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The Uniform Owner-Resident Relations Act

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THE UNIFORM OWNER-RESIDENT RELATIONS ACT

INTRODUCTION

The first session of the 32nd New Mexico legislature enacted[1] a comprehensive act governing relations between owners and residents of rental housing,[2] the "Uniform Owner-Resident Relations Act" (hereinafter UORRA). Despite its title, the UORRA is not a uniform act but is unique to New Mexico. It is a product of compromise among lobbyists and legislators representing the different interests of tenants, landlords and property managers. Initially, two groups proposed acts. Neither proposal had the requisite support, and as a result, a compromise act was formed by drafting compromise sections on disputed points and then grafting these onto the proposal initially presented by the landlord interests.[3] The result of this compromise has been an act that is unduly complex and opaque.

Regardless of its complexity and opaqueness, the UORRA advances New Mexico landlord-tenant law. Previously, virtually no legislation and very few cases in New Mexico directly concerned the landlord-tenant relationship.[4] The case law largely concerns commercial leases, rather than residential ones. Those cases dealing with

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1. The present Act was introduced as House Bill 173 in the House Judiciary Committee, with Representatives Raymond Sanchez and Ronald Chaplin as co-sponsors. The UORRA met little resistance in either chamber of the Legislature and on March 18, 1975, was signed into law by Governor Jerry Apodaca.

2. N.M. Stat. Ann. §§ 70-7-1 to 70-7-51 (Supp. 1975), Laws of New Mexico 1975, ch. 38, §§ 1 to 52. Passed as part of ch. 38 Laws of 1975, and integral to the remedies section of UORRA, is an amendment, N.M. Stat. Ann. § 36-12-1.1 (Supp. 1975), to the Forceful Entry and Detainer article, N.M. Stat. Ann. §§ 36-12-1 to 36-12-5 (Repl. 1972, Supp. 1975). Within the text, reference to particular sections are given only by section number, e.g., § 70-7-32 is referred to simply as § 32.

3. Originally, two groups desired a residential landlord-tenant bill. The Albuquerque Legal Aid Society sought to have the Uniform Residential Landlord and Tenant Act introduced. The New Mexico Builder's Council sought to introduce a bill with the same title as the present Act. It seemed likely that the former could not pass the Senate and the latter not pass the House. Professor Joseph Goldberg of the University of New Mexico Law School was asked to help prepare a compromise bill by drafting compromise sections. The latter bill was altered by incorporating those sections.

4. There has been some legislation in the area of remedies: ejectment, N.M. Stat. Ann. §§ 22-8-1 to 22-8-30 (1953, Supp. 1975); forceable entry and detainer, N.M. Stat. Ann. §§ 36-12-1 to 36-12-5 (Repl. 1972, Supp. 1975); and landlord's liens, N.M. Stat. Ann. § 61-3-4 and § 61-3-4.1 (Repl. 1974).

residential property are confined to problems concerning responsibility for personal injuries resulting from defective premises.[5] Thus, the UORRA fills an important gap in New Mexico statutory and case law by codifying the obligations and rights of owners and residents of residential rental property.

The UORRA does not, however, codify the common law, rather it effects a fundamental shift in viewpoint. It modernizes the law of landlord-tenant by separating residential from commercial property and by treating the relationship between landlord and tenant as essentially contractual.[6] The common law of landlord-tenant developed for rural, commercial and agricultural property. As residential leases became more prevalent they were treated in the same manner as commercial leases. At common law property was conveyed by lease to the lessee-tenant, who became the owner of a possessory estate. The lessor-landlord became a reversioner who would regain ownership at the termination of the lease and whose interest in the property extended only to protection of the value of his reversion. In modern urban residential housing, landlords commonly desire to maintain greater control over the residence and tenants increasingly desire that the landlord assume greater responsibility for the condition of the residence. The UORRA departs from the common law conveyance theory and treats the relationship as a contractual one. Hence, lease covenants are dependent rather than independent, so that a breach of an obligation by one party will excuse or modify the obligations of the other party.[7] Similarly, the contractual duty to mitigate damages is imposed.[8] The UORRA further departs from the common law[9] by imposing an obligation upon the resident to keep

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5. *See, e.g.*, Coggins v. Gregorio, 97 F.2d 948 (10th Cir. 1938); Barham v. Baca, 80 N.M. 502, 458 P.2d 228 (1969).

6. The need for separate treatment of residential and commercial property is reflected in the drafting and approval of the Uniform Residential Landlord and Tenant Act by the Conference of Commissioners on Uniform State Laws in 1972 and its adoption in eight states: Alaska, Arizona, Florida, Hawaii, Kentucky, Nebraska, Oregon and Virginia. The American Bar Foundation has also sponsored a residential act, the Model Residential Landlord-Tenant Code (tent. draft 1969). Excellent articles on the problems and development of modern residential landlord-tenant laws are available. *See, e.g.*, Indritz, *The Tenants' Rights Movement*, 1 N.M. L. Rev. 1 (1971); and Donahue, *Change in the American Law of Landlord and Tenant*, 37 Mod. L. Rev. 242 (1974).

7. The UORRA has no specific section which states that covenants are dependent; rather in discussing remedies for breaches of obligations, it allows the non-breaching party to avoid obligations; *see, e.g.*, N.M. Stat. Ann. § 70-7-30 (Supp. 1975), allowing the resident to counterclaim in a landlord's action for possession.

8. N.M. Stat. Ann. § 70-7-6(A) (Supp. 1975).

9. *See, e.g.*, Thompson, 3 G Commentaries on the Modern Law of Real Property § 1146 (1959).

the premises clean and in proper use during possession, as well as upon redelivery.[10]

This Comment seeks to facilitate reference to the UORRA by examining the various sections of the Act and developing their interrelationships. It also seeks to identify changes which the Act effects in prior New Mexico law by contrasting common law background and New Mexico precedent. The discussion focuses on five areas: coverage and application of the Act, rental agreements, owner's obligations and resident's rights, resident's obligations and owner's rights, and remedies.[11]

COVERAGE AND APPLICATION OF THE UORRA

Section 8 of the UORRA states:

> The Uniform Owner-Resident Relations Act applies to, regulates and determines rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit located within this state.[12]

The UORRA applies only to residential dwellings[13] and not to commercial property. This application is limited in two ways: by the Act's effective date and by specific exemptions.

Section 54 provides that the effective date for the Act is July 1, 1975.[14] Section 50 provides that prior transactions remain valid while section 51 provides that:

> The provisions of the Uniform Owner-Resident Relations Act are applicable to rental agreements *entered into or extended or renewed after the effective date* and shall not be applicable to any agreements or conditions existing prior to the effective date of the provisions of the Uniform Owner-Resident Relations Act. (emphasis added)

It will usually be clear whether an agreement was "entered into or extended or renewed" after July 1, 1975. However, a periodic

10. *Id.* § 70-7-22.

11. The sections discussed under each of these headings are: Coverage, N.M. Stat. Ann. §§ 70-7-8, -9, -49, -50, -51 (Supp. 1975); Leases, *Id.* §§ 70-7-12, -14 to -18, -23 to -25, -34; Owner's Obligations, *Id.* §§70-7-16, -19, -20, -24, -26 to -29, -31, -32, -34, -38, -39; Resident's Obligations, *Id.* §§ 70-7-15, -22, -33, -34; and Remedies, *Id.* §§ 70-7-30, -41 to -49.

12. N.M. Stat. Ann. § 70-7-8 (Supp. 1975).

13. "Dwelling unit" is defined as "a structure, mobile home or the part of a structure that is used as a home, residence or sleeping place by one [1] person who maintains a household or by two [2] or more persons who maintain a common household;" N.M. Stat. Ann. § 70-7-3(F) (Supp. 1975). If any problem arises in applying the definition, the use of the phrase "dwelling unit" in burglary statutes has produced a body of authority covering even the most bizarre situation.

14. Laws of New Mexico 1975, ch. 38, § 54. As usual, this provision is not included in the codification.

tenancy based upon an oral agreement may present problems. An oral agreement to take possession and pay rent monthly, for example, creates a month-to-month tenancy by operation of law.[15] If the initial entry under the agreement was prior to the effective date of the Act, will the Act apply to the tenancy because each month the tenancy is renewed or extended or will the Act not apply because each month is a continuation of the tenancy? The scarce authority which may be relevant to this question is inconsistent.[16] New Mexico has no relevant decision. Absent relevant authority, courts should be free to interpret the law so as to effectuate the purpose of the UORRA. One of its purposes is improvement of New Mexico housing,[17] and passage of the Act indicates a concern to replace an outdated common law with the provisions of the UORRA. Since oral agreements resulting in periodic tenancies usually apply to inexpensive housing, the high likelihood that such housing does not meet the standards of the UORRA suggests that the Act's purposes can best be served by holding its provisions applicable.[18]

The UORRA may also be inapplicable to residential housing falling within any of six exemptions in Section 9. Each exemption is based upon some unique conditions or circumstances that make the provisions of the UORRA inapplicable or undesirable. The Act exempts residence at institutions where residency is incidental to another purpose, such as providing detention, medical or geriatric care, education or religion.[19] Similarly, residence in a sorority or fraternity or other social club is exempt.[20] The rationale for these

15. Under the UORRA the periodic tenancy is created by N.M. Stat. Ann. § 70-7-15(C) (Supp. 1975); at common law the result would be the same, 1 American Law of Property § 3.25 (A. J. Casner ed. 1952).

16. The view taken by the Restatement is that the relation is continuing. Restatement (Second) of Property § 1.5, comment *c* and Reporter's Note to § 1.5 (Tent. Draft No. 1, 1973). *See, e.g.*, Wagner v. Kepler, 411 Ill. 368, 104 N.E.2d 231 (1951) (continuation); *contra*, Lambur v. Yates, 148 F.2d 137 (8th Cir. 1945) (new tenancy). The cases discussing whether each successive period is a continuation or a renewal or extension have arisen in a different context. At common law a landlord was responsible only for defects existing at the beginning of the lease. Courts were asked to rule whether a defect existing at the beginning of a period, but not before initial entry, was the landlord's responsibility. As indicated, the authorities were conflicting. Since the question presented in this Comment is substantially different, these authorities have little value.

17. "PURPOSE.—The purpose of the Uniform Owner-Resident Relations Act is to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of owner and resident, and to encourage the owners and residents to maintain and improve the quality of housing in New Mexico." N.M. Stat. Ann. § 70-7-2 (Supp. 1975).

18. This will also result in the Act being interpreted in accordance with the intent of one of the principal drafters. Interview with Professor Joseph Goldberg, University of New Mexico Law School.

19. N.M. Stat. Ann. § 70-7-9(A) (Supp. 1975).

20. *Id.* § 70-7-9(C).

exemptions is that in each situation greater control over the resident is required or preferred because of the primary service of the institution. Residential housing under a contract for sale is exempt.[21] The contract for sale creates a relationship between the present owner and the future owner whereby the future owner incurs obligations and has expectations different from those of a tenant who at a future date must return the property to its owner. Courts have generally not treated this relationship as a landlord-tenant one.[22]

Another exemption excludes residential housing on premises used primarily for agricultural purposes.[23] Here, notice and termination requirements are more appropriately based on the necessities of agriculture and may differ substantially from those of the UORRA. It is worth noting, however, that housing for migrant workers will frequently be within this exemption, thereby leaving uncovered an area of very serious housing problems. Similarly, residency by an employee of the owner when the right to residency is conditional upon employment in or about the premises is exempted,[24] in part because notice and termination requirements should match those for the attendant employment.

The final exemption is for transient occupancy in a hotel or motel.[25] This exemption, more than any of the others, appears vague. The Act defines neither "transient occupancy" nor "hotel" or "motel." Surely, the exemption should not turn upon the name of a building. A motel may be rented so as to come within the Act, and a dude ranch may be exempt despite its name. The exemption rests ultimately on transience, *i.e.*, short periods of residency and high turnover among residents that make the provisions of the UORRA inappropriate. Both the Uniform Residential Landlord and Tenant Act[26] and the Model Residential Landlord-Tenant Code[27] suggest incorporating a state's transient lodging or similar tax law to draw upon the detailed distinctions and presumptions generally made in such laws. New Mexico has a Lodgers' Tax Act;[28] however, incorporation by reference is forbidden by the New Mexico Constitu-

21. *Id.* § 70-7-9(B).

22. 1 American Law Of Property § 3.9 (A. J. Casner ed. 1952) and cases cited therein. The resident under contract for sale is treated as the owner in equity and, as such, would be classified as an owner under the definition of the Act, N.M. Stat. Ann. § 70-7-3(J)(2) (Supp. 1975).

23. N.M. Stat. Ann. § 70-7-9(F) (Supp. 1975).

24. *Id.* § 70-7-9(E).

25. *Id.* § 70-7-9(D).

26. Uniform Residential Landlord and Tenant Act § 1.202.

27. American Bar Foundation, Model Residential Landlord-Tenant Code § 2-101 (Tent. Draft, 1969).

28. N.M. Stat. Ann. § 14-37-14 to § 14-37-24 (Spec. Supp. 1975).

tion.[29] Application of the exemption may nevertheless be guided by some of the provisions of the Lodgers' Tax Act. That Act gives a comprehensive list of lodging facilities in addition to hotels and motels[30] and then excludes residencies that are 30 days or longer or are covered by an agreement to reside 30 days or longer.[31] Guidelines for application of the UORRA need not be as precise as may be desired in a tax law. Certainly 30 days is not a magic number, but rather a rule of thumb against which to judge an individual case. The danger in specifying elaborate guidelines within the Act is that they may be applied to exclude a situation which meets the rationale for the exception or to include one that does not. Because this exception is broadly phrased, courts must look to its substance and purpose in applying it.

RENTAL AGREEMENTS

Rental agreements are defined by the UORRA as:

> . . . all agreements, written or oral, between an owner and resident, and valid rules and regulations adopted under Section 23 of the Uniform Owner-Resident Relations Act embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises.[32]

Several sections of the Act specify what may or may not be included within a rental agreement. In general, the Act allows the owner and future resident to agree upon rent, the method in which it is paid and the rental term.[33] It allows for agreement on deposits within limits[34] and disallows certain agreements which waive rights or obligations under the Act.[35]

Limitations on Contractual Powers

Sections 12, 14, 16 and 17 of the Act provide a context within which rental agreements are to be interpreted and agreement provi-

29. N.M. Const. art. IV, § 18.
30. N.M. Stat. Ann. § 14-37-15G (N.M. Municipal Code 1975).
31. *Id.* § 14-37-17A (1), (2).
32. *Id.* § 70-7-3(N) (Supp. 1975). An oral lease does not violate the statute of frauds if it is not for a term exceeding three years or if the rent reserved to the lessor is at least two-thirds of the rental value of the property. New Mexico is one of only two states that does not have any statute requiring written leases. The English Statute of Frauds, 29 Chas. 2, ch. 3, is still in effect for leases in New Mexico. That statute was held applicable and interpreted in Childers v. Talbott, 4 N.M. (4 Gild., E.W.S. ed.) 336, 16 P. 275 (1888); Childers v. Lee, 5 N.M. 576, 25 P. 781 (1891); McNeill v. Kass, 31 N.M. 110, 241 P. 1026 (1925).
33. N.M. Stat. Ann. § 70-7-15 (Supp. 1975).
34. *Id.* § 70-7-18.
35. *Id.* § 70-7-16.

sions allowed or disallowed. Section 14 states that an agreement may include terms and conditions not prohibited by the UORRA or other laws.[36] Prohibited terms are unenforceable. There is, however, too little to inhibit the inclusion of such provisions. Landlord-tenant disputes are infrequently litigated. Many provisions which would be unenforceable in court may in practice be enforceable because the tenant lacks the knowledge or incentive to assert his rights under the Act. Section 17 allows recovery of damages sustained because of the application of illegal provisions only if it is shown that "an owner *deliberately* uses a rental agreement *known to him to be prohibited by law*" (emphasis added).[37] More effective to discourage use of illegal provisions would have been a requirement that the tenant show only the illegality and the resulting damages. Recovery of damages places the parties in the position they would have been in had the illegal provision not been included. The present provision, however, achieves that objective only when the illegality was deliberate, but not when the illegality cannot be shown to be deliberate.

The Act's provision for recovery of attorney's fees[38] in a successful action, by comparison, increases the incentive to file suit. Without this provision it is doubtful that even very strong cases would be filed because actual damages are often too slight to warrant paying an attorney. Other acts governing residential rental housing have recognized the need to provide greater incentive to pursue certain unlawful or inequitable landlord practices. The Uniform Residential Landlord and Tenant Act allows the tenant to recover up to three months' periodic rent plus damages,[39] and the Model Residential Landlord-Tenant Code makes certain acts misdemeanors accompanied by a fine of $200, half of which goes to the tenant.[40]

Complementing the provision forbidding unlawful terms are provisions against inequitable terms and conditions.[41] This provision is

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36. An example of a provision prohibited by a law different from the UORRA would be confession of judgment provisions, N.M. Stat. Ann. § 21-9-16 (Repl. 1970).

37. N.M. Stat. Ann. § 70-7-17 (Supp. 1975).

38. N.M. Stat. Ann. § 70-7-48 (Supp. 1975).

39. Uniform Residential Landlord and Tenant Act § 1.403.

40. American Bar Foundation, Model Residential Landlord-Tenant Code § 3-501 and § 3-502 (Tent. Draft, 1969). The misdemeanors are (1) inclusion of confession of judgment form in rental agreement (§ 3-404(1)) and (2) willful retention of security deposits (§ 2-401(5)).

41. N.M. Stat. Ann. § 70-7-12 (Supp. 1975):

> A. If the court, as a matter of law, finds that any provision of a rental agreement was inequitable when made, the court may limit the application of such inequitable provisions to avoid an inequitable result.
>
> B. If inequitability is put into issue by a party to the rental agreement, the parties to the rental agreement shall be afforded a reasonable opportunity to

similar to one in the Uniform Residential Landlord and Tenant Act except for the latter's use of the term "unconscionable" rather than "inequitable."[42] To determine whether a term is inequitable, consideration should be given to market conditions, the positions and interests of tenant and owner, and what the law states or implies the obligations of the parties are. Also of value is case law from states adopting the Uniform Residential Landlord and Tenant Act's very similar language.[43]

Section 16 further limits the content of rental agreements.

> No rental agreement may provide that the resident or owner agrees to waive or forego rights or remedies under the law.[44]

Some implications of this section are immediately apparent. There cannot be a provision for confession of judgment or waiver of notice of proceedings.[45] The resident cannot waive the right to the return of the balance of prepaid rent and deposits upon termination by agreeing that they are non-refundable.[46] Certain waivers are specifically allowed and will be discussed later, *e.g.*, agreements to perform the owner's duty of repair and maintenance.[47]

Permitted Provisions

The rental agreement may establish rent,[48] the rental term,[49] deposits,[50] the owner's right of entry,[51] and use of the unit.[52] It may also provide for disclosure and possibly for the resident's assumption of certain obligations of the owner.[53] Each of these areas is discussed below.

Rent: The UORRA imposes no restrictions on the amount of rent except that if the rental agreement itself is silent the rent is "the fair

present evidence as to the setting, purpose and effect of the rental agreement, or settlement, to aid the court in making a determination.

42. Uniform Residential Landlord and Tenant Act § 1.303. Section 12(A) of UORRA is equivalent to § 1.303(a)(1) of the Uniform Act; Section 12(B) of UORRA is equivalent to § 1.303(b) of the Uniform Act.

43. The term "unconscionable" is, of course, linked with other uniform acts that may also be helpful, *e.g.* Uniform Commercial Code § 2-302, Uniform Consumer Credit Code § 5.108 and § 5.111 (1974).

44. N.M. Stat. Ann. § 70-7-16 (Supp. 1975).

45. *See* note 40 *supra.*

46. *See, e.g.,* N.M. Stat. Ann. § 70-7-18(C) and § 70-7-31(B) (Supp. 1975). A court might, however, find such a non-refundable sum part of the rental costs instead of a deposit.

47. *See* text accompanying notes 133 to 143 *infra.*

48. N.M. Stat. Ann. § 70-7-15(A), (B) (Supp. 1975).

49. *Id.* § 70-7-15(C).

50. *Id.* § 70-7-18.

51. *Id.* § 70-7-24(A).

52. *Id.* § 70-7-25.

53. *Id.* § 70-7-20(C), (D).

rental value for the use of the premises and occupancy of the dwelling."[54] The place and time of rental payments are also subject to agreement, but once agreed to the rent is due and payable without demand.[55] If the place of payment is not defined by the agreement the rent is payable at the dwelling unit. If the time of payment is not specified in the agreement and is payable for a term of one month or less, rent is due at the beginning of the term. If the time is not prearranged and the term is longer than one month, rent is due in equal monthly installments payable at the beginning of each month.[56]

A question left unanswered by the Act is whether rent is apportionable.[57] The question may arise when the resident either rightfully or wrongfully terminates. Since the normal procedure is to pay rent in advance, nonapportionment of rent benefits the landlord, while apportionment benefits the tenant. The rule at common law is that rent is not apportionable absent an agreement requiring it.[58] No legitimate reason appears for not allowing rent apportionment if termination is rightful. A rightful termination ends the resident's interest in the property and ends any claims against the landlord except those arising during the tenure. Reciprocally, the landlord's claims against the resident not arising during the tenure cease. Not to apportion rent allows the landlord to be enriched unjustly. Residential leases, unlike some commercial or agricultural leases, seldom present problems for rate of apportionment. Business property may be of greater value during certain periods of the year, but the value of an apartment should be unvarying—day-by-day apportionment may be presumed.[59] The presumption of day-by-day apportionment should not be conclusive. Rental dwellings located in an area of winter sports may fluctuate in value, and under such conditions

54. *Id.* § 70-7-15(A).

"[f]air rental value" is that value which ic comparable to the value established in the market place; N.M. Stat. Ann. § 79-7-3(G) (Supp. 1975).

There remains, of course, the general power of the court to set aside or modify the rent provision that is inequitable. N.M. Stat. Ann. § 70-7-12 (Supp. 1975).

55. N.M. Stat. Ann. § 70-7-15(B) (Supp. 1975).

56. *Id.*

57. Apportionment is referred to only in the section on resident's rights following fire or casualty. There it is said that "[a]ccounting for rent, in the event of termination or apportionment, is to occur as of the date of the vacation." N.M. Stat. Ann. § 70-7-31(B) (Supp. 1975). There, however, apportionment refers to a reduction in rent in terms of the proportion of the dwelling still being occupied. Nevertheless, this indicates a recognition that the resident is chargeable with rent only for what he is using.

58. *See, e.g.*, Silveira v. Ohm, 33 Cal.2d 272, 201 P.2d 387, 390 (1949); 1 American Law of Property § 3.64 (A. J. Casner ed. 1952); 5 Powell, Real Property ¶ 662 (1970).

59. This is the position taken in American Bar Foundation, Model Residential Landlord-Tenant Code § 2-301(3) (Tent. Draft, 1969).

apportionment should reflect the rental value. Courts should admit evidence of factors affecting seasonably different property values.[60]

When termination is wrongful, the situation is reversed in part. The tenant still is under an obligation to pay rent. Section 6, however, imposes upon the aggrieved party the duty to mitigate damages. Thus, the Act imposes upon the owner a duty to attempt to re-rent the premises when a resident breaches a rental agreement by abandoning or by otherwise wrongfully terminating. This is not equivalent to apportionment, since the resident remains liable for rent as long as the owner makes a good faith effort to mitigate.[61] A tenant who plans to breach his lease may, by finding another party to assume the lease, be able to compel the owner to accept the new tenant unless the owner has good reason not to accept him.[62] Thus, for wrongful termination apportionment is not available, but there is a duty to mitigate.

Term: The rental agreement may provide for the residential term.[63] The Act does not require that the rental agreement specify the term. If a definite term is not specified, the Act establishes a periodic tenancy of indefinite duration with the rental period established by the amount of time for which the initial rent payment is consideration. If the rent is paid weekly, the tenancy becomes week-to-week. In all other cases the tenancy is month-to-month.[64] A term which is established for a definite period teminates at the end of the period. Termination of periodic tenancies is by compliance with the notice requirements of the Act.[65]

Deposits and Prepaid Rent: Within limits prescribed by the Act the owner is permitted to demand deposits and prepaid rent.[66] A deposit is defined in Section 3(D) as:

> . . . an amount of currency or instrument delivered to the owner by the resident as a pledge to abide by terms and conditions of the rental agreement; . . .

60. The presence of a university with a yearly schedule allowing extended summer vacations is another example suggesting differentiation in day-by-day value.

61. *See* N.M. Stat. Ann. § 70-7-11 (Supp. 1975):

> Every duty under the Uniform Owner-Resident Relations Act . . . imposes an obligation of good faith in its performance or enforcement.

62. It should be noted that the UORRA makes no provision for subleasing or assignment. Setting reasonable standards for subleases and assignments would go far to eliminate the hardships imposed on residents who must leave before the term is complete. The Model Code provides detailed statutory treatment of the subject. American Bar Foundation, Model Residential Landlord-Tenant Code § 2-403 (Tent. Draft, 1969).

63. N.M. Stat. Ann. § 70-7-14 (Supp. 1975).

64. *Id.* § 70-7-15(C).

65. N.M. Stat. Ann. § 70-7-37 (Supp. 1975).

66. *Id.* § 70-7-18.

This broad definition is intended to cover prepaid rent.[67] However, the specific provisions of Section 18 exclude the last month's prepaid rent from coverage under this section as a deposit.[68]

Whether or not a payment to the owner is a deposit depends on whether it is a pledge to abide by a term or condition of the rental agreement. The usual security deposit and damage deposit poses no problem, but consider a requirement of "an automatic, non-refundable cleaning fee." Within the context of the UORRA, such a cleaning fee functions as a deposit and should be treated accordingly. Section 22(B) provides that upon termination the resident must place the premises in "as clean condition, excepting ordinary wear and tear, as when residency commenced." If the resident performs his obligation, the cleaning fee is superfluous. If not, the owner uses that portion of the fee necessary to perform the resident's obligation. It is functionally a deposit regardless of name. Any deposit must be refundable.[69] Hence, a provision that the cleaning fee is non-refundable is illegal.[70]

Section 18 limits the amount of the deposit depending on the length of the term and the amount of the rent.[71] If the rental agreement is for a term of one year (implicitly also for terms greater than one year), the owner may demand any amount, but if that amount is greater than one month's rent the owner must pay the resident interest equal to that which the federal home loan bank board permits savings and loan associations to pay.[72] If the agreement covers a tenancy of less than one year or a periodic tenancy, the initial period of which is less than one year, the Act makes it unlawful to ask or receive more than the equivalent of one month's rent.[73]

Section 18(B) excludes the last month's prepaid rent from the above considerations. Thus, on a month-to-month tenancy an owner may demand that the last month's rent be prepaid. That amount is not calculated in deciding the limits on the deposit. Since only the last month's rent is excluded, other money received for security purposes in the name of prepaid rent would be calculated into the deposit limitations. Section 18(B) specifically forbids denoting a

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67. *Id.* § 70-7-18(B).
68. *Id.*
69. *Id.* § 70-7-18(C).
70. *Id.* § 70-7-16 to -17
71. *Id.* § 70-7-18(A).
72. *Id.* § 70-7-18(A)(1).
73. *Id.* § 70-7-18(A)(2).

deposit as prepaid rent to avoid paying interest under Section 18(A)(1).

Section 18(C) provides for the use and/or return of deposits and prepaid rent. Upon termination the owner may use deposits both for damages that may have resulted and for unpaid rent. No similar provision allows use of prepaid rent to repair damages. Since the last month's prepaid rent is specifically excluded from the special limitations on deposits, the Act implies, but does not specifically state, that prepaid rent should be just that and not a way for the owner to get additional damage deposits. Any balance of prepaid rent and deposits must be returned to the resident within 30 days of termination, and the resident has the obligation to provide a location to which the owner may return the balance.[74] The balance returned must be accompanied by a written itemization of deductions made by the owner with reasons therefor.[75]

Section 18(D) provides that the resident's remedy for breach of the owner's obligations to return the balance with an accounting is to recover the balance due plus attorney's fees and court costs. As noted, the resident must tell the owner where to send the deposit, but it is questionable whether his failure to do so means that he has no remedy. Certainly, the landlord cannot be obligated to return money to someone whose whereabouts are unknown to him. However, Section 11 provides that the owner must carry out his duties in good faith. If the owner knows the whereabouts of the tenant, even though the resident has not designated a location, good faith should require the owner to perform his duty.

Even though the owner is required to return the remaining deposit, the small amount usually involved in security and other deposits tends to ensure that legal action against the owner will not be pursued. The Act's allowance of attorney's fees and court costs seems small inducement for tenants to pursue their remedies. Other comprehensive acts have imposed greater penalties for failure to return deposits—penalties which accrue to the resident and, hence, encourage them actively to pursue their rights.[76]

Another problem arises occasionally regarding deposits when an owner who has received deposits terminates his interest in the

74. *Id.* § 70-7-18(C).

75. *Id.*

76. For example, the Uniform Act allows recovery of twice the amount wrongfully withheld plus reasonable attorney's fees. Uniform Residential Landlord and Tenant Act § 2.101(C). The Model Code makes the failure to return deposits a misdemeanor with the tenant to receive half of the fine which may be as great as $200.00. American Bar Foundation, Model Residential Landlord-Tenant Code §§ 2-401, 3-501 to -502 (Tent. Draft, 1969).

property. Section 21 makes the successor liable for all obligations under the rental agreement or the Act, including accounting and return of the deposit at the end of the term.[77]

Additional Provisions: The UORRA explicitly mentions four other areas for which a rental agreement may provide. First, the resident and owner may agree that the owner may enter to inspect, make repairs, supply services and exhibit the dwelling.[78] Second, they may agree that the resident may use the premises for a purpose other than or in addition to a residential dwelling.[79] If they do not so agree, the residence may only be used as "a home, residence or sleeping place."[80] Third, the agreement may require notification of resident's absence for periods of more than seven days, with such notice given no later than the first day of the absence.[81]

Fourth, the owner may adopt rules for the use and occupancy of the dwelling, provided their purpose is

> . . . to promote the appearance, convenience, safety or welfare of the residents in the premises, preserve the owner's property from abusive use or make a fair distribution of services and facilities held out for the residents generally.[82]

These rules may be adopted at any time including the time when the rental agreement is entered into. If there are such rules at the time of the rental agreement, copies must be given to the resident.[83] These rules may subsequently be supplemented or altered provided reasonable notice is given and they do not substantially alter the rental agreement and initial bargain.[84] Enforceability of rules is conditional upon (1) their being reasonably related to the purpose for which they were adopted; (2) their applying to all residents fairly; (3) their being sufficiently explicit fairly to inform the resident of his obligations; (4) their not being designed to evade the owner's obligations; and (5) the resident's receiving notice as required in the Act.[85]

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77. By treating the deposit as a pledge, N.M. Stat. Ann. § 70-7-3(D) (Supp. 1975), and by imposing the accounting and return conditions, *Id.* § 70-7-18(C), the title to the deposit is retained by the tenant. *See, e.g.,* 2 Powell, Real Property ¶ 231[2] (1967). *Cf.* Kalish, *The Nebraska Residential Landlord and Tenant Act,* 54 Neb. L. Rev. 603, 627-628 (1975).

78. N.M. Stat. Ann. § 70-7-24 (Supp. 1975). The right of entry without consent is discussed below, at text accompanying note 243 *infra.*

79. N.M. Stat. Ann. § 70-7-25 (Supp. 1975).

80. *Id.* § 70-7-3(E) & § 70-7-25.

81. *Id.* § § 70-7-25 & 70-7-34.

82. *Id.* § 70-7-23(A).

83. *Id.* § 70-7-23(F).

84. *Id.*

85. *Id.* § 70-7-23(B)-(E).

OWNER'S OBLIGATIONS AND RESIDENT'S RIGHTS

The UORRA imposes numerous obligations upon the owner and gives the resident corresponding rights and remedies. Some of these obligations have been discussed previously, *e.g.*, the duty to return and account for deposits.[86] This section of the Comment is primarily concerned with (1) the duty to disclose, (2) the duty to deliver possession, and (3) the duty to maintain the premises in a habitable condition.

Disclosure

The UORRA requires that the owner provide the resident with his name and address[87] so that he will know to whom he may complain or upon whom he may serve process or give notice, thereby avoiding some problems with an absent or anonymous owner. Alternatively, the owner may disclose a person authorized as his agent for purposes of service of process and notice.[88] Section 19 requires disclosure of the identity of the person who will manage the premises in conformity with the owner's obligations under the Act and the rental agreement.[89] Any person so designated becomes the agent of the owner with respect to those obligations.[90] The owner may, of course, be the manager. The required disclosure must be in writing even if the rental agreement is oral.[91]

The information which must be disclosed must also be kept current through changes in ownership or management.[92] This provision is reinforced in Section 21, which relieves the owner or manager of liability under the Act or any rental agreement upon termination of ownership or management only if written notice is given to the resident of the termination. On notice of termination of the owner's interest, the resident is directed to pay rent to the successor-in-interest.[93] This section is consistent with the New Mexico Supreme Court's holding in *Fletcher v. Bryan.*[94] Fletcher had leased property

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86. *See* text accompanying note 74, *supra.*

87. N.M. Stat. Ann. § 70-7-19(A)(2) (Supp. 1975).

88. *Id.* This alternative is not attractive for it increases the chances of default and uses necessary time needed to answer.

89. N.M. Stat. Ann. § 70-7-19(A)(1) (Supp. 1975).

90. *Id.* § 70-7-19(C).

91. *Id.* § 70-7-19(A).

92. *Id.* § 70-7-19(B).

93. *Id.* § 70-7-21(A). The UORRA provides great detail on notice in N.M. Stat. Ann. § 70-7-13 (Supp. 1975). That section is directly modeled on the provisions in the Uniform Commercial Code, N.M. Stat. Ann. § 50A-1-201(25)-(27) (Repl. 1962, Supp. 1975), and in the Uniform Residential Landlord and Tenant Act § 1-304.

94. Fletcher v. Bryan, 76 N.M. 221, 413 P.2d 885 (1966).

from Thompson. Thompson conveyed the property to Bryan without notice to Fletcher. Fletcher continued to tender rent to Thompson, who refused acceptance. Bryan brought an action for possession against Fletcher for failure to pay rent. The court said:

> After notice to the tenant that premises have been conveyed by the lessor, the tenant must pay accruing rents to the grantee. Until the tenant has notice of the conveyance, he is protected in paying rent to his original landlord.[95]

The court based its position in part upon a New Mexico statute which provided:

> Grants of rents, returns, or remainders of possession shall be valid without previous ceremonies of the tenants, but no tenant having paid rent to the grantor before receiving notice of the transfer shall be injured thereby.[96]

Section 21 goes one step further than *Fletcher* by requiring that notice be given in writing.

Delivery of Possession

At common law the owner was required to put the resident in possession at the commencement of the term; if he breached this duty, the resident had an action for damages.[97] If the resident was kept from possession by a third party, usually the prior tenant who held over, the authorities were in conflict as to whether the owner had a duty to deliver possession and the resident an action for breach. The English rule, adopted in many American states, requires the landlord to deliver actual possession.[98] Under the so-called American rule the landlord need not deliver actual possession, but only the right to possession.[99]

New Mexico adopted the English rule in *Barfield v. Damon.*[100] The court held that "it was the duty of the landlord to put the tenant in actual possession when right to possession accrued."[101] For the most part, the UORRA in Section 26 codifies the English rule by requiring the owner to place the resident in actual possession

95. *Id.* at 223-224, 413 P.2d at 887.
96. N.M. Stat. Ann. § 70-1-20 (Repl. 1961).
97. 1 American Law of Property § 3.37 (A. J. Casner ed. 1952); 2 Powell, Real Property ¶ 225[1] (1967).
98. 1 American Law of Property § 3.37 (A. J. Casner ed. 1952); *see, e.g.,* Dieffenbach v. McIntyre, 208 Okla. 163, 254 P.2d 346 (1952).
99. *See, e.g.,* Hannan v. Dusch, 154 Va. 356, 153 S.E. 824, 70 A.L.R. 141 (1930). *Hannan* contains an exposition of the rationale behind the American and English rules.
100. 56 N.M. 515, 245 P.2d 1032 (1952).
101. *Id.* at 518, 245 P.2d at 1034.

at the commencement of the period.[102] The owner has the obligation to remove a party wrongfully in possession, and the owner may bring an action for possession for that purpose.[103] The rationale for placing the burden on the owner is that he is in a better position than the tenant to know the status of the property, the rights and intentions of the present tenant, and to pursue a remedy against the wrongful party. In addition, the tenant has legitimate expectations of taking actual possession and will receive less than he bargained for if he is required to bear the cost of proceedings against the wrongful party.[104] However, the full force of the English rule imposing liability on the owner is mitigated by the UORRA provision which relieves the owner of liability if he reasonably seeks to obtain possession.[105]

Section 28 sets forth the resident's rights and remedies should the owner fail to deliver actual possession. Rent abates until possession is delivered.[106] In addition, the resident may terminate the rental agreement after five days' notice and recover any prepaid rent and deposits.[107] Alternatively, the resident may demand specific performance and maintain an action against any person wrongfully withholding possession or wrongfully in possession to recover damages.[108] If the owner wrongfully withholds possession, or if he fails to make a reasonable effort to put the resident-to-be in possession, the resident-to-be may maintain an action for damages against the owner.[109] If it can be shown that the failure to deliver possession was willful and not in good faith, the aggrieved party may recover reasonable attorney's fees.[110]

Several problems are presented by the UORRA's treatment of

102. N.M. Stat. Ann. § 70-7-26 (Supp. 1975):

> DELIVERY OF POSSESSION.–At the commencement of the rental period as specified in the rental agreement, the owner shall deliver possession of the premises to the resident in compliance with the rental agreement and Section 20 of the Uniform Owner-Resident Relations Act. The owner may bring an action for possession against the resident or any person wrongfully in possession and may recover the damages provided in Subsection C of Section 33 of the Uniform Owner-Resident Relations Act.
>
> If the owner makes reasonable efforts to obtain possession of the premises, he shall not be liable for an action under this section.

103. *Id.*

104. Restatement (Second) of Property § 6.2, comment *a* at 138-140 (Tent. Draft, 1974). The Restatement adopts the English rule.

105. N.M. Stat. Ann. § 70-7-26 (Supp. 1975).

106. *Id.* § 70-7-28(A).

107. *Id.* § 70-7-28(A)(1).

108. *Id.* § 70-7-28(A)(2). This section gives the resident-to-be a right to bring an action for possession against the prior resident wrongfully holding over.

109. *Id.*

110. *Id.* § 70-7-28(B).

delivery of possession. At the very least, the resident-to-be should be relieved of any obligation to pay rent until he has obtained possession. The Act seems to allow the resident to abate rent and then to elect either to terminate or to demand performance.[111] Section 26 states, however, that if the owner makes reasonable efforts to obtain possession, "he shall not be liable for an action under this section."[112] Abatement and election apparently are actions based on the owner's liability for not delivering possession. Of course, the first step in such an action would be by way of self help, *i.e.*, not paying rent and terminating with a request for return of prepaid rent and deposits. Nevertheless, should the owner refuse to return the prepaid rent or bring an action against the resident, the resident is faced with the nonliability of the owner who has made reasonable attempts to deliver.[113] Actions for return of prepaid rent or for setoff for abated rent seem to be disallowed. This conflict between the permissive language of Section 28 and the prohibitive language of Section 26 can, however, be resolved. The apparent objective of the drafters of the Act was to excuse the owner who makes reasonable efforts from liability for consequential damages when his inability to deliver arises from the wrongful act of a third party while allowing the resident to terminate or abate until possession is delivered. This objective can be achieved, by applying the final paragraph of Section 26,

> (i)f the owner makes reasonable efforts to obtain possession of the premises, he shall not be liable for an action under this section,

only to subsection 28(B),

> (i)f a person's failure to deliver possession is willful and not in good faith, an aggrieved person may recover from that person damages sustained by him, and reasonable attorney's fees.

In this way the broad language of Section 26 is harmonized with that permitting abatement.

No time period is specified before which the resident must give notice of termination.[114] This could result in a hardship to

111. *Id.* § 70-7-28(A).

112. *See* notes 102, 105 *supra* and accompanying text. An "action" is defined at N.M. Stat. Ann. § 70-7-3(B) (Supp. 1975):

> "action" includes recoupment, counterclaim, setoff, suit in equity and any other proceeding in which rights are determined, including an action for possession; . . .

113. *Cf.* Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 Hastings Const. L.Q. 893, 898 (1975).

> Every case apparently involving a permissive action could in fact be set up to involve complementary mandatory actions.

114. N.M. Stat. Ann. § 70-7-28(A)(1)(Supp. 1975).

owners. An owner has an option to oust a holdover[115] or to treat him as a month-to-month tenant.[116] Having leased the premises to another, the owner is forced to take the first option to avoid liability to the new tenant. Since the new tenant is not required to give notice of termination within a specified period, notice may come after the owner has lost the option to treat the holdover as a month-to-month tenant. It is evidently the intent of the Act to place this burden upon the owner; however, a tenant who substantially misleads the owner to believe that he desires possession may be prevented in equity from asserting the right to terminate.[117]

Duty to Maintain Residence in Habitable Condition

The Act's most significant change from the common law regards the owner's obligation to maintain the dwelling and premises in a habitable condition.[118] At common law the rule of *caveat emptor* applied to leases. With limited exceptions the tenant took the premises as he found them, and the landlord had no obligation to see that the premises were habitable or safe unless he specifically covenanted to do so.[119]

New Mexico cases followed this rule with common law exceptions. In *Coggins v. Gregorio* the Tenth Circuit said:

> While *there is no implied warranty by the landlord that the leased premises are safe or fit for occupancy,* the landlord is liable for injuries resulting to the tenant from latent defects in the premises known to the landlord and concealed from the tenant.[120]

The general rule with respect to safety of premises with its exceptions was again stated in *Lommori v. Milner Hotels, Inc.:*

> The common law rule regarding liability for injuries to third persons places responsibility on the tenant in possession and excuses the landlord. There are some exceptions, as (1) when the landlord knows of a hidden defect and does not communicate that knowledge to the tenant, *Coggins v. Gregorio,* 10 Cir., 1938, 97 F.2d 948; (2) when the landlord binds himself by a covenant to repair; (3) when the

115. *Id.* § 70-7-26.

116. *Id.* § 70-7-15(C).

117. The Act specifically supplements its provisions with the provisions of equity, N.M. Stat. Ann. § 70-7-4 (Supp. 1975).

118. N.M. Stat. Ann. § 70-7-20 (Supp. 1975).

119. 1 American Law of Property § 3.45 (A. J. Casner ed. 1952); 2 Powell, Real Property ¶ 225[2] (1967); Restatement (Second) of Property § 5.1, reporter's notes at 64-72 and comment *b* at 56-58 (Tent. Draft, 1974).

120. Coggins v. Gregorio, 97 F.2d 948, 951 (10th Cir. 1938) (emphasis added); *accord,* Barham v. Baca, 80 N.M. 502, 458 P.2d 228 (1969); *see also* Hogsett v. Hanna, 41 N.M. 22, 63 P.2d 540 (1936).

> landlord reserves control of part of the premises such as passageways, stairs, etc., *Hogsett v. Hanna*, 1936, 41 N.M. 22, 63 P.2d 540; (4) when the injury is to persons off the premises in which situation the owner continues liability for ordinary negligence arising from conditions of disrepair, or dangerous activities carried on by his tenant.[121]

Within the last ten years, however, courts have begun to impose upon the residential lease a warranty that the premises are safe and fit for habitation.[122] The American Law Institute has accepted, for the Restatement (Second) of Property, a provision obligating landlords to have the premises in condition suitable for residential use.[123] Both the American Bar Foundation[124] and the Commissioners of Uniform Acts[125] have adopted provisions obligating landlords to keep the premises safe and fit for habitation. Numerous states have adopted such requirements by statute.[126]

Section 20, requiring the owner to maintain the residency so that it is fit and safe for habitation, is substantially identical to Section 2.104 of the Uniform Residential Landlord and Tenant Act.[127] As a result, cases arising in those states that have adopted the Uniform Act will provide helpful authority for actions arising in New Mexico under Section 20.

Section 20 contemplates two possible situations: either the residence is within a city with an applicable housing code or it is not. If there is an applicable local housing code, the owner must substan-

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121. Lommori v. Milner Hotels, Inc., 63 N.M. 342, 346-347, 319 P.2d 949, 952 (1957).

122. *See, e.g.*, Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961):

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*. Permitting landlords to rent "tumbledown" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners. 111 N.W.2d at 412-413.

See also, Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Foisy v. Wyman, 83 Wash.2d 22, 515 P.2d 160 (1973). *See*, Indritz, *The Tenants' Rights Movement*, 1 N.M. L. Rev. 1 (1971).

123. Restatement (Second) of Property, § § 5.1, 5.4, 5.5 (Tent. Draft No. 2, 1974).

124. American Bar Foundation, Model Residential Lanlord-Tenant Code § 2-203 (Tent. Draft, 1969).

125. Uniform Residential Landlord and Tenant Act § 2.104.

126. Jurisdictions that have adopted the Uniform Act, *supra* note 143, are listed in note 6. The Restatement (Second) of Property, Statutory Note to Chapter Five, 44-55 (Tent. Draft No. 2, 1974) contains a detailed analysis of statutory provisions concerning the landlord's duties with respect to the condition of the premises.

127. Uniform Residential Landlord and Tenant Act, § 2.104.

tially comply with its requirements regarding health and safety.[128] In this situation the housing code determines the maximum duty of the owner.[129] If there is no applicable housing code, the standards are set by Section 20, subsections A(2) through (6). The owner must:

> (2) make repairs and do whatever is necessary to put and keep the premises in a safe condition as provided by applicable law, and rules and regulations as provided in Section 23 of the Uniform Owner-Resident Relations Act;
>
> (3) keep common areas of the premises in a safe condition;
>
> (4) maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, if any, supplied or required to be supplied by him;
>
> (5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal from the appropriate receptacle; and
>
> (6) supply running water and a reasonable amount of hot water at all times and reasonable heat except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the resident and supplied by a direct public utility connection.

The statutory provisions generally conform to the standards in municipal housing codes. The Albuquerque Housing Code provides that:

> no owner shall occupy or let to any other occupant any vacant dwelling unless it is clean, sanitary, and fit for human occupancy.[130]

It imposes more specific requirements for safety, heating, electrical equipment and ventilation.[131] The housing code and the provisions of the UORRA need not conform. Thus, housing codes may set substantially higher or lower standards.[132] Many codes contain

128. N.M. Stat. Ann. § 70-7-20(A)(1) (Supp. 1975).

129. *Id.* § 70-7-20(B).

130. Albuquerque, N.M., Housing Code § H-902(A)(6) (1971).

131. The Housing Code is available from the City Clerk. Only the first three sections of the ordinance, adopting and making available the Code are set forth in City of Albuquerque, Revised Ordinances, § § 7-7-1,2,3 (1974). The full text is set forth in Albuquerque, N.M., Development Regulations and Policies, § § E-25 to E-40 (1974).

132. *See* text accompanying notes 128 and 129 *supra.* By not requiring the municipal housing codes to conform substantially to the Uniform Owner-Resident Relations Act, it is possible for local housing codes to require very low standards or to delete protection

elaborate rules on heating, ventilation and sanitation but ignore important problems such as bad plaster, chipping paint, insects and rodents.

Having established the applicable standards by reference to the UORRA or the local housing code, the Act allows the resident to assume some of the owner's obligation to maintain the residence in accordance with the standards.[133] Again, two situations are envisioned by the Act: the dwelling unit is or is not a single family residence. If the dwelling unit is a single family residence, the resident may assume obligations of repair and maintenance and the obligations specified in Section 20(A)(5) and (6),[134] *i.e.*, to provide trash removal and supply running water and hot water.[135] An agreement to assume these obligations must be in writing, for consideration, and entered into in good faith.[136] If the dwelling is not a single family residence, the resident is permitted to assume the obligations of repair and maintenance.[137] However, no provision permits the resident to assume the obligations specified in Section 20(A)(5) and (6). Without a specific allowance Section 16 prohibiting waiver of rights applies.[138] Unlike the single family situation in which there is no sharing of essential facilities with another dwelling,[139] dwellings coming under Section 20(D) share common facilities. Allowing one resident to take over obligations for trash removal and provision of water might harm other residents who have no statutory remedy against a fellow resident who shirks the assumed obligation. Not allowing assumption of these obligations is consistent with the condition placed on assumed obligations, that they not diminish or affect the obligations of the owner to other residents.[140] An assumption of the owner's obligation in non-single

provided by the Act. Query whether there would be an equal protection claim under the fourteenth amendment in such cases. *See also*, Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Colum. L. Rev. 1254 (1966).

133. N.M. Stat. Ann. § 70-7-20(C) & (D) (Supp. 1975).

134. *See* text accompanying note 129 *supra.*

135. N.M. Stat. Ann. § 70-7-20(C) (Supp. 1975).

136. *Id.*

137. *Id.* § 70-7-20(D).

138. The Uniform Residential Landlord and Tenant Act § 1.403, § 2.104 & Commissioner's Comment, after which the present section is modeled, treats these agreements as specific exemptions to the general rule that rights cannot be waived.

139. N.M. Stat. Ann. § 70-7-3(Q) (Supp. 1975):

> Q. "single family residence" means a structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it is a single family residence if it has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment nor any other essential facility or service with any other dwelling unit; . . .

140. N.M. Stat. Ann. § 70-7-20(D)(2) (Supp. 1975).

family dwellings must be in a separate writing signed by the parties, for consideration and entered into in good faith.[141] In both situations, the assumption may not be for the purpose of evading the owner's obligations.[142] An agreement that the resident will discharge these obligations does not constitute a forbidden evasion if it is intended that the obligation be effectively discharged by the resident.[143]

In allowing a resident to agree to repair, the Act does not distinguish between defects existing at the commencement of the lease and defects arising while the resident is in possession. This may seem unfair to a resident who lacks notice of repairs necessary before taking possession and who may consequently receive inadequate consideration for the agreement to repair. Because of this possibility the American Law Institute takes the position that

> a covenant in the lease that the tenant is to keep the leased premises in repair is not to be construed as waiving any right the tenant may have to insist upon the premises being in a condition at the beginning of the lease suitable for the use contemplated by the parties.[144]

This provision is unnecessary in the UORRA because the agreement to repair must specify the repairs to be done and be for consideration.[145]

The UORRA also allows informal arrangements whereby the resident performs the obligations of the owner.[146] Such arrangements will not and cannot diminish the owner's obligations.[147] Personal performance of the obligation by the owner is not required. Rather the resident becomes the owner's agent for purposes of the arrangement. The owner may not evict the resident for a breach of the arrangement, nor is breach a noncompliance of the resident's

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141. *Id.* § 70-7-20(D)(1).

142. *Id.* § 70-7-20(C) & (D)(1).

143. The Act does not provide explicitly for agreements to assume obligations similar to those provided in Section 20(5) and (6) when there is an applicable housing code. Clearly the drafters of the Act regard the obligations of trash removal and provision of running water and hot water to be transferable. There is no reason to interpret Section 20 as not allowing assumption of these obligations providing there is no restriction in the housing code itself.

144. Restatement (Second) of Property, comment *d* to § 5.6 at 115 (Tent. Draft No. 2, 1974).

145. N.M. Stat. Ann. § 70-7-20(C), (D) (Supp. 1975). Also where an agreement to repair would be unfairly burdensome the court can limit application of the inequitable provision. N.M. Stat. Ann. § 70-7-12 (Supp. 1975).

146. N.M. Stat. Ann. § 70-7-20(E) (Supp. 1975).

147. *Id.*

obligations under the UORRA.[148] The only available remedies are those arising in other areas of law and equity.[149]

Sections 27 and 29 set forth the resident's rights and remedies following a breach of the owner's obligation to maintain the premises in a condition safe and fit for habitation. Subject to the below expressed qualification, the remedies of termination,[150] abatement of rent,[151] damages[152] and injunction[153] are available to the resident.

Provision of effective remedies and alternative remedies greatly expands the common law, which offered one extremely limited remedy. As mentioned above, the landlord at common law had no obligation to maintain the premises once they were leased. However, the landlord did have an obligation not to interfere in the tenant's quiet enjoyment of the premises.[154] Upon this obligation the courts based a remedy, constructive eviction, that indirectly and with substantial limitations imposed a duty to maintain the premises. In constructive eviction the courts held that some acts or omissions of the landlord which fell short of actual eviction of the tenant but which made the premises unusable would have the same effect as eviction, *i.e.*, the tenant could vacate the premises and be relieved of the obligation to pay.[155]

To take advantage of constructive eviction the tenant was forced to vacate. This limitation is illustrated in the New Mexico case of *Kennedy v. Nelson.*[156] The plaintiff-landlord had covenanted in a lease to provide light, water, heat and gas to defendant-tenant's house trailer. Upon failure to comply with the covenant, the tenants gave notice of termination. They did not vacate, however, for nine months. The trial court held that the tenants had waived the right to

148. *Id.*

149. *See,* N.M. Stat. Ann. § 70-7-4 (Supp. 1975); Restatement (Second) of Agency § 377 & § 401 (1958).

150. N.M. Stat. Ann. § 70-7-27(A) & § 70-7-29(A)(1) (Supp. 1975).

151. *Id.* § 70-7-29(A)(2).

152. *Id.* § 70-7-27(B).

153. *Id.*

154. 1 American Law of Property § 3.47 (A. J. Casner ed. 1952). Direct infringement of the tenant's right to quiet enjoyment may also call into play the remedies of N.M. Stat. Ann. § 70-7-32 (Supp. 1975). *See also* the discussion at text accompanying notes 213 to 224, *infra.*

155. 1 American Law of Property § 3.51 (A. J. Casner ed. 1952).

156. 76 N.M. 299, 414 P.2d 518 (1966). Three issues were presented upon appeal: (1) constructive eviction, which is discussed in the text, (2) the exclusion of testimony on the condition of the premises, which was common in actions for non-payment of rent, *but see* N.M. Stat. Ann. § 70-7-45 (Supp. 1975), and (3) the independence of lease covenants. The Supreme Court avoided a direct discussion of independent covenants. However, they effectively ruled that a breach of the covenant to provide water and heat did not directly allow termination and failure to pay rent. 76 N.M. at 303; *see also,* Heighes v. Porterfield, 28 N.M. 445, 214 P. 323 (1923).

claim constructive eviction.[157] The Supreme Court avoided discussion of constructive eviction except by indicating that to the extent the tenants had stayed in reliance on a promise to carry out the obligations they were excused from vacating and there would be no waiver.[158] With the exception presented in *Kennedy v. Nelson*, constructive eviction requires vacation of the premises. By imposing a statutory obligation to maintain the premises, the UORRA obviates the need to rely on constructive eviction for residential tenancies.[159]

Section 27 sets out the remedies available for "a material noncompliance by the owner with the rental agreement or noncompliance with Section 20 of the Uniform Owner-Resident Relations Act materially affecting health and safety."[160] The resident may terminate and seek damages or injunctive relief.[161] The remedies in Section 29, on the other hand, do not apply to noncompliance with the rental agreement, but rather apply only to a breach of the Act's habitability requirements, *i.e.*, to any "failure of the owner to perform his obligations as required by Section 20 of the Uniform Owner-Resident Relations Act."[162] The resident may only terminate the lease or abate rent.[163]

In addition, the remedies in Section 29 are not available when the circumstances resulting in the noncompliance were beyond the owner's control,[164] whereas the remedies of Section 27 remain available although the resident may not recover consequential damages.[165] In neither case are the remedies allowed when the noncompliance is a result of "the deliberate or negligent act or omission of the resident, a member of his family or other person on the premises with his consent."[166]

Beyond these points, however, the interrelation of the two sections is puzzling because both provide remedies for material breach

157. Kennedy v. Nelson, 76 N.M. at 302, 414 P.2d at 520 (1966).

158. *Id.* 76 N.M. at 304, 414 P.2d at 521.

159. *See, e.g.*, Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969) which carefully contrasts the warranty of habitability and constructive eviction both in terms of rationale and remedies; and Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), which sets out the alternative remedies.

160. N.M. Stat. Ann. § 70-7-27(A) (Supp. 1975).

161. N.M. Stat. Ann. § 70-7-27(A) (Supp. 1975) (termination); N.M. Stat. Ann. § 70-7-27(B) (Supp. 1975) (damages and injunctive relief; N.M. Stat. Ann. § 70-7-27(C) (Supp. 1975) (expressly allows both 27(A) and 27(B) to apply jointly).

162. N.M. Stat. Ann. § 70-7-29(A) (Supp. 1975).

163. *Id.* § 70-7-29(A)(1) (termination); *Id.* § 70-7-29(A)(2) (abatement of rent).

164. N.M. Stat. Ann. § 70-7-29(C) (Supp. 1975). The remedies of this section are available for violations of N.M. Stat. Ann. § 70-7-39 (Supp. 1975) concerning owner retaliations.

165. N.M. Stat. Ann. § 70-7-27(B) (Supp. 1975).

166. *Id.* § § 70-7-27(A), 70-7-29(C).

of the owner's obligations under Section 20 and both provide for termination. A central problem interfering with solution of the puzzle is the language of Section 29.

> RESIDENT RIGHTS IN EVENT OF BREACH.–
> A. Upon the failure of the owner to perform his obligations as required by Section 20 of the Uniform Owner-Resident Relations Act, the resident may give written notice to the owner specifying the breach and may:
> (1) terminate, upon written notice, as provided in Section 27 of the Uniform Owner-Resident Relations Act, the rental agreement; or
> (2) be entitled to reasonable abatement of the rent.
> B. If the resident proceeds under Paragraph (1) of Subsection A of this Section, he may not proceed under Section 27 of the Uniform Owner-Resident Relations Act.

Section 29(B) allows the resident to proceed under Section 29(A)(1), that is, to terminate upon notice as provided in Section 27, only if he does not proceed as provided in Section 27. This appears contradictory. Numerous resolutions suggest themselves but only one reflects the intention of the drafters, and it presents its own problems.

Since both sections provide for termination but Section 27 provides for damages, it seems possible that Section 29(B) is intended to disallow the action for damages under Section 27. This would be futile, since a tenant would simply terminate under Section 27, which expressly provides for both termination and damages.[167] The only substantial difference between Sections 27 and 29 is that the former allows damages and the latter allows rent abatement. The only remedy that is not expressly stated to be in addition to termination is abatement. This remedy is, of course, inconsistent with termination because it implies that the resident is remaining on the premises. Also, the only way to reconcile this inconsistency is to interpret Section 29(B) as containing an error in referring to Section 29(A)(1) instead of 29(A)(2). Such an interpretation, however, excludes damages and injunctive relief as well. A tenant may be satisfied with the location of his apartment, and yet at the first freeze the water pipes might burst, leaving him without water and with damages to his belongings. No reason appears why the tenant should not be allowed to recover damages as well as abate until the water is on.

Substantive changes could be made until a rational construction is reached, but this would reflect not the intent of the drafters but only

167. *Id.* § 70-7-27(C).

an intellectual reconciliation. If Section 29(B) stands, disallowing proceedings under Section 27 after an election to terminate under Section 29(A)(1), there should be some substantive difference between the two termination remedies, if the seeming contradiction in Section 29 is to be avoided. Section 29(A)(1) can be read as only incorporating the notice requirements of Section 27, leaving the tenant with a right to terminate regardless of the other conditions, specifically the owner's reasonable attempts to remedy, provided the tenant will forego Section 27 damages.[168] This interpretation itself presents difficulties because the notice requirements of Section 27 are integrated with the owner's opportunity to remedy.[169] It does, however, suggest a substantive difference between Section 27 and 29 rights to termination, eliminates the inconsistency and provides some explanation for the two remedy sections.

This problem of interpretation illustrates the opaquity and confusion in the UORRA. As a compromise Act which was not completely redrafted, the sections beneficial to the landlord, such as the opportunity to remedy in Section 27,[170] and those beneficial to the tenant, such as termination without opportunity of the landlord to remedy in Section 29,[171] conflict in ways which are not easily resolved.

As discussed above[172] Section 29 cannot be used when noncompliance with the owner's obligations was beyond the owner's control,[173] whereas Section 27 remedies can.[174] Section 31, however, provides the resident with express remedies when "the dwelling unit or premises are damaged or destroyed by fire or casualty." At early common law destruction of the premises did not empower the

168. Professor Goldberg, who was responsible for drafting the compromise measures, *see* notes 3, 18 *supra*, indicated that the intention of the drafters had been to incorporate only the notice provisions of Section 27 into Section 29. By deleting the second comment this becomes much clearer:

> (1) terminate, upon written notice as provided in Section 27 of the Uniform Owner-Resident Relations Act, the rental agreement . . .

The object was to allow the resident to terminate without giving the owner a right to remedy provided the resident would forego any right to damages.

169. N.M. Stat. Ann. § 70-7-27(A) (Supp. 1975):

> . . . the resident may deliver a written notice to the owner specifying the acts and omissions constituting the breach *and* that the rental agreement will terminate upon a date not less than seven days after receipt of notice if a reasonable attempt to remedy the breach is not made in seven days. . . . (emphasis added).

The interpretation suggested in the text requires the written notice necessary for Section 29 to include only the requirements before the "and."

170. N.M. Stat. Ann. § 70-7-27(A) (Supp. 1975).

171. *Id.* § 70-7-29(A).

172. *See* text accompanying notes 165 to 166 *supra*.

173. N.M. Stat. Ann. § 70-7-29(C) (Supp. 1975).

174. *Id.* § 70-7-27(B).

tenant to terminate, receive damages or abate rent.[175] The rationale behind this doctrine was that the lease was for the land, and, if a fire destroyed a building, the tenant still had the land.[176] Where the lease was of agricultural land, this rationale had some merit, but in modern residential leases the rationale is inappropriate, for it is the building that is really the subject of the lease. Courts have modified the rule and allowed termination when the premises have been rendered uninhabitable.[177] This position is illustrated in the New Mexico case of *Scharbauer v. Cobean.*[178] In the parties' commercial lease was a provision that the lease was void if the premises were rendered untenantable. A fire damaged the premises, but they were repaired within five days. The court recognized that the lease clause was intended to alter the common law doctrine. The problem was to discover what constituted rendering the premises untenantable. The court distinguished cases concerning premises rendered permanently untenantable necessitating reconstruction from premises rendered temporarily untenantable necessitating only repairs.[179] The lease was said to be terminable only in the former situation.[180]

Section 31(A) sets forth remedies for damage or destruction of premises "to the extent that enjoyment of the dwelling unit is substantially impaired." What constitutes substantial impairment? This question can be rephrased in terms of the common law distinction: Does "substantially impaired" contemplate both permanently untenantable necessitating reconstruction and temporarily untenantable necessitating only repairs or just the former? The answer is a simple "both." This follows from the second alternative remedy given in Section 31(A)(2) which clearly contemplates that continued occupancy may be lawful even though there has been substantial impairment. The Act does away with the common law distinction for residential tenancies.

The resident may terminate when there has been substantial damage to the dwelling.[181] He does so by vacating and, within seven days of vacating, giving notice of intention to terminate. The termination relates back to the date of vacating.[182] Alternatively the resident may, if lawful, vacate only the part rendered unusable and

175. 1 American Law of Property § 3.103 (A. J. Casner ed. 1952).
176. Restatement (Second) of Property § 5.4, Reporter's Notes 4 & 5, at 96, 97 (Tent. Draft No. 2, 1974).
177. *Id.;* 1 American Law of Property § 3.103 (A. J. Casner ed. 1952).
178. 42 N.M. 427, 80 P.2d 785, 118 A.L.R. 102 (1938).
179. 42 N.M. at 429-432, 80 P.2d at 786-788.
180. 42 N.M. at 432, 80 P.2d at 788.
181. N.M. Stat. Ann. § 70-7-31(A) (Supp. 1975).
182. *Id.*

continue occupancy of the remainder.[183] The rental liability is then reduced in proportion to the diminution in fair rental value.[184] There is a danger that the resident may be tempted to apportion too great an amount. Such action would result in his being liable for any additional rent the court deems appropriate should the owner sue. This could be avoided by negotiating the reduction with the owner.[185]

If continued occupancy is lawful, the resident may nevertheless terminate rather than apportion. The right to terminate is not conditional upon occupancy of the premises being unlawful, nor is apportioning mandatory when occupancy is lawful. This provision does not pose a problem of tenants' terminating for minor fire or casualty damage, since Section 31 is only applicable when there has been substantial impairment to the enjoyment of the premises.

Section 33(B) adds these points: the owner must return the balance of prepaid rent and deposits under Section 18; the accounting for rent occurs proportionately from the date of partial or complete vacation; and the resident is responsible for damage caused by his negligence.[186]

Right to Quiet Enjoyment

The resident has a right to the peaceful and undisturbed possession of the dwelling and premises. The Act specifically provides in Section 32 that a resident who is in compliance with the rental agreement and who is unlawfully removed, excluded or whose landlord willfully and wrongfully diminishes or interrupts essential services may terminate or recover possession,[187] effectively restating the common law.[188] This section is reinforced by the provisions of Section 36 prohibiting diminution of services and taking possession of the dwelling unit except in cases of abandonment and surrender.

The resident's right to peaceful and undisturbed possession traditionally precludes the owner's right to enter. Section 24 of the Act defines the owner's right of entry:

> A. The resident shall, in accordance with provisions of the rental agreement, consent to the owner to enter into the dwelling unit in

183. *Id.* § 70-7-31(B).

184. *Id.*

185. Settlements and agreements of this kind are expressly allowed. N.M. Stat. Ann. § 70-7-7 (Supp. 1975).

186. *Id.* § 70-7-31(B).

187. *Id.* § 70-7-32. These remedies may, in appropriate circumstances, overlap remedies in other sections, *e.g.*, § § 70-7-27, 70-7-29, 70-7-39.

188. 1 American Law of Property § § 3.47, 3.49, 3.50, 3.51 (A. J. Casner ed. 1952). *See also* discussion of constructive eviction in text accompanying note 155 *supra.*

order to inspect the premises, make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgages, prospective residents, workmen or contractors.

B. The owner may enter the dwelling unit without consent of the resident in case of emergency.

C. The owner shall not abuse the right of access.

D. The owner has no other right of access except by court order, and as permitted by Subsection B of this section, or if the resident has abandoned or surrendered the premises.

The resident's remedies are given in Section 38(B):

> B. If the owner makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the resident, the resident may obtain injunctive relief to prevent the recurrence of the conduct or terminate the rental agreement. In either case, the resident may recover damages and reasonable attorney's fees.[189]

The resident should enjoy the right to possession and quiet enjoyment free from fear of retaliation by the owner. Section 39 prohibits the owner from increasing rent, decreasing services, or threatening to or bringing an action for possession because the resident organized or joined a resident's union or has complained concerning the owner's violation of a building or housing code provision.[190] However, the owner may make reasonable rent increases or changes in service in spite of these acts of the resident.[191] Frequently where the resident is in possession under a periodic tenancy owner retaliation takes the form of giving notice that the tenancy will terminate at the end of the period.[192] Such termination upon notice is provided for in the UORRA without reference to motive of the owner.[193] Where the motive is retaliation, however, the tenant may resist this attempt and have a defense to any action for possession brought by the owner.[194] The defense may be overcome apparently if correction of

189. *But see* limitations in N.M. Stat. Ann. § 70-7-40 (Supp. 1975).

190. N.M. Stat. Ann. § 70-7-39(A) (Supp. 1975).

191. *Id.* § 70-7-39(B).

192. *See* Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969); Robinson v. Diamond Housing Corp., 139 U.S. App. D.C. 339, 463 F.2d 853 (1972).

193. N.M. Stat. Ann. § 70-7-37 (Supp. 1975).

194. *Id.* § 70-7-39(B). *Cf.* Edwards v. Habib, 397 F.2d at 699:

> It is true that in making his affirmative case for possession the landlord need only show that his tenant has been given the 30 day statutory notice, and he need not assign any reason for evicting a tenant who does not occupy the premises under a lease. But while the landlord may evict for any legal reason

the complained of defects require alteration, remodeling or demolition effectively depriving the resident of the use of the dwelling.[195] The resident, in addition to the defense, may either terminate or abate rent as provided in Section 29.[196]

In summary, the owner is obligated to deliver actual possession of habitable premises and to maintain the premises in habitable condition. The resident may terminate a rental agreement for failure of delivery or habitability. He has, in addition, other remedies depending upon the special conditions discussed above. The provisions are not unduly burdensome on the owner. In fact, the Act generally excepts the owner from liability for failure to comply when he has made reasonable efforts in good faith to do so.

RESIDENT'S OBLIGATIONS AND OWNER'S RIGHTS

The Act does not impose obligations solely on the owner nor does it leave him without effective rights and remedies. The resident's primary obligations are to pay rent[197] and to keep the premises in a clean and sanitary condition.[198] Payment of rent has been previously discussed.[199] The obligations of the resident under Section 22 complement those of the owner for maintaining habitability. The resident must:

> A. comply with obligations imposed upon residents by applicable minimum standards of housing codes materially affecting health or safety;
>
> B. keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit, and upon termination of the residency place the dwelling unit in as clean condition, excepting ordinary wear and tear, as when residency commenced;
>
> C. dispose from his dwelling unit all ashes, rubbish, garbage and other waste in a clean and safe manner;
>
> D. keep all plumbing fixtures in the dwelling unit or used by the resident as clean as their condition permits;

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or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted (footnotes deleted).

195. N.M. Stat. Ann. § 70-7-40(A)(3) (Supp. 1975). This prevents the situation in which the owner decides that the property is economically not worth compliance with the code but is prevented from removing the property from the market because he cannot evict the tenant. *Cf.* Robinson v. Diamond Housing Corp., *supra* note 192.

196. N.M. Stat. Ann. § § 70-7-29, 70-7-39(B) (Supp. 1975); *see* text beginning at note 183.

197. N.M. Stat. Ann. § 70-7-15 (Supp. 1975).

198. *Id.* § 70-7-22.

199. *See* text accompanying notes 54 to 62 *supra.*

E. use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilation, air conditioning and other facilities and appliances including elevators, if any, in the premises;

F. not deliberately or negligently destroy, deface, damage, impair or remove any part of the premises or knowingly permit any person to do so;

G. conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises; and

H. abide by all bylaws, covenants, rules or regulations of any applicable condominium regime, cooperative housing agreement or neighborhood association not inconsistent with owner's rights or duties.

These requirements do not pose any significant problems for interpretation.

These obligations are, however, a notable step forward from the common law. At common law the tenant could use or abuse the premises in any manner that an owner of a fee simple could with only three exceptions. He could not use the premises for illegal purposes, nor in a manner inconsistent with the terms of the lease, nor in a manner that injured the lessor's reversion.[200] An unreasonable or improper use of the premises resulting in harm to the lessor's reversion constituted waste.[201] Certain of the above listed obligations would fall within the traditional category of waste, *e.g.*, destruction or damage of the premises. Most, however, impose obligations which reflect the Act's purpose to promote "maintaining and improving the quality of housing" by promoting safe and healthy living conditions.[202] These provisions also reflect the view that living conditions at one residence affect those of other residences.

Section 33 provides the owner's remedies for resident's noncompliance with Section 22 obligations "materially affecting health and safety" or material noncompliance with the rental or a separate agreement. The owner may elect to terminate by delivering written notice specifying the acts or omissions constituting the breach. In so doing, he must specify a date of termination not less than seven days after receipt of notice.[203] The lease will terminate on that date unless the breach is remedied by the tenant either by repair or payment prior to the date of termination.[204] The resident must suc-

200. 1 American Law of Property § 3.39 (A. J. Casner, ed. 1952).
201. *Id.*
202. N.M. Stat. Ann. § 70-7-2 (Supp. 1975).
203. *Id.* § 70-7-33(A).
204. *Id.*

cessfully remedy before the date of termination. This is a more onerous burden than that imposed on the owner in similar circumstances, for the owner is protected from liability under Section 27 if he has made a reasonable effort in good faith to remedy his noncompliance.[205] Residents who often lack skills or tools required to make repairs must hire someone to make repairs. Seven days frequently will be insufficient to remedy successfully. A more equitable provision would defeat the owner's termination when the resident can show that he is making reasonable efforts in good faith which are likely to be successful.[206] Nevertheless, the Act makes no such provision.

Section 33(B) provides the remedy for the resident's failure to pay rent. The owner must deliver written notice of non-payment and intention to terminate. If rent is not paid within three days, the owner may terminate and the resident must deliver possession.[207] Section 35 reinforces these provisions by entitling the owner to possession and to claim rent when the rental agreement is terminated. Section 40 provides that the owner may bring an action for possession when the resident is in default of rent.[208] In addition, the landlord is provided with a landlord's lien on the possessions of the tenant which remain in the residency.[209] If the resident's failure is willful, the owner may recover reasonable attorney's fees and court costs.[210]

As previously noted,[211] the owner has certain limited rights of access provided either in the rental agreement or by Section 24.[212] If the resident refuses to consent to such access, the owner must obtain an injunction ordering access. Section 38(A) allows the owner to obtain injunctive relief or terminate for a refusal to allow lawful access. In either case damages, reasonable attorney's fees and costs are recoverable.[213]

The owner has a right to possession when the resident has abandoned.[214] Abandonment, as defined in Section 3(A), has three

205. The resident may, if this interpretation of the Act is correct, terminate regardless of reasonable efforts under N.M. Stat. Ann. § 70-7-29(A)(1) (Supp. 1975), but cannot obtain damages.

206. Basically this raises an equal protection argument. The owner and resident in the same circumstances are provided different legal rights for noncompliance. There does not appear to be a substantial rationale for treating the two classes differently.

207. N.M. Stat. Ann. § 70-7-33(B) (Supp. 1975).

208. *Id.* § 70-7-40(A)(2).

209. *Id.* § 61-3-4 (2nd Repl. 1974).

210. *Id.* § 70-7-33(C) (Supp. 1975).

211. *See* text accompanying note 78 *supra.*

212. N.M. Stat. Ann. § 70-7-38(A) (Supp. 1975).

213. *Id.*

214. *Id.* § 70-7-34(C).

elements: (1) absence in excess of seven days, (2) without notice, (3) while delinquent in rent. In these circumstances, the owner may take immediate possession but is responsible for removal and storage of the resident's personal property.[215] The owner may also attempt to re-rent the dwelling. If he is successful, the prior tenancy is terminated.[216] This section allows, but does not require, the owner to attempt to re-rent, thereby conflicting with the duty to mitigate.[217] This specific exemption allows the landlord some discretion in deciding whether the tenant is likely to return.

The rental agreement may also require the resident to notify the owner of extended absence in excess of seven days.[218] This is a reasonable provision because the danger of property damage or loss is greater when property is vacant. The construction to be given Section 34(A) which provides the owner's remedy for failure to give notice is unclear.

> A. If the rental agreement requires the resident to give notice to the owner of an anticipated extended absence in excess of seven days as required in Subsection A of Section 3 of the Uniform Owner-Resident Relations Act and the resident willfully fails to do so, the owner may recover damages from the resident.

Section 3(A), which defines abandonment, makes delinquency in rent essential. Delinquency in rent has no legitimate connection to a provision intended to safeguard the premises during a resident's extended absence. Also, if this section incorporates the conditions of abandonment, it would do no more than repeat the provisions of Section 34(C) discussed above. It is rational to allow the owner damages he sustains that proximately flow from a resident's extended absence if the resident has agreed and failed to give notice. The phrase "as required in Subsection A of Section 3" may frustrate the purpose of this provision by making it applicable only when the resident has abandoned. The only reasonable construction is to omit the phrase.

In summary, the UORRA imposes upon the resident only one obligation that was not previously present, the duty to maintain the premises in clean and undamaged condition. The Act does, however, codify other obligations: the duty to pay rent, allow access, give notice of extended absence and comply with applicable rules and regulations. Specific remedies are provided for breach of these obligations.

215. *Id.* § 70-7-34(C).
216. *Id.; Cf.* Riggs v. Murdock, 10 Ariz. App. 248, 458 P.2d 115 (1969).
217. N.M. Stat. Ann. § 70-7-6(A) (Supp. 1975).
218. *Id.* § 70-7-34(A).

REMEDY PROCEDURE

The Act provides a procedure for the owner or resident to gain possession of the premises set out in Sections 30 and 40 through 47. Section 41 makes this procedure the exclusive action for possession.

> ACTION FOR POSSESSION BY OWNER OR RESIDENT.–
> An action for possession of any premises subject to the provisions of the Uniform Owner-Resident Relations Act shall be commenced in the manner prescribed by the Uniform Owner-Resident Relations Act.

No longer is the old forceful entry and detainer procedure (FED)[219] available.[220] The new procedure is similar to that under FED. Differences are noted below.

The UORRA action for possession is begun by filing a petition for restitution with the clerk of either the district or magistrate court.[221] The petition must contain (1) the facts, stated with particularity, on which petitioner seeks relief,[222] (2) a reasonably accurate description of the premises, and (3) the requisite compliance with notice provision.[223] The petition may contain other claims for relief,[224] *e.g.*, an action for damages for breach of rental agreement or an action for an injunction prohibiting the owner from interfering unlawfully again. Any party may request that causes of action other than for possession be tried separately.[225]

Summons is then issued with a copy of the petition attached. The summons must state that it is an action for possession, the answer day for any other claims for relief joined with the possessory action, and notice that "if the defendant fails to appear judgment shall be entered against him."[226] This latter statement contradicts Section 44, however, which states that if the defendant is properly served but does not appear in response, "the court shall try the cause as though

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219. *Id.* § § 36-12-1 through 36-12-5 (2nd Repl. 1972).

220. Laws of New Mexico, ch. 38, § 53 (1975) amends the FED Act, stating that it "shall not apply to actions by a landlord arising out of a residential tenancy governed by the Uniform Owner-Resident Relations Act." *See* N.M. Stat. Ann. § *36-12-1.1 (Supp. 1975).*

220. Laws of New Mexico, ch. 38, § 53 (1975) amends the FED Act, stating that it "shall not apply to actions by a landlord arising out of a residential tenancy governed by the Uniform Owner-Resident Relations Act." *See* N.M. Stat. Ann. § 36-12-1.1 (Supp. 1975).

221. N.M. Stat. Ann. § 70-7-42 (Supp. 1975).

222. *Cf.* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), particularity required by due process in order to have judicial determination of the appropriateness of issuing writ.

223. N.M. Stat. Ann. § 70-7-42 (Supp. 1975).

224. *Id.*

225. *Id.*

226. *Id.* § 70-7-43.

he were present."[227] In such a case, it is conceivable, albeit improbable, that possession would be denied the owner.

The defendant need not answer the petition for possession. He may appear either on the day of trial or before and assert any legal or equitable defense, setoff or counterclaim.[228] Section 30 specifically allows the resident to counterclaim[229] for any amount recoverable under the Act in response to an action for possession based on nonpayment of rent. Section 40(B) provides that bringing an action of possession by the owner does not release him from liability under Section 20.

Trial of an action for possession is held not less than seven days nor more than ten days after service of process.[230] If judgment is rendered for the petitioner, the court may declare the rental agreement forfeited and, on the owner's request, may issue a writ of restitution directing the sheriff to restore the premises to the owner within seven days after entry of judgment.[231]

Either party may appeal. If the defendant appeals, the writ is stayed and the court may require a deposit with the clerk or an appeal bond to cover the judgment and court costs.[232] If the resident appeals, the resident pays rent into an escrow account, from which mortgage payments and other indebtedness on the property may be paid monthly.[233] If the owner is sustained on appeal, the remainder of the funds are paid to him.[234] If the decision on appeal is against the owner, the resident may remain in possession but still has the obligation to pay rent. The escrow account is paid to the owner less any amounts for which the resident successfully counterclaimed.

As discussed at the beginning of this section, the UORRA action for possession replaces the old FED procedure. There are a number of differences. Both magistrate and district courts have jurisdiction to hear actions for possession.[235] The procedure is now by petition

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227. *Id.* § 70-7-44.
228. *Id.* § 70-7-45.
229. Note that Lindsey v. Normet, 405 U.S. 56 (1972) held that the due process clause of the fourteenth amendment did not require the allowance of counterclaims and defenses in an action for possession as long as there was some other means by which they could be raised.
230. N.M. Stat. Ann. § 70-7-43 (Supp. 1975).
231. *Id.* § 70-7-46.
232. *Id.* § 70-7-47.
233. *Id.*
234. *Id.*
235. N.M. Stat. Ann. § 36-12-1(B) (2nd Repl. 1972) provided district courts with concurrent jurisdiction only for rentals of fifty dollars or more.

for restitution with its required allegations.[236] There is no additional penalty for taking an appeal.[237]

Section 48 allows the prevailing party to recover attorney's fees and court costs not only in actions for possession but in any suit "to enforce the terms and conditions of the rental agreement." This provision is modified by specific provisions in sections of the Act which allow for recovery of attorney's fees and costs only when the violation was willful and deliberate.[238]

Section 49, entitled "Unlawful and forcible entry," provides the procedure for actions arising out of unlawful detainer or forcible entry with detention or peaceful entry with unlawful detention, but may not be used for actions for possession. From the examples provided, *i.e.*, consideration of rent owing and damages done, it appears that this section can be used when a party seeks restitution of value rightfully his and yet does not seek possession. The district and magistrate courts are given jurisdiction over such complaints, and may give restitution.[239]

CONCLUSION

This Comment has had two objects: to suggest an interpretation of the Act or at some points alternative interpretations which would bring together the provisions of the Act under general headings, and to indicate where the pre-existing common law of landlord-tenant has been changed. It should be apparent that the Act is not as clear as it may at first seem. For example, the applicable law on default of rent must be gathered from 10 sections pertaining to obligations, abatement, apportionment, and remedies. Many provisions could be given more unified treatment. The Act at places appears inconsistent, *e.g.*, Sections 27 and 29 on resident's remedies. It is at many points opaque, *e.g.*, Section 34(A) on notice of extended absence and Section 29 on delivery of possession. Amendment could clarify these sections. Since the UORRA was the product of compromise, some of the opaqueness and inconsistency undoubtedly results from the redrafting necessitated by compromise.

The substantive aspects of the Act are on the whole more beneficial to tenants than was the prior law in that the Act does provide a minimal warranty of habitability, a duty to mitigate damages, an

236. *Id.* § 36-12-1 (2nd Repl. 1972) provided for filing a civil complaint alleging the existence of one or more sets of facts stating a cause of action.

237. *Id.* § 36-12-4(A) (2nd Repl. 1972) provided for payment of double the value of rent during period of appeal.

238. *See, e.g.*, N.M. Stat. Ann. § § 70-7-27(B), 28(B), 33(C), 37(C) (Supp. 1975).

239. *Id.*

opportunity to raise counterclaims in actions for possession, and some degree of guarantee that deposits will be returned or accounted for. Yet the Act is a step backward from prior law in the area of delivery of possession. The Act is also beneficial to owners in that it explicitly sets forth the resident's obligations, retains a workable summary eviction procedure, relieves them of liability for reasonable attempts to remedy non-compliance, and removes some of the uncertainty occasioned by the paucity of New Mexico cases on residential rentals.

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