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Landlord and Tenant - Retaliatory Eviction Based upon Tenant Rent Withholding as a Result of Housing Code Violations Is Unlawful and May Be Raised as a Defense in an Action by Landlord for Possession

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RECENT DEVELOPMENT

LANDLORD AND TENANT — RETALIATORY EVICTION BASED UPON TENANT RENT WITHHOLDING AS A RESULT OF HOUSING CODE VIOLATIONS IS UNLAWFUL AND MAY BE RAISED AS A DEFENSE IN AN ACTION BY LANDLORD FOR POSSESSION.

Robinson v. Diamond Housing Corp. (D.C. Cir. 1972)

In May of 1968, Mrs. Lena Robinson entered into a month to month lease of a house in the District of Columbia with Diamond Housing Corporation. Diamond sued for possession when rent was withheld[1] due to the unsafe and unsanitary condition of the premises.[2] Mrs. Robinson was able to successfully assert a *Southall Realty* defense[3] and prevailed. Following a second unsuccessful suit,[4] Diamond sued for possession on the basis of a 30-day notice to quit given a tenant at sufferance[5] and alleged that it was unwilling to make repairs and intended to remove the unit from the market.[6] Mrs. Robinson claimed that the eviction action was filed in retaliation for the assertion of the *Southall Realty* defense in the first suit, and, therefore, could not be maintained.[7] The

1. Robinson v. Diamond Housing Corp., 463 F.2d 853, 858 (D.C. Cir. 1972). For an in-depth study of rent withholding legislation and problems attendant thereto in one jurisdiction, *see The Pennsylvania Project — A Practical Analysis of the Pennsylvania Rent Withholding Act,* 17 VILL. L. REV. 821 (1972); Comment, *Housing Market Operations and the Pennsylvania Rent Withholding Act — An Economic Analysis,* 17 VILL. L. REV. 886 (1972).

2. At the conclusion of the trial in Diamond's original suit for possession, the jury returned a special verdict finding that housing code violations rendered the leased house unsafe and unsanitary. 463 F.2d at 858.

3. In Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968), the District of Columbia Court of Appeals held that a lease purporting to convey property burdened with substantial housing code violations was void and that the landlord was not entitled to regain possession from the tenant because of the tenant's nonpayment of rent. *Id.* at 837.

4. Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. App. 1969). In the second suit Diamond contended that, since the lease was void, Mrs. Robinson was a trespasser. The District of Columbia Court of Appeals affirmed the decision of the trial court which held that, under the unenforceable lease entered into in violation of the law, the tenant was a tenant at sufferance rather than a trespasser. *Id.* at 495. *See* note 5 *infra.*

5. D.C. CODE ENCYCL. ANN. § 45-902 (1968). The 30-day notice is a grace period which allows the tenant time to find new accommodations before the landlord can require him to vacate the leased premises.

In the District of Columbia, a tenant at sufferance — one holding over and paying rent after the expiration of his lease — is entitled to a 30-day notice before his possession can be terminated. Hampton v. Mott Motors, Inc., 32 A.2d 247 (D.C. Mun. Ct. App. 1943). *See* D.C. CODE ENCYCL. ANN. §§ 45-820, -902, -904 (1968) and accompanying commentary.

6. 463 F.2d at 859. *See* notes 47-49 and accompanying text *infra.*

7. In Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969), the United States Court of Appeals for the District of Columbia Circuit

trial court, however, granted Diamond's motion for summary judgment[8] and was affirmed by the District of Columbia Court of Appeals which held that, as a matter of law, the retaliatory eviction defense was unavailable.[9] On further appeal, the United States Court of Appeals for the District of Columbia Circuit[10] reversed, *holding* that in view of the legislative policy enunciated in the District of Columbia Housing Regulations (Housing Regulations), and the accompanying reliance on private enforcement, Mrs. Robinson should have been given the opportunity to prove the facts necessary to establish a retaliatory eviction defense. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

In recent years many of the common law principles of landlord and tenant law[11] have been subject to increasing scrutiny, especially as they relate to urban housing.[12] This has been particularly true in the District of Columbia where court decisions[13] and legislation[14] have fortified the federal policy to provide a decent home and a suitable living environment for every American family.[15]

Three cases are of special import when considering the impact of *Diamond Housing,* the foremost of which is *Edwards v. Habib.*[16] In *Edwards,* a landlord gave the 30-day statutory notice to quit to a tenant who held under a month to month lease after the tenant complained of sanitary code violations to the Department of Licenses and Inspections.[17] The United States Court of Appeals for the District of Columbia Circuit held that while a landlord could evict for any legal reason or for no

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held that a tenant who had reported housing code violations to the authorities could raise the retaliatory motive of his landlord as a defense in eviction proceedings. *Id.* at 699.

8. 463 F.2d at 859.

9. Robinson v Diamond Housing Corp., 267 A.2d 833 (D.C. App. 1970).

10. *See* notes 87–90 and accompanying text *infra.*

11. *See generally* 20 GEO. L.J. 521 (1931).

12. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *See also* Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code,* 6 REAL PROP. PROB. & TR. J. 550 (1971); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change,* 54 GEO. L.J. 519 (1966); Skillern, *Implied Warranties in Leases: The Need for Change,* 44 DEN. L.J. 387 (1967).

13. *See* notes 16–29 and accompanying text *infra.*

14. D.C. HOUSING REG. §§ 2901–14 (1970). These regulations are set out in Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord Tenant Law Reform in the District of Columbia,* 59 GEO. L.J. 909, 958–61 (app.) (1971).

15. 42 U.S.C. § 1441 (1970).

16. 397 F.2d 687 (D.C. Cir. 1968). *See* Comment, *Protection for Citizen Complaints to Public Authorities — Prohibition of Retaliatory Evictions: The Case of Edwards v. Habib,* 48 NEB. L. REV. 1101 (1969); 23 ARK. L. REV. 122 (1969); 82 HARV. L. REV. 932 (1969).

17. 397 F.2d at 688–89. The Department of Licenses and Inspections is charged with the responsibility for overseeing the implementation of housing regulations in collaboration with the Department of Public Health. The Department of Licenses and Inspections conducts inspections, administers and executes regulations, prepares notices of deficiencies, and investigates all complaints regarding housing. D.C. CODE ENCYCL. ANN. tit. I, App. II, Reorg. Ord. No. 55, pt. III(c) (1966), *as amended* D.C. CODE ENCYCL. ANN. tit. I., App. II, Reorg. Ord. No. 55 (Supp. 1972).

reason, he could not, as a matter of policy and statutory interpretation,[18] evict in retaliation for a tenant's report of housing code violations to the proper authorities.[19] That holding represented a further judicial limitation[20] on the common law rule governing the landlord's power to evict.[21]

In *Brown v. Southall Realty Co.*,[22] the District of Columbia Court of Appeals held, in an action by a landlord for nonpayment of rent, that a lease purporting to convey property burdened with substantial housing code violations was illegal and void and that the lessor was not entitled to possession because of the lessee's nonpayment of rent.[23] The court relied on the Housing Regulations[24] to establish the standard by which the landlord's right to collect rent was to be measured.[25]

In a more recent case, *Javins v. First National Realty Corp.*,[26] the United States Court of Appeals for the District of Columbia Circuit, recognizing the needs of modern urban society, held that a warranty of habitability, measured by the standards of the Housing Regulations, was implied by operation of law in leases of dwelling units[27] and that a breach of that warranty gave rise to usual contract remedies.[28] The court stressed the myriad differences between feudal England and urban America, and stated:

18. The court in *Edwards*, although it did not decide the issue on constitutional grounds, devoted a major portion of its opinion to the question of the tenant's constitutional rights and the extent to which the principle of Shelley v. Kramer, 334 U.S. 1 (1948), was to be applied. 397 F.2d at 690–98 & nn. 6–37. *Shelley* established the principle that "private" discriminatory action by individuals may amount to state action within the meaning of the fourteenth amendment by virtue of a party's resort to the state judicial system for enforcement of his action. 334 U.S. at 20. *See* 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193 (1967); 13 ST. LOUIS U.L.J. 323 (1968).

19. 397 F.2d at 699.

20. The dissent argued that this was a matter to be resolved by the legislature and not by the courts. *Id.* at 704 (Danaher, J., dissenting).

21. At common law, a tenant without a fixed time period in his lease could be evicted for any reason or no reason. Note, *Retaliatory Eviction — Is California Lagging Behind?*, 18 HASTINGS L.J. 700, 702 (1967). Courts previously have limited a landlord's power to evict in other circumstances. United States v. Beatty, 288 F.2d 653 (6th Cir. 1961) (prohibition against evicting a tenant for registering to vote or voting); Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955) (when the government is the landlord, it cannot act arbitrarily and is subject to due process requirements); Calvin v. Martin, 64 Ohio L. Abs. 265, 111 N.E.2d 786 (Ct. App. 1952) (emergency rent control legislation may limit a landlord's rights).

22. 237 A.2d 834 (D.C. App. 1968).

23. *Id.* at 837.

24. D.C. HOUSING REG. §§ 2901–14 (1970).

25. 237 A.2d at 836.

26. 428 F.2d 1071 (D.C. Cir. 1970).

27. At common law, there was no implied warranty of habitability. However, an exception was later grafted onto this rule for a short-term lease of a furnished dwelling. *See* 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952); Note, *Recent Erosions of Caveat Emptor in the Leasing of Residential Housing*, 49 N.C.L. REV. 175 (1970). Other jurisdictions have also adopted the *Javins* approach to warranties of habitability. *See* Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

28. 428 F.2d at 1072–73. Leases were considered conveyances at common law, and the application of contract law principles to leases is a relatively new development in the history of landlord-tenant relations. *See* Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP. PROB. & TR. J. 550 (1971); Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?* 9 KAN. L. REV. 369 (1961). As to potential contract remedies, *see* Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969).

> The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 to 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, *they seek a well known package of goods and services* — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[29]

The holdings of *Southall Realty* and *Javins* have been codified in the Housing Regulations.[30] The *Southall Realty* holding that a lease is void if entered into while the property is burdened with housing code violations rendering it unsafe or unsanitary, is contained in section 2902.1(a). The lease is also rendered void under section 2902.1(b) if the violations develop during the period of the tenancy and go uncorrected. The *Javins* warranty of habitability is codified in section 2902.2. The Housing Regulations thus appear to allow the tenant in search of a remedy to proceed under either the *Southall Realty* illegal contract theory or the *Javins* warranty of habitability theory.[31]

The Housing Regulations codify and expand the holding of *Edwards* by protecting the tenant from both retaliatory eviction and from retaliation that falls short of actual eviction[32] when the tenant has complained of housing code violations to the authorities — the basic *Edwards* situation — organized or joined a tenant's union, or asserted other rights under the Housing Regulations,[33] including rights under section 2901[34] or section 2902.[35] It was the interplay of the section 2902 habitability rights with the section 2910 protection against retaliatory action that formed the basic issue in *Diamond Housing*.

Since continued inspection of every dwelling would be an impossible burden, the housing regulatory scheme relies, to a large extent, upon individual tenants to bring violations to the attention of the Department of Licenses and Inspections so that investigation can be made.[36]

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29. 428 F.2d at 1074 (emphasis added). The opinion also briefly discussed the warranties available with contract law. *Id.* at 1075–77.

30. D.C. HOUSING REG. § 2902 (1970). *See* Daniels, *supra* note 14, at 933.

31. Daniels, *supra* note 14, at 933.

32. The Housing Regulations provide in pertinent part:

> [A]n owner [shall not] . . . cause a tenant to quit a habitation involuntarily, nor demand an increase in rent from the tenant, nor decrease the services to which the tenant has been entitled, nor increase the obligations of a tenant . . . .

D.C. HOUSING REG. § 2910 (1970).

33. The Housing Regulations do not expressly provide for rent withholding, but it has been stated, and supported by analysis, that the right to withhold rent flows logically from the illegal contract and warranty remedies within the regulations. Daniels, *supra* note 14, at 935–38.

34. D.C. HOUSING REG. § 2901 (1970) sets forth the standard of policy of the regulations.

35. D.C. HOUSING REG. § 2910(a)–(c) (1970).

36. *See* Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968), where the court noted the obvious dependence of code enforcement on private initiative, as

The inconvenience and possible disclosure of violations which those complaints and inspections cause the landlord form the basis for his desire to discourage them. As stated by the court, the question presented in the instant case was whether or not a landlord who had been frustrated in his effort to evict a tenant for nonpayment of rent by the tenant's assertion of a *Southall Realty* defense could accomplish the same goal by serving a 30-day notice to quit.[37] It would seem clear that if the answer were in the affirmative, no rational or successful housing policy relying upon tenant enforcement could be pursued. *Edwards* prohibited retaliatory action taken for the raising of a complaint. If tenants could be subjected to retaliatory eviction by the landlord *after* violations have been established, the net effect would be that tenants would not complain.[38] Without complaints, there would be no enforcement and the deterioration in housing conditions would continue.

The *Diamond Housing* court analyzed the problem by starting with the assumption that the *Edwards* principle controlled.[39] From this, it followed that Diamond could evict if it could show a valid reason, or no reason at all for its action. Mrs. Robinson could remain in possession if she were able to persuade the jury that the eviction was retaliatory. Diamond's position was that an *Edwards* defense in this situation was legally insufficient. Diamond presented four lines of analysis which it contended led to that conclusion; however, the majority was unpersuaded. As the majority indicated, the question of motivation, which was the basic issue of fact, was inappropriate for summary judgment.[40]

Diamond first argued, relying on the opinion of the District of Columbia Court of Appeals from an earlier action in the Robinson-Diamond dispute,[41] that *Edwards* should be "limited to its facts."[42] The

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well as the number of complaints in a given year resulting from private action. *Id.* n.43. *See Hearings on S.2331, S.3549, and S.3558 Before the Subcomm. on Business and Commerce of the Senate Comm. on the District of Columbia,* 89th Cong., 2d Sess., *passim* (1966).

37. 463 F.2d at 857.

38. *See id.* at 860. The *Diamond* court noted the observation of a previous panel of the District of Columbia Circuit that there was a "rising incidence of possessory actions based on notices to quit following closely on the heels of possessory actions based on nonpayment of rent." *Id., quoting* Cooks v. Fowler, 437 F.2d 669, 673 (D.C. Cir. 1971). *See* Daniels, *supra* note 14, at 943. For a discussion of the subject of code enforcement and its effects on the low-cost housing market, *see* Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy,* 80 YALE L.J. 1093 (1971).

39. 463 F.2d at 861.

40. *Id. See* note 68 and accompanying text *infra.*

41. Robinson v. Diamond Housing Corp., 267 A.2d 833 (D.C. App. 1970). *See* note 9 and accompanying text *supra.*

42. 463 F.2d at 861. *Edwards* involved a tenant with a month to month lease who was given notice to vacate after complaining of housing code violations. The *Diamond* tenant was a tenant at sufferance who was occupying the premises under a void lease. The latter tenant had made no complaint, but had used the violations as a defense to the landlord's suit for possession. While this factual distinction exists between the two situations, it is submitted that the majority in *Diamond Housing* correctly interpreted the meaning of *Edwards* — that the tenant is to be protected from retaliatory action when he takes his part in the enforcement scheme. The court recognized both the complaint process and rent withholding as part of

majority disapproved of this narrow approach, noting that there was "no reason why anything should turn on the different legal status of this tenant or the different use to which she put the Housing Regulations."[43] The Housing Regulations disclosed both a policy statement by the legislative body that private enforcement was necessary,[44] as well as a clear determination that no tenant could be evicted for successfully asserting a *Southall Realty* defense.[45] Such a policy did not rest on the court's interpretation of the intentions of the legislature as it did in *Edwards,* but on explicit statutory language.[46]

Unsuccessful in the attack on the scope of the *Edwards* decision, Diamond opened a second front alleging in its affidavit that it was unwilling to make the repairs required to comply with the Housing Regulations and stating its intention to remove the unit from the market.[47] Diamond claimed a right not to have tenants, and, since it was not going to repair, was arguably following the spirit of the regulations by not renting a dwelling unfit for habitation.[48] The court was unimpressed with that approach and, while it recognized a landlord's right to discontinue rental of *all* his units, held that that right did not justify the removal of but some of his units from the housing market in an effort to intimidate his remaining tenants.[49]

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the legislative plan for enforcement, and, therefore, considered that the tenant was to be protected from retaliatory action while engaged in either course. *Id.* at 863.

43. *Id.* at 862.

44. *See* D.C. HOUSING REG. § 2901.2 (1970).

45. *Id.* § 2910(c).

46. The *Diamond Housing* court flirted with the constitutional issue raised in *Edwards,* whether eviction through the judicial process for reporting code violations to the proper authorities amounted to governmental action hindering first amendment rights, but by-passed it since the legislative intent made such inquiry unnecessary. *See* note 18 *supra.* The court, nevertheless, did refer to a case relying on the constitutional issue, Hosey v. Club Van Courtlandt, 299 F. Supp. 501 (S.D.N.Y. 1969). In examining the *constitutional* issues involved in retaliatory eviction, the *Hosey* court stated:

> A retaliatory eviction would be judicial enforcement of private discrimination; it would require the application of a rule of law that would penalize a person for the exercise of his constitutional rights . . . .
>
> . . . Permitting retaliatory eviction would thus inhibit him in the exercise of his constitutional rights or, in the words of the Supreme Court, have a chilling effect.
>
> We accordingly hold that the fourteenth amendment prohibits a state court from evicting a tenant when the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for an exercise of his constitutional rights.

Id. at 506 (footnotes omitted).

47. 463 F.2d at 859.

48. *Id.* at 864. *See* Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 950 (D.C. Cir. 1960), wherein the court stated that compliance could be had with the code by repairing or taking the unit from the market.

49. 463 F.2d at 867. *See* Palmer v. Thompson, 403 U.S. 217 (1971); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965). The court in *Diamond* set no criteria to be used in determining whether Diamond was going out of business or engaging in a discriminatory partial closing. For example, if Diamond owned several buildings, would the closing of one amount to going out of business, or would the discontinuance of apartments on one floor to create office space amount to going out of business?

In response to Diamond's argument, attorneys for Mrs. Robinson suggested that the court formulate comprehensive guidelines to deal with eviction when the property involved is subject to housing code violations. While the court declined that invitation because it feared that guidelines might become a mechanical means of resolving cases,[50] it did set forth "clarifications" which it felt were applicable. The court expressed the hope that the "clarifications" would dispel some confusion surrounding the issue[51] and would assist in the case by case development which the court favored for *Edwards*-type situations.[52]

Under section 2301 of the Housing Regulations, occupation of a dwelling burdened with violations is illegal.[53] Diamond raised this issue as its third argument for eviction, claiming it was unlawful for Mrs. Robinson to occupy, and for Diamond to allow occupancy of, such a dwelling unit. The court initially rejected this reasoning on an estoppel basis, taking the position that the landlord could not rely on his wrongful neglect in not repairing the dwelling as a basis for evicting the tenant.[54] Diamond need not "permit" habitation of such a unit if it could correct the violations, so that, unless Diamond was unable to repair, the tenant could not be evicted on this ground.[55] If Diamond was unable to repair, the tenant could then be evicted and the unit taken from the market, but not taken, repaired, and leased to another.[56]

Diamond's fourth point, mootness, was only briefly discussed by the court. Diamond argued that the case should be dismissed since the tenant had left the property voluntarily. Since there was a conflict in the evidence as to why Mrs. Robinson had vacated the premises while the case was still in the courts, the issue was left for determination upon remand.[57]

The foundation of the retaliatory eviction defense is the intention of the landlord, and if his intention is to punish the tenant for lawful action by evicting him, or to intimidate other tenants by evicting one of their number who insists on exercising his legal rights, eviction is not permissible.[58] In *Edwards,* the court stated that, in the case of a tenant without a lease, a landlord need not give a reason for an eviction, but only had to show that the tenant had received the required 30-day notice to quit.[59] The defense of retaliatory motive was available to the tenant, but he was

50. 463 F.2d at 864.
51. *Id.* at 865.
52. *Id.* at 864.
53. The Housing Regulations provide that "[n]o owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations." D.C. HOUSING REG. § 2301 (1970).
54. 463 F.2d at 868.
55. *Id.*
56. *Id.* at 866 n.20. This would produce the most undesirable result since the tenant, after all his effort, would see the unit made habitable and then rented to another when his action made the improvement possible.
57. *Id.* at 870.
58. *Id.* at 865.
59. 397 F.2d at 699. *See* note 5 and accompanying text *supra.*

obliged to meet the burden of proof in order to succeed.[60] The *Diamond* court, noting that the subjective motive of the landlord could only be determined by objective manifestations, determined that when the manifestations evidenced conduct "inherently destructive" of tenant rights or chilled their exercise, the presumption was thereby established that the landlord's motive was improper.[61] The court stated that when the presumption is established, "it is then *up to the landlord to rebut it* by demonstrating that he is motivated by some *legitimate business purpose* rather than by the elicit motive which would otherwise be presumed."[62] The court left the "inherently destructive" category open-ended in keeping with its desire to encourage case by case development, but resolved the issue at hand by clearly establishing that an unexplained eviction following the assertion of a *Javins* or *Southall Realty* defense was squarely within the "inherently destructive" category and gave rise to the presumption of illicit motive.[63]

The *Diamond* court appears to have adopted a more liberal stance with regard to the presumption of a retaliatory motive than that previously proposed by others.[64] Instead of a time limit approach, the *Diamond* court would examine the actual conduct of the landlord and, if found to be within the proscribed category, the landlord is presumed to have an illicit motive, even if the attempt to evict comes over a year after the initial action by the tenant. The Model Residential Landlord-Tenant Code (Model Code) evidences a policy not to subject the landlord to such an open-ended test[65] and its possible undesired side effects. Both the Uniform Residential Landlord Tenant Act (Uniform Act) and the Model Code will presume an illicit motive if the landlord moves to evict a tenant within a given period of time. That approach offers some certainty and

60. *Id.* at 700.

61. 463 F.2d at 865. The court found an analogous situation regarding proof of motive in controversies in the field of labor law. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Brown, 380 U.S. 278 (1965).

62. *Id.* (emphasis added). The issue of presumption of unlawful motive after certain types of eviction also has been discussed in two proposed codes. In the Uniform Residential Landlord-Tenant Act, acts against the tenant are presumed retaliatory if occurring within one year of the complaint or action by the tenant. UNIFORM RESIDENTIAL LANDLORD-TENANT ACT § 5.101(b) (request for approval withdrawn 1973) [hereinafter cited as UNIFORM ACT]. The Uniform Act is set forth in Subcomm. on the Model Landlord-Tenant Act of Comm. on Leases, *Proposed Uniform Residential Landlord and Tenant Act,* 8 REAL PROP. PROB. & TR. J. 104 (1973). *See also* the accompanying commentary. *Id.* The Uniform Act covers the *Edwards* situation, but not the problem treated in *Diamond.*

The Model Residential Landlord-Tenant Code also deals with retaliatory action. MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407 (Tent. Draft 1969) [hereinafter cited as MODEL CODE]. The Model Code provides a six month period of presumption of retaliation, but also lists reasons for which the landlord may evict provided he overcomes the presumption of retaliation. *Id.* § 2-407(2)(a)-(h). *See also* Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code,* 21 HASTINGS L.J. 369 (1970), for commentary on the Model Code and its solutions to modern problems in the landlord-tenant area. The *Diamond Housing* court was seeking well-reasoned solutions to these problems based on the social policy expressed by the legislature, rather than the "instant" solutions to be found by applying a rule to every case.

63. 463 F.2d at 865.

64. *See* note 62 *supra.*

65. MODEL CODE § 2-407, comment (Tent. Draft, 1969).

puts both the landlord and tenant on notice that eventually they can be separated. With the *Diamond* position, however, the possibility that a tenant could raise the retaliatory eviction defense can drag on long past any beneficial purpose of the defense and merely become a harassment to the landlord. The *Diamond* court gave no indication that it foresaw tenant abuse of the remedy provided, although the dissent did sound a note of general alarm at the potential consequences of the court's stance.[66]

Even under the *Diamond* approach, however, the landlord and tenant are not welded together. The landlord may overcome the unfavorable presumption by producing evidence sufficient to show a legitimate business justification for his action.[67] The questions of the sufficiency of the justification and of whether the landlord was motivated by that justification, are questions of fact in each case.[68] Although the court was not overly expansive in its handling of what constituted a legitimate business justification, it clearly stated that a "convincing showing" by Diamond that it was impossible or unfeasible to make repairs would suffice as a legitimate justification.[69] Just as clearly, the court refused to accept the desire to remove a tenant not paying rent, under these circumstances, as a legitimate justification.[70] The desire to remove a unit from the market was insufficient, in the majority view, to qualify as a legitimate justification unless the reason for the removal was found by a jury to be sufficient to overcome the otherwise presumed unlawful motive.[71] The majority ignored the practical problems Diamond would face in trying to convince a jury of its pure motives, thus possibly cementing the bonds of the troublesome union and driving Diamond, denied a legal divorce, to abandon the property.[72]

The public policy against occupancy of substandard dwellings was examined by the court in two different types of cases. In the situation in which the violations existed and the landlord was unable to repair, the landlord had a legitimate reason for taking the unit off the market and could meet his section 2301 obligations by evicting the tenant.[73] Where the

66. 463 F.2d at 871–72 (Robb, J., dissenting).
67. *Id.* at 865.
68. *Id.* at 867. The existence of a factual dispute of potential complexity, the majority felt, made the resolution of the dispute by summary judgment inappropriate, even with an unopposed affidavit filed by one of the parties. *Id.* at 866–67. Judge Robb took issue with the majority on this procedural point. The affidavit of Diamond stating its unwillingness to repair and desire to take the unit from the market was not opposed by an affidavit from Mrs. Robinson. *Id.* at 871 (Robb, J., dissenting). Judge Robb was of the opinion that summary judgment was appropriate since no material issue of fact as to the motive of the landlord existed. *Id.* Confronted with the affidavit, Judge Robb seemed willing to accept the proposition that Diamond's reason for the eviction was sufficient as a matter of law, a position already rejected by the majority under the "inherently destructive" test. The majority thus impliedly held that a sworn, unopposed affidavit was legally insufficient to rebut the presumption of illegal action by the landlord.
69. *Id.* at 865–66.
70. *Id.* at 865.
71. *Id.* at 866.
72. *See id.* at 871–72 (Robb, J., dissenting).
73. *Id.* at 869.

landlord was able but unwilling to repair, the court viewed taking the unit off the market as constructive eviction or trying to do constructively what he could not do actually.[74] Although the tenant has contract remedies for such action by the landlord, exactly what they are and what relief is available will require further exposition.[75]

Judge Robb's dissent centered most of its attention, not on the specifics of the majority's opinion, but on the underlying philosophy which Judge Robb felt the court espoused.[76] The dissent saw no legal basis to support the presumption of illicit motive which the majority established, and rejected the concept that the solution to an apparently insolvable problem, the blight of urban housing, lay in the public control of the business activity of the private landlord.[77] While not extensively developed, the dissenting opinion reflected a deep-rooted distrust for the type of regulation the majority was considered to favor, as well as a fear of the practical consequences of excessive interference.[78]

Any court could feel comfortable in taking judicial notice of the deplorable housing conditions in America's inner cities. Tenants are becoming more militant and organized, and, in the District of Columbia, the Housing Regulations forbid an eviction on the basis of organizing or belonging to such a tenant group,[79] thus impliedly encouraging such activity. The landlord who is a slumlord, either because of his own indifference or because of the unfortunate social and economic circumstances afflicting society as a whole, evokes little sympathy. When the landlord, or slumlord, finds the situation intolerable, unprofitable, or both, he will most likely not invest further in his property, withdraw his capital, or simply abandon it. The fact of landlord flight or attrition may or may not be borne out of empirical evidence,[80] but that would be the consequence of the "Draconian" treatment of landlords[81] which the majority tacitly seemed to encourage and which the dissent feared. Such flight of the private landlord, coupled with other factors, would leave the inferior housing units, and thus their tenants, to the mercy of their most probable new landlord, the city governmental bodies.[82]

Taking the dissent's approach to its extremes, a landlord could argue that excessive state regulation by legislative and judicial action in effect had gone beyond reasonable regulation for the public health, safety, or welfare and was in reality a "taking" within the meaning of the fifth

74. *Id.*

75. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.61 (1970). *See also* MODEL CODE §§ 2-204 to -208, 2-408 (Tent. Draft, 1969).

76. 463 F.2d at 871-72 (Robb, J., dissenting).

77. *Id.*

78. *Id.*

79. D.C. HOUSING REG. § 2910(b) (1970).

80. *See* Ackerman, note 38 *supra.*

81. 463 F.2d at 872 (Robb, J., dissenting).

82. In 1966, for example, New York City's Real Property Department was the largest slumlord in the nation. SATURDAY EVENING POST, Dec. 17, 1966, at 8.

amendment.[83] It remains speculative whether Judge Robb's fears would extend so far, but when a social policy, with its actions and reactions, is set in motion, its momentum may carry it beyond originally contemplated boundaries.

The majority rather quickly passed over the questions raised by Judge Robb, as if afraid of the practical difficulties of approaching them too closely. Unfortunately, data on the influence of *Diamond Housing* will not be forthcoming for some time, but even with the data available to it at the time of the *Diamond* decision, the majority cavalierly accepted the proposition that landlord regulation through code enforcement would not affect the availability of housing.[84] Common experience would seem to indicate that excessive regulation causes capital to flee to the most profitable enterprise that has the least amount of hindering regulation. If this observation is correct, then urban housing would be a low priority item for private capital, especially urban housing for the poor. It is to be hoped that the prediction of the majority will prove more accurate than that of Judge Robb, but, if so, it would appear to be more the result of good fortune than an occurrence expected because of a rational choice of alternatives.

Note should also be taken of the court's decision to provide "clarifications," rather than comprehensive guidelines, to resolve the problems of applying its decision in *Diamond Housing*. Besides the reasons enunciated by the court,[85] several others can be discerned. First, as evidenced in Judge Robb's dissent,[86] there would appear to be a "jurisdictional restraint" on the expansive exercise of the court's power. The District of Columbia Court Reorganization Act of 1970[87] evidenced an intent by Congress to leave matters of local concern — landlord-tenant matters are notorious as such — to the local courts of the District, and to not bring into federal courts cases which would be in state courts in other jurisdictions.[88] Second, the *Diamond Housing* court may have been unwilling to burden the courts of the District with a set of guidelines when the federal courts will no longer hear such cases, and the District

83. The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. This is analogous to the situation where a private land owner may challenge zoning laws as being unconstitutional "takings" of private property. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In regard to the application of the fifth amendment prohibition against such taking without compensation to the states through the fourteenth amendment, *see* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (dictum); Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Annot., 23 L.Ed.2d 985, 989, *supplementing* Annot., 18 L.Ed.2d 1388, 1406.

84. 463 F.2d at 860.

85. *See* notes 50–52 and accompanying text *supra*.

86. 463 F.2d at 871 (Robb, J., dissenting).

87. District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91–358, tit. 1, 84 Stat. 475 (codified in D.C. CODE ENCYCL. ANN. §§ 11-101 *et seq.* (Supp. (1970).

88. 463 F.2d at 871 (Robb, J., dissenting). *See* 115 CONG. REC. 26072–73 (1969).

of Columbia courts will no longer be bound by federal precedent.[89] Finally, after the *Edwards* decision and the legislative codification of *Javins* and *Southall Realty,* the court might also have felt that with *Diamond Housing* it had fulfilled its role in implementing basic policy and that future cases should be decided with reference to such decisions without judicial declaration of explicit guidelines. Such an approach would more easily permit modification or changes in position should the conditions develop differently from those the majority foresaw.

The *Diamond Housing* court has taken the next logical step after *Edwards* in protecting the rights of tenants. However, under the policy established by Congress of keeping essentially local matters in local courts,[90] the courts of the District of Columbia are to function with respect to the federal courts in the same manner as the courts of the states function with respect to the federal courts within their borders. Therefore, the practical benefits of *Diamond Housing* may be somewhat diffused and dissipated because cases which previously would have reached a sympathetic United States Court of Appeals may now not do so, leaving their disposition to the District of Columbia courts which may be more subject to local pressure and lack the independence of the federal courts.[91]

The impact of the *Diamond* decision remains speculative, and, in the context of the increasing deterioration of urban areas, such a holding may be a final factor in driving borderline landlords from the business, thus injecting even greater state control and regulation into what was once the private sector. On the other hand, it may be the one necessary step left to keep the landlord, even with the burden of proof he bears, from evicting the tenant in the face of legislative prohibition.

The *Edwards* position forbidding retaliatory eviction has been accepted by other jurisdictions,[92] but whether the rationale of *Diamond Housing* will enjoy such support remains to be seen. One of the most important factors that will influence the response to *Diamond Housing* is whether the view of the majority, landlord adjustment, or that of the dissent, landlord flight, materializes. If the former, *Diamond Housing* may stand in the vanguard of future housing policy; if the latter, then

89. M.A.P. v. Ryan, 285 A.2d 310 (D.C. App. 1971).

90. *See* notes 86–89 and accompanying text *supra.*

91. This is not to say that the District of Columbia Court of Appeals is "anti-tenant," and it should be noted that *Southall Realty* was decided by that court. However, the court adopted a narrow and restrictive reading of *Edwards* in *Diamond Housing,* which may be a more accurate barometer of the court's approach to future landlord-tenant controversies. The District of Columbia Circuit in *Diamond* also viewed the holding of the District of Columbia Court of Appeals as in direct conflict with the Housing Regulations, a possible indication that the District of Columbia Court of Appeals will interpret similar regulations restrictively.

92. *See, e.g.,* Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (Ct. App. 1971); Silberg v. Lipscomb, 117 N.J. Super. 491, 285 A.2d 86 (Dist. Ct. 1971); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). Some jurisdictions have adopted the rule by statute. *See, e.g.,* PA. STAT. tit. 35 § 1700–1 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1972); CONN. GEN. STAT. REV. § 52–54–2 (Supp. 1972). For a further listing, *see* UNIFORM ACT § 5.101, Comment (request for approval withdrawn 1973). *Cf.* MODEL CODE § 2–407 (Tent. Draft, 1969).

it may well be the high water mark in the struggle to control the blight which has affected urban housing. *Diamond Housing* will be either an end or a beginning of major developments in landlord-tenant law for some time. Despite its influence on the District of Columbia, the impact on the policy of other jurisidictions may prove far more significant.

A final point which must be considered in regard to the impact of this decision is the unique geographic situation in which it was decided. The District of Columbia is not only the seat of the federal government, but also the only totally urban jurisdiction on a level comparable to the states. It is not faced with the different regional and economic areas and interests which hinder state governments, make enactments of legislation more challenging, and make the judiciary more cognizant of divergent parochial viewpoints. Urban areas may be hamstrung by rural legislators whose constituencies are not greatly moved by city problems and who may demand that their representatives allocate resources to their needs. To the extent that proves true, the impact of *Diamond Housing* in jurisdictions other than the District of Columbia may be lessened.

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