the enforcement system seldom considered in the landlords or owner’s terms is the courtroom. Several cities — Pittsburgh, St. Louis, Cleveland, and Washington, D.C., to name a few—have housing courts, to which OEO-funded counsel can bring a tenant’s case. The judge here supposedly has a familiarity with housing policy, but this is not substitute for competent and enthusiastic counsel for the owner or landlord involved. Indeed, many landlords may qualify for OEO-counsel by their lack of income. Currently, landlords’ counsel are no match for tenants’ legal services attorneys. Housing courts should be careful that they are not driving landlords out of business.

Another idea threading its way through all these reform proposals is the idea of zoned codes. It was proposed first by local officials and later advocated in a 1955 speech by William Slayton, then Urban Renewal Administrator. But the Law Reviews early picked up and extolled it. Basically the idea was that, since city-wide codes were proving unenforceable for various reasons, the city should be divided into several code enforcement areas. To each a different code would apply. It might be well to examine this idea—its content and feasibility—in detail before proceeding to other, newer suggestions. Its history will provide some insight into the inadequacies of past efforts at code reform.35

III. LAW REVIEW COMMENT ON ZONED CODES

In 1956, a Harvard Law Review Note suggested that zoned codes be adopted for 3 different kinds of areas: (1) demolition-redevelopment areas, where standards after demolition would be high in order to preserve the pristine condition of the structures. (2) rehabilitation areas, in which selective demolition and rehabilitation would attempt to preserve the neighborhood and (3) maintenance areas, in which code conformance was wide-spread and existing conditions have merely to be maintained. The implication of all this is that maintenance of existing property values is the purpose of codes. Another implicit suggestion is that different codes should apply to different areas, depending on the age and life of the buildings found in each.

This may work well when the various codes with differing standards are applied to land-areas recently the beneficiary of replanning or Federal aid. Thus redevelopment and conservation areas, both with basically one type of structure of the same age, can be distinguished from the rest of a city. But when a whole city is “zoned” for housing code purposes, neighborhoods defined by the age and life-span of its structures may be harder to define geographically.

Another notion is clearly needed. To understand this need, one must step several paces back and, in a detached way, reexamine the proposed three-tiered codes. What was intended? All of the proposals are meant to set housing standards after the city has been replanned. This, however, never happens all at once. The process can take years, even decades. What about standards in the interim? Another note suggests that the

34. Supra note 30.
35. The following section is based on the author’s interpretation of the idea of “zoned codes” in law reviews. The chronology of this idea can be found in the following articles: Note, Municipal Housing Code, 69 HARV. L. REV. 515 (1956); Comment, Building Codes, Housing Codes, and the Conservation of Chicago Housing Supply, 31 U. CHIC. L. REV. 180, 200-203; Warren, Conservation and Rehabilitation of Housing, 63 MICH. L. REV. 892, 894-896, 901-902 (1965); Note, Enforcement of Housing Codes, 78 HARV. L. REV. 801 (1965).
longer the time until replanning or demolition, the more severe the applicable code should be.

If the idea is "time to demolition," an underlying rationale is relatively easy to find. An owner who is shortly to have his structure demolished should not be forced to invest in it. Indeed, the interests of the city in a later eminent domain proceeding may not be served if he is forced to do so: the "just compensation" value will only rise as a result.

This rationale can be broadened if, for the idea of "time to demolition", is substituted that of "time to replanning". The latter can apply to any area of a city. The assumption here is that, at some future time, the replanning of a neighborhood will increase land values. Then each landlord and owner should be compelled to bring the condition of his structure up to a level equalling his neighbor's. Uniform treatment would be the goal, but on an areal or neighborhood basis. (Mortgage bankers will testify that location is a major determinant of housing value.)

Thus minimal standards would apply to areas about to be demolished; standards would be higher in neighborhoods further away from their rendezvous with replanning, and highest in those areas just replanned or developed.

The zoned code resolves the dilemma posed by the attempt (using a single code) to set minimal . . . standards for the protection of the poor while at the same time setting high standards for urban renewal areas. The resolution is to have different codes for different areas. 31 U. Chic. L. Rev. 180, 200 (1963).

Placing redeveloped areas under the strictest standards may be unrealistic, but presumably the planning commission should decide how the city should be zoned.

IV. IS ZONING REALISTIC?

Many urbanologists argue that our cities have grown in successive concentric rings around a downtown area. This historic pattern might provide a basis for isolating neighborhoods which were developed all at once over a contiguous and discrete land-area. Land left vacant is filled in later, often with commercial uses or apartments. If this is so, a city would be relatively easy to zone for codes. Unfortunately, this pattern is by no means omnipresent.

Where the pattern is not prevalent, other approaches are available. In a racial slum or ethnic neighborhood, it may well be that a contiguous

land-area also defines a housing market. Other markets are less easy to locate geographically. For example, the market in housing for the elderly might be circumscribed by such factors as the proximity of mass transit in conjunction with shopping areas.

Whatever the difficulties of defining a housing market, it can be reasonably argued that when the law commentators argued for zoned codes, they really meant a series of codes, each applicable to a given housing market. Thus broadened, the concept of "different codes for different areas" can better encompass the unstandardized, mixed-use neighborhood.

More specifically, Charles Abrams has argued that strict code enforcement tends to drive out the "first generation" of slumlords. Speculators buy their properties. Financially, this second generation is characterized by a lower equity interest in the property. As the equity in the property decreases, the owner will be less likely (and has less incentive) to comply with the code. Eventually, this process leads to abandonment. So buyers might be classified according to their equity interests. Sellers can similarly be classified by their probable capital gain upon resale. Together, the size of equity requirements for buyers and capital gains for sellers constitute the parameters of every housing market. So considerable research on market areas would be required before a zoned code would become feasible.

One further distinction may prove useful. That is, in the present tight mortgage market, there may be a class of landlord-owner who is locked into his holdings because no speculator can get a mortgage to take it off his hands.

V. THE ADMINISTRATION OF ZONED CODES

Regardless of whether zoned codes can be made to reflect housing markets, zoned codes may increase efficient administration to the extent that area inspections are also encouraged. Indeed, areal inspections, done door-to-door, often improve the enforcement record of the code agency. It is often argued that they do several more things, like reducing any later need for land clearance on an area-wide scale, reducing repair costs by detecting violations early, and ultimately, reducing the number of individually-initiated complaints. All of these benefits are empirically unproven. Law reviews merely assert them.

The prime advantage of areal inspections is an increase in the number of inspections per hour. This is better resource allocation, the advocates say. If the number of violations were randomly distributed

38. Dept. of Building of City of New York, supra note 33, at 169.
over all inspection areas, then the number of violations found would indeed rise. Without this condition, however, there is no guarantee that areal inspections will increase the number of violations found. Moreover, problems of area selection would remain and undoubtedly increase over time.

Another advantage possibly connected to areal inspections is a saving of inspector’s time in court. One inspector could have all of his area’s cases called for the same day, and thus reduce the initial time he would have to wait in the courtroom. Time saving could result if landlords’ properties are concentrated in one inspection area so that one inspector can deal with all the properties of one owner without researching all of one’s holdings. Court-time would not be taken up with violations alone, but with the multiple violations of particular persons. A consolidation of complaints could result—one inspector could have all of one landlord’s cases called on the same day, and so reduce the number of appearances that both would otherwise have to make in court.

Area inspections do have a third advantage in providing more uniform treatment of a neighborhood. This is in one sense a normative value benefitting owners. Judges in housing or general jurisdiction courts could familiarize themselves with the housing problems of an area. Dealing with the case’s generated by such inspections in sequence would assure at minimum a uniformly applied judicial bias.

Area inspections might also have a political impact. Slum dwellers know of the unequal treatment which a complaint-initiated system produces. Area inspections would give code enforcement a great visibility. However, this might also be counterproductive, in that inspectors might be hounded on their rounds by complaining tenants and might, as a result, actually see very little.

So some of these advantages are highly contingent. Achieving the benefits of areal inspections now obviously depends on a reorganization of several components of the legal system: the inspectors, judges, procedures used in administration, follow-up enforcement, etc. What we can learn from exploring the idea of new types of codes is that it will take more than codes alone to do the job. Other local, state, and even national policies are involved as well, and must be coordinated into any workable solution.

VI. A Proposal

What past attempts to redraft codes have failed to identify is their effect on housing markets.

This is now being done, however, in the case of some other public programs—rent control, for instance. The recent Niebanck Report on Rental Housing in New York City concluded that the rent-controlled market and the poorest quality housing were currently found to be in the closest correlation.\(^{40}\) Rent control had, over the years, produced problems that now delimited an identifiable housing market, just as location, structure type, and rent level did. George Sternlieb, another recent student of New York City, found that the administrative problems of code enforcement and rent control were much the same.\(^{41}\) In this latter study, one problem was to predict the landlord's costs. This is a problem of both rent control and code enforcement.\(^{42}\)

What does all this mean? Among other things, it indicates that, where rent control has been operative for some years, the problems created become headaches for code enforcement officials as well. Not in a cause and effect relationship necessarily, but interrelated still.

The situations which give rise to these two programs can be very different. Poor quality housing and a short supply need not go together under any iron law of economics. Indeed, a housing shortage may spur excellent maintenance in the face of a profitable and competitive used-housing market. Although, independent political considerations often give rise to a clamor for rent control (tenant voters being more numerous than objecting landlords in a jurisdiction); Boston, Cambridge, Massachusetts and Akron, Ohio have recently debated the issue in their councilmanic chambers. Boston instituted rent control. Adoption in each case may be unwise, but the debates only underscore the danger of ignoring or imprecisely defining the impact of economics on a housing market. They show that if code enforcement fails, a city council may be induced to institute a more drastic program, like rent control.

\(^{40}\) Niebanck, *Rent Control and the Rental Housing Market in New York City 1968*, Housing and Development Administration of the City of New York, Department of Rent and Housing Maintenance, unpublished monograph (January 1970), p. xvi: "While differentiation can be made on many grounds, e.g., location, structure type or level of rent, the most useful basic classification is control status itself."

Controlled units constitute over one-half of the units in the city's stock: 83% rent from $40-125 per month; 70% are located in structures containing between 3 and 49 units. *Id.* at xvi-xvii. Decontrolled and never controlled units, on the other hand, tend to be in quite large structures, with rents averaging $80-150 and $150-2—per month respectively. *Id.* at xviii. In the decontrolled sector, 70% of the housing units are in one and two family houses. *Id.* at xvii. Never controlled units contain, two-thirds of the time, more than 50 units, *Id.* at xviii. While the size of the unit does not vary much between the three categories, the quality of the housing provided in each does: high quality units are much more frequent in the decontrolled and never controlled structures. *Id.* at xxvi-xxx.

\(^{41}\) Sternlieb, *The Urban Housing Dilemma*, Housing and Development Administration of the City of New York, Department of Rent and Housing Maintenance (unpublished prelim. draft, undated).

\(^{42}\) *Id.* at Appendix 8-1, p. 465.
There are points at which code enforcement programs dovetail—for good or ill—with other governmental programs. Relocation housing for urban renewal can often become the focus of code enforcement attention, and the result can be a decrease in the supply of housing available to displaced people. Federal programs, as we have seen, do encourage code enforcement programs around urban renewal projects. When program is piled on program, often each will compound the problems of the others. Studies of New York City now provide sorry testimony of this.

So a realistic statement of the issue is to ask whether code enforcement should be deliberately made a part of a larger urban program—or whether it needs its own rules and rationale. It has too often been the handmaiden of other programs and interests. Housing officials can often find as many as 1000 violations in one structure. In such situations, using codes is like hunting an elephant armed with grapeshot. The need for a new approach is increasingly apparent as housing conditions worsen. Codes have been—in effect—indirect subsidies to tenants at landlord’s expense. They have shifted the burden of repairing the premises from tenant to landlord and in many cases have driven landlords out of business. They are, therefore, removing housing from what would otherwise be a viable market. So any further redrafting should speak to the problem of abandonments and other destructive effects on this market.

Similarly, a redrafting should not merely aim at providing better enforcement. Past attempts have achieved no significant impact on complaint procedures. A different approach is required. Enforcement should be made self-starting. Owners and landlords should be provided with incentives to comply with the codes.

Another program need is to consider all aspects of the enforcement system. Substantive law, embodied in the standards that the codes prescribe for housing, is only one of these. Procedural rules, enforcement personnel, organizations, resource allocation decisions, and habits of mind constitute the other aspects that should be covered. A failure to deal with any one of these aspects could nullify the impact of a change in any single component.

The concept of “zoned codes”, proposed only in law reviews in a general way to date, might be modified, developed, and adopted into a code based on “market zones”. Each zone would then be a contiguous

43. E.g., McLaughlin, 8,360 Violations Laid to Landlord. WASHINGTON POST (October 24, 1970), B1.
land area, a neighborhood built as a unit, or a discrete housing market. Each market could be ascertained by reference to the following data:

a. recent sales: downpayment rates and capital gains
b. built-up equity in a market: length of tenure might be used as rough guide
c. frequency of sales
d. in-and-out migration

There are two ways to put this proposal into operation. They are not necessarily mutually exclusive. As a first step, all code standards for each zone or market should be dropped to a minimum level and regarded thereafter as a floor on housing standards. Then standards should be raised in quantum jumps. Types of "amenities" would form each quantum of improvements, falling into four categories:

(a) structural
(b) infrastructural
(c) sealing the shell
(d) cosmetic

Housing codes were originally devised to control the living conditions presented by urban housing. Since present codes often lose sight of these conditions of habitability in more technical considerations of materials and performance standards, this proposal allows a more functional definition of a code violation. Such a re-definition has recently taken place in New Jersey: there, "... each housing unit, or the building's common areas or supporting systems, can be liable for citation as in violation because of specific conditions found. * * * The concept of 'violation' is thus refined under this new system as the result of conditions which affect the functional ability of housing to serve its purpose . . ."44 In an effort to keep landlords in business and performing a social function at the same time, they should be cited for one type of violation, as proposed above, at a time, beginning with the types most basic to the skeletal structure of the building.

This proposal also presents an opportunity to take account of a second factor. That is, housing is and has always been built by those who can afford it. This means that new construction is intended for the wealthy. Currently, it is out of the reach of one-half of all the families in this country. First owners, however, eventually move on to other housing, and their homes filter down to lower income groups, finally to poverty groups. Codes, however, tend not to reflect this trickle-down effect. The same materials are still specified. To reflect the needs and

finances of the new occupants, they should allow for the elimination of luxuries, the use of cheaper building materials, and the phasing-out of some non-structural features of the dwelling. Porches, ornate facades, shingled roofs, etc., would thus gradually be dismantled. Owners and landlords could convert their premises to less costly, easily maintainable dwellings using Code-approved materials.

Any owner or landlord would have to improve his premises in the most basic category before he would go into the next type. For any improvements made he could raise his rents ratably. This may prove to be a complex administrative problem—something like rent control. 45 To eliminate some of the problems the landlord might be allowed to assess tenants extra charges for the improvements. These could be paid separately from rent and not controlled by the lease. They would be like "mortgage points". Or, as an alternative, his tax assessment might be ratably reduced for a stated period, preferably 3-5 years. This constitutes an indirect subsidy, whereas rent increases are a direct one.

As a second step, a landlord should have, as a defense to a formal charge or administrative allegation of a code violation, that he is not making a profit 46 customary in his market, or that, in the alternative, he needs to retain his profits to make code improvements.

Taken together, these two suggestions constitute a bonus or incentive system, much used today in some zoning ordinances. The second proposal operates as a limit upon the first. In that way, the tough questions of defining a market by profitability are avoided, except as the last resort.

This proposal has several definite advantages. It recognizes the economic problems of landlords. It admits that codes are most likely to be enforced where it is least feasible. It admits that, no matter what the side-effects of bad housing, most tenants survive the experience and are better left to it when the alternative seems to be less housing for their income group. After a long period of experimentation showing, if nothing else, that coerced enforcement is not feasible, it offers an incentive to better maintenance. It allows enforcement to continue without much increase in administrative personnel. Enforcement is made self-starting to the extent the incentives work. Code violations and improvements are dealt with in four categories; landlords need only deal with one type of violation at a time. Thereafter, the owner should gain

45. This is a form of rent control, but differs from other forms in that landlords will be given an incentive to repair their premises as they seek increased rents.
46. Profit should be defined, for this purpose, as a set ratio of net income to sales price.
immunity from further inspections for several years. In effect, this has always been the advantage of area inspections for landlords. Finally, all of these proposals operate to bring the level of housing above a minimum level, below which normal code procedures are to be continued.

The disadvantages of this proposal are several, and at least suggest the constraints under which the program will have to operate. First, the proposal may seem to "institutionalize" low-income housing markets. This charge is largely gainsaid by the proposal's emphasis on minimum standards and amenity improvements. It cannot be emphasized too much that this represents a shift of tactics, not less enforcement.

Further, a shift of tactics may be necessary to meet changing times. Black communities today often see code enforcement officials as the tools of established power, and, as officials work to renew the property tax base of the center city, the charge is leveled that the aim is to make housing more expensive, drive out the black population, and "restore" whites in the neighborhood. Area or market inspections, if properly planned, could diminish both the shadow and the substance of such charges.

Secondly, critics might say that the system will only produce sloppy management and less maintenance and repair work. In effect, the landlord will charge what the market will accept, and housing conditions will decline. This charge can be met in several ways. Most importantly, it is unlikely that tenants will remain passive to poor housing in the future. On the contrary, they are likely to be even more vocal in airing their grievances. Further, the landlords will have an incentive to raise housing standards through tax reductions or rent increases. There may also be a need for sheltering present income through further tax incentives, but, of that, more later. Third, in a market in which eviction is becoming harder, there is little chance that landlords will be able to squeeze tenants any further. Indeed, they will have to live with them for longer terms.

Some people, however, may oppose the present plan for reasons quite apart from its merits. Playing a form of "plague politics", they may prefer to see the number of abandonments rise to such a level where government will have to intervene with massive amounts of money. Their theory would be that the worst crisis produces the best solution. Even disregarding the dubiousness of this assumption, the argument is answerable on its own terms. The present proposal provides subsidies to landlords indirectly. That is, the subsidies come in a form that does not require Congressional or legislative authorization, but creates

investment incentives in the form of property tax breaks and a promise of higher rental charges. This is money that the government never collects but instead allows the taxpayer to keep for a civic purpose. This approach worked well for industry as a Federal investment tax credit in the early 1960's. The resulting investment in capital plant produced the largest annual increases ever in GNP. Indeed, the same device might now be tried for the poverty-sector housing market. Such indirect subsidies are an interim measure until direct ones are politically feasible. Critics will say that such a market will not gear up for investment as quickly, but that is speculative. The incentive is just as powerful, no matter what the state of the industry.

Lawyers may oppose the present proposal thinking it an unconstitutional treatment of owners and landlords. The equal protection clause of the Fourteenth Amendment requires that governmental actions be uniform for all citizens, except as the legislature can reasonably conclude that groups of citizens can be classified differently so as to achieve some over-all societal good. Thus, all of our cities need not be demolished and redeveloped under urban renewal programs, but "blighted" parts can be. All of our towns need not be zoned alike, because separation and diversity of land-uses is thought to benefit all. Zoned codes stand in the same light. Although physically all housing starts out in a condition reflecting only the money-investment in them their location and use, over time, in a particular housing market soon distinguish one structure from another built at an equivalent cost. There is no reason why a city should be zoned as a unit for housing code purposes when different housing markets clearly exist within it. Different markets can reasonably require different public policies. The problem of abandoned ownership clearly demarcates one market today. Since this normally leads to the further structural renewal programs, but demolition as a public nuisance or costly public ownership may be the result. To prevent this, some regulation is

48. "There has been a good deal of discussion regarding whether it would be lawful to create a zoned housing code in which different parts of the city would be subject to different standards. Because housing code in which different parts of the city would be subject to different standards. Because housing codes deal with matters so directly related to public health and safety, there is an argument that the same standards should be used throughout the entire municipality. This is generally the case, but there is some pressure for zoned housing codes and they may become more popular in the future. It is difficult to say whether it will be possible to devise valid criteria for classifying different parts of the city for different housing standards." Bosselman, The Legal Framework of Building and Housing Ordinances, 4 The Building Official, 10, 13 (March, 1970).


50. Ungar, City to Aid 28 Families in Tenement, Washington Post (November 6, 1970), Al, reporting that a federal court in the District of Columbia ordered the city to run an abandoned apartment house with public funds at no expense to the tenants. See also Hudson, Mayor Urges a

Further, equal protection problems arise when there are imposed on one property owner greater burdens than are forced on his fellows. Thus, if a housing code required plumbing only in apartments with more than three rooms, the owner of the larger apartments could argue that the legislature has created an unreasonable or invalid class of property owners. It has been so argued, successfully too.\footnote{Benjamin Altmann, the Rent Commissioner for New York City recently said that the point of low profitability in rental housing is in the 20-50 unit project. Nearly all apartment houses this size are rent controlled. Recent construction would not build so small a complex—it would be unprofitable from the outset. Somewhere above this size, the business of renting housing should become profitable enough to warrant investment. Such a level of profitability should perhaps, in the future, be}


\footnote{The concept of a “market” in a zoned code likely to be held void for vagueness. Edgar A. Levy Leasing Co. v. Siegal, 253 U.S. 242 (1922), held constitutional a N.Y.C. rent control ordinance which allowed, as a defense to a landlord’s action for nonpayment of rent, a tenant’s showing that the rent charged was “unjust and unreasonable”. Certainly the concepts of a market or profitability are no vaguer.}

\footnote{Where preservation of property values is a valid legislative purpose for zoning, this argument will be easy to make. \textit{See} State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wisc. 262, 69 N.W.2d 217, \textit{cert. denied} 350 U.S. 841 (1955).}

\footnote{Brennan v. City of Milwaukee, 265 Wisc. 52, 60 N.W.2d 704 (1953).}

\footnote{Neither is the concept of a "market" in a zoned code likely to be held void for vagueness. Edgar A. Levy Leasing Co. v. Siegal, 253 U.S. 242 (1922), held constitutional a N.Y.C. rent control ordinance which allowed, as a defense to a landlord's action for nonpayment of rent, a tenant's showing that the rent charged was "unjust and unreasonable". Certainly the concepts of a market or profitability are no vaguer.}
an aspect of building permit or subdivision hearings. So the proposal that unprofitability be a defense for landlords can be reversed—and the same idea, in the hands of public officials, might become a tool for guiding future development. George Sternlieb shows quite neatly how to calculate expenses; it can be done with little administrative trouble. To such calculations would, however, have to be added requirements for better technology that would decrease maintenance costs.

VII. OTHER DIMENSIONS OF THE SOLUTION

This proposal represents, given the framework within which codes exist, the best that can be devised. More innovative approaches are necessary. One would be changing the Federal tax laws to allow depreciable "tax shelters" for improvements made on slum properties. There would of course be initial problems of defining an improvement severable from the rest of the premises and assigning to it a depreciable life. But these definitional problems are no more insuperable than the questions raised and resolved by the Internal Revenue Service when dealing with corporate taxpayers.

Similarly, landlords might be allowed to set aside some of their profits as a bad debt reserve, with the stipulation that it be invested in the property between tenancies in order to attract new leases. Any money lost over and above this reserve through non-payment of rent also might be deducted as a bad debt.

Another device for paying for code improvements is a lease. Repairs could be made and initially paid for by the landlords. They would then "lease" the improvement to the city in return for a rental over the life of the improvement—a 3 to 5 year period, decided on primarily for administrative convenience. Sale and leaseback arrangements might also be used in basically the same way. Here the landlord pays the "rent" on the improvement sold previously to the city to recoup the investment in it. For him, the "rent" is a deductible business expense.

The city's expenses, in the foregoing schemes or when repairs are borne directly, might be financed with bonds floated by local housing authorities, under the Turnkey Public Housing Programs which could then lease the improvement to the landlord at some fraction of its cost. This proposal might be combined with the leasing devices discussed previously.

Code improvements, whether financed with direct or indirect subsidies, will be expensive. The problem is costly to society in any case, especially if nothing is done.

55. Sternlieb, supra note 41.
VIII. Conclusion

The point here is that any solution to the problem of housing code enforcement must take account of the whole economic and political system that now generates realty investment. I have mentioned but a few of the considerations. There are many more, involving several types of insurance underwriting, liens, title insurance, etc. If the whole system cannot be modified at once there is little sense in redrafting the codes, which after all are only one part of it.

Today, codes achieve one of two things when they are enforced: higher rents or abandonments. Neither helps the tenants of the affected housing.

In this situation, and with systematic changes in the codes unlikely, an alternative is the selective abolition of the codes in housing markets where they only produce disastrous effects.

Opponents will say that this is not politically feasible. I am not convinced of that. Leaders like Jesse Gray are continually charging that there is collusion in New York City between the enforcement officials and the city. In effect, he thinks that the officials are bribed to stay away. He feels that there are underlying "policy reasons" for this. Finding a violation might mean an eventual abandonment—neither the city nor the landlord wants this, so their interests coalesce. The result is little enforcement.

If the "amenity" codes were replaced in some housing markets with other devices allowing landlord and tenant to bargain over better conditions, then such suspicions would be met. The rhetoric of "community control" could be mustered in support of this. (An alternative is community endorsement of the code as is, but that would really end the landlords’ business.)

What I am really suggesting is a sort of NLRB type framework for housing markets that do not produce good housing. This might not produce better housing, but it would give the tenants a say in the quality-level finally achieved. A bargaining process between landlord and enforcer is what normally takes place. The difference would be that now, the tenant’s voice would be heard. No increase in staff or budget would be required. Tenants groups could not then be heard to complain that they expect more of their landlords than they got. This result would be achieved since the burden would be on the tenant groups to come forth with negotiable proposals.

Paternalistic reformers might think that the poor should not be left to poor housing and that we must "do something". This urge to do something is primarily a problem of their own personalities. The poor
should not be made to suffer for it. Currently, with higher rents and abandonments the only real consequences of code enforcement, they are indeed suffering.

With housing codes, law has been asked to do something which it cannot do: to achieve better housing in the face of a difficult economic situation for landlords, a tight money market for slum mortgages and improvement loans, and rising expectations and demands of tenants. In such a case, the proper role of the state may be to help the tenants express their own desires.
Housing Codes: a Selected Bibliography

(Based on a search of the Index to Legal Periodicals, using the following topics: Housing, Building Laws, and City Planning)

Books:


Articles:


Laws: