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Chapter 19: Rent Control

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C H A P T E R 19

Rent Control

ROBERT M. BLOOM* AND MARSHALL F. NEWMAN**

§19.1. Statutory responses to housing shortages. *Early history.* Contrary to a widely-held belief, the use of rent controls to ameliorate severe housing shortages is not a new phenomenon in Massachusetts. As early as December 12, 1919, the General Court, responding to the acute housing shortage brought on by World War I, ordered the Commission on the Necessaries of Life to study and investigate the circumstances affecting the charges for rent of property used for living quarters.¹ At first, the powers of the Commission were limited to the holding of hearings and the making of reports. In June 1920, the Commission was further empowered to investigate all complaints and to make a survey of the housing situation throughout the Commonwealth.²

The first, albeit primitive, rent control law in Massachusetts was in Acts of 1920, chapter 578. The Act made unenforceable in actions for rent all “unjust and unreasonable rents” for dwelling premises, excluding boarding rooms or rooms in hotels.³ The statute created a rebuttable presumption that a rental charge was unjust and unreasonable if it had been increased by more than 25% over the previous year’s charge, except in cases where unusual repairs and alterations had been made.⁴ Although the Act made unjust rents unenforceable, it did not preclude a landlord from using summary process to recover possession of premises from tenants who refused to pay the “unenforceable” rent increases. This gaping loophole undermined the effec-

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§19.1. ¹ Acts of 1919, c. 365. The Commission was initially established only to study and investigate the soaring prices of commodities. Acts of 1919, c. 341. Its charge to study rentals was something of an afterthought.

² Acts of 1920, c. 628.

³ Acts of 1920, c. 578, § 1.

⁴ *Id.*

tiveness of the law during its three years of existence.⁵

Federal controls—World War II. The Emergency Price Control Act of 1942 (EPCA),⁶ like the earlier Massachusetts legislation, was a response to the extraordinary circumstances brought on by a world war. Congress felt that the stabilization of prices and rents was necessary to carry on the war effort.⁷ The EPCA created an Office of Price Administration (OPA), which was empowered to designate an area as a “defense rental area” after consulting with state and local officials.⁸ After a locality was so designated, state and local officials were given sixty days in which to act on their own with regard to high rents.⁹ If the state or local officials failed to act, the Price Administrator could establish as maximum rent levels those rents in effect before the war effort had been undertaken.¹⁰ All counties in Massachusetts were eventually designated as defense rental areas with the maximum rent levels set at the rental charges in effect on March 1, 1942.¹¹

A landlord in a defense rental area, under sanction of a \$5,000.00 fine or one year imprisonment or both,¹² was required to register with the local OPA office and to provide his tenants with a copy of this registration.¹³ Whenever there was a change in tenants, the landlord was required to file a notice of the change, bearing the new tenant’s signature, with the local OPA office.¹⁴ This procedure insured that no new tenant would pay more than the maximum rent. If a landlord wanted to increase the rent, he had to petition the Area Rent Office and demonstrate that at least one of the several circumstances enumerated in the OPA Rent Regulations for Housing¹⁵ applied to the building in question.

⁵ Although chapter 578 was originally scheduled to remain in effect for only 20 months (until February 1, 1922), id. § 3, Acts of 1921, c. 488, extended its life for an additional year, and Acts of 1922, c. 357, § 4 extended it an additional six months (until July 1, 1923).

⁶ Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

⁷ Id. § 1(a), 56 Stat. 23-24.

⁸ Id. §2(b), 56 Stat. 26

⁹ Id., 56 Stat. 25.

¹⁰ Id.

¹¹ All counties in Massachusetts had been declared defense rental areas by October 5, 1942, with the exceptions of the counties of Dukes and Nantucket. Those two counties were brought under rent control when the Price Administrator designated as defense rental areas all sections of the country not previously controlled. 7 Fed. Reg. 7942 (1942).

¹² Act of Jan. 30, 1942, ch. 26, § 205(b), 56 Stat. 33.

¹³ Rent Regulation for Housing § 7(a), 8 Fed. Reg. 7345 (1943).

¹⁴ Id.

¹⁵ Id. § 5, 8 Fed. Reg. 7341 (1943). Among the circumstances which might permit an increase in the maximum rent allowable were the undertaking of major capital improvements; an increase in the services or furnishings supplied to the building; an increase in the number of occupants; or a showing that the rent in effect as of the maximum rent date had been based on personal or special relationships, thus causing the rent to be lower than the fair market value of the premises. Id.

The EPCA, in addition to controlling rents, also imposed a few rather ineffectual restraints on evictions in defense rental areas. If a landlord wanted to evict a tenant on one of the six grounds specified in the Regulations,¹⁶ he merely had to give notice to the tenant and the area rent office before initiating summary process.¹⁷ These six grounds for eviction were not exclusive, however; if a landlord wanted to evict a tenant for other reasons and established that the eviction would not be inconsistent with the purposes of the EPCA and the Rent Regulation for Housing, he could obtain a certificate of eviction from the area rent office and then proceed in court.¹⁸

Federal rent control after World War II. The life of the EPCA was extended several times after the conclusion of World War II,¹⁹ but by 1947 housing was one of the few sectors in the economy still subject to price controls. Consequently, Congress was able to give the subject of rent control its almost undivided attention.²⁰ The result of this attention was the Housing and Rent Act of 1947 (the 1947 Act),²¹ in which Congress, while expressing a reluctance to continue rent controls in a peacetime economy,²² concluded that the housing emergency brought on by the war still existed, and that rent controls were needed at least for a limited time in order to fight inflation and to achieve rental stability.²³

The 1947 Act set as a maximum rent level those rents in effect on June 30, 1947, the last effective date of the EPCA.²⁴ It also provided

¹⁶ Id. § 6(a), 8 Fed. Reg. 7343 (1943), provided that a tenant could be evicted if (1) the tenant refused to execute a renewal of an existing lease; (2) the tenant refused the landlord access to the rental unit for purposes of inspection or of showing the accommodations to a prospective purchaser; (3) the tenant violated a substantial obligation of the lease or committed or permitted a nuisance or used the accommodations for an illegal or immoral purpose; (4) at the time the tenant's lease expired the occupants of the premises were subtenants; (5) the landlord in good faith intended to demolish the housing accommodations or to alter or remodel them in a way that could not practicably be done with the tenant in occupancy; (6) the landlord in good faith sought to recover possession of the housing accommodations for immediate use and occupancy for himself.

¹⁷ Id. § 6(d), 8 Fed. Reg. 7344 (1943).

¹⁸ Id. § 6(b), 8 Fed. Reg. 7344 (1943). The certificate of eviction was not, of course, an order for eviction; it merely authorized the landlord to pursue remedies available under local law.

¹⁹ Joint resolution of June 30, 1945, ch. 214, § 1, 59 Stat. 306, extended EPCA until June 30, 1946; Joint Resolution of July 25, 1946, ch. 671, § 1, 60 Stat. 664, further extended the EPCA until June 30, 1947. The 25-day gap in federal rent controls which resulted from the late date of renewal in 1946 was filled, in Massachusetts, by an Executive Order of Governor Maurice Tobin, who ordered that continuing effect be given to all the rules, regulations and orders issued by the OPA until the war was officially concluded. Mass. Exec. Order No. 93 (July 1, 1946).

²⁰ See generally Willis, *The Federal Housing and Rent Act of 1947*, 47 Colum. L. Rev. 1118 (1947).

²¹ Act of June 30, 1947, ch. 163, 61 Stat. 193.

²² Id. § 201(a), 61 Stat. 196.

²³ Id. § 201(b), 61 Stat. 196.

²⁴ Id. § 204(b), 61 Stat. 198. The 1947 Act, unlike the EPCA, excluded from federal control all hotel, motel, and newly-constructed units. Id. § 202(c), 61 Stat. 197.

a civil remedy for those tenants whose landlords collected or attempted to collect rents above the legal limits.²⁵ The eviction provisions of the 1947 Act differed greatly from those of the EPCA. The EPCA did not set out specific grounds on which landlords might evict tenants. Instead, it delegated to the OPA a broad power to regulate "renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations" which were likely to result in rent increases inconsistent with the purpose of the EPCA.²⁶ The 1947 Act, on the other hand, provided that tenants might be evicted only on one or more of the five grounds enumerated in the Act.²⁷

The Housing and Rent Act of 1948 (the 1948 Act)²⁸ extended the 1947 Act to March 31, 1949.²⁹ One of the few substantive additions of the 1948 Act was a sixty-day written notice requirement to a tenant before he could be subject to eviction proceedings.³⁰

The Housing and Rent Act of 1949 (the 1949 Act)³¹ further extended the 1947 Act to June 30, 1950³² and added several important features to the federal rent control scheme. It made the adjustment of rent contingent upon the landlord's certifying that he was maintaining and would continue to maintain all services furnished as of the date determining the maximum rent.³³ It set maximum rent, for the first time, at a level that would give the landlord a "fair net operating income," as defined by the Act.³⁴ The 1949 Act also eliminated the

²⁵ Id. § 205, 61 Stat. 199. A landlord who demanded, accepted or received rent in excess of the maximum levels was liable to the tenant for reasonable attorney's fees, court costs and liquidated damages in the amount of the greater of either \$50 or three times the amount by which the payment demanded, accepted or received exceeded the lawful maximum rent. Id.

²⁶ Act of Jan. 30, 1942, ch. 26, § 2(d), 56 Stat. 26. See note 16 supra.

²⁷ Under the 1947 Act, a tenant could be evicted if (1) under state law the tenant violated the "obligation of his tenancy" or committed a nuisance or used the accommodations for an "immoral or illegal purpose or for other than living or dwelling purposes;" (2) the landlord sought in good faith to recover possession for his immediate and personal use and occupancy; (3) the landlord in good faith sought to substantially alter or remodel the housing accommodations or to demolish them and replace them with new construction, which work could not practically be done with the tenant in occupancy, and which plans had obtained the necessary approval under federal, state or local law; (4) the landlord had contracted in good faith to sell the housing accommodations to a purchaser for the purchaser's immediate personal use and occupancy; or (5) the housing accommodations were located within a single dwelling unit not used as a rooming or boarding house, the remaining portion of which was occupied by the landlord or his family. Act of June 30, 1947, ch. 163, § 209(a), 61 Stat. 200. Compare id. with Rent Regulation for Housing § 6(a), summarized in note 16 supra.

²⁸ Housing and Rent Act of 1948, ch. 161, 62 Stat. 93.

²⁹ Id. § 202(a), 62 Stat. 94.

³⁰ Id. § 204(e), 62 Stat. 99.

³¹ Housing and Rent Act of 1949, ch. 42, 63 Stat. 18.

³² Id. § 203(a), 63 Stat. 21.

³³ Id. § 203(b), 63 Stat. 21.

³⁴ Id., which read in pertinent part:

In determining whether the maximum rent . . . yields a fair net operating income . . . , due consideration shall be given to the following, among other relevant factors: (A)

five statutorily specified grounds of eviction of the 1947 Act, and instead delegated to the Housing Expediter the same power that had previously been delegated to the OPA to regulate "speculative" and "manipulative" leasing practices.³⁵ Finally, the 1949 Act provided for the termination of federal rent controls in each state or locality that either enacted its own rent control laws or declared by law that federal rent control was no longer necessary because the shortage of rental housing had abated.³⁶

The 1947 Act was further continued by the Housing and Rent Act of 1950,³⁷ the Defense Production Act Amendments of 1951³⁸ and 1952,³⁹ and the Housing and Rent Act of 1953.⁴⁰ Both the Housing and Rent Act of 1950⁴¹ and the Defense Production Act Amendments of 1952⁴² provided for a later termination of federal control if a locality, by resolution or referendum, concluded that a substantial shortage of housing still existed in its area and that federal controls should therefore continue. Referendums held in Massachusetts⁴³ clearly indicated that most of its cities and towns were overwhelmingly in favor of rent control.⁴⁴

Massachusetts legislation. During the late 1940's several bills were introduced in the General Court to insure the continuation of rent controls.⁴⁵ The repeated renewals of federal controls, however, made action on these bills unnecessary. When it became clear, in 1953, that Congress would no longer continue the federal controls,⁴⁶ the Massachusetts legislature finally acted.

Chapter 434 of the Acts of 1953 provided that any city or town in which federal rent control existed as of the date of the Act (June 2,

Increases in property taxes; (B) unavoidable increases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and maintenance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance.

³⁵ Id. § 206, 63 Stat. 29.

³⁶ Id. § 203(h), 63 Stat. 26-27.

³⁷ Housing and Rent Act of 1950, ch. 354, § 2, 64 Stat. 255.

³⁸ Defense Production Act Amendments of 1951, ch. 275, § 211, 65 Stat. 149.

³⁹ Defense Production Act Amendments of 1952, ch. 530, § 201(a), 66 Stat. 306.

⁴⁰ Housing and Rent Act of 1953, ch. 31, § 2, 67 Stat. 24.

⁴¹ Housing and Rent Act of 1950, ch. 354, § 4, 64 Stat. 255.

⁴² Defense Production Act Amendments of 1952, ch. 530, § 201(b), 66 Stat. 306.

⁴³ Referendums to determine whether localities desired federal rent controls to remain in effect were authorized by Acts of 1950, c. 752; Acts of 1952, c. 620.

⁴⁴ See 1959 Election Statistics, The Commonwealth of Massachusetts, Pub. Doc. No. 43, at 359-61.

⁴⁵ See, e.g., Mass. S. 273 (1948); Mass. S. 374 (1947); Mass. S. 314 (1947); Mass. H.R. 250 (1947).

⁴⁶ The last extension of the Housing and Rent Act of 1947 was scheduled to expire on July 31, 1953. Housing and Rent Act of 1953, ch. 31, § 2, 67 Stat. 24.

1953), could, by a vote of the appropriate local body, establish controls under the newly enacted state provisions until June 30, 1954.⁴⁷ If a locality failed to hold a referendum, or if a referendum were held and the continuation of rent controls was rejected, rent controls in that locality would expire on July 31, 1953, the last effective date of federal controls. Twenty-eight cities and forty-five towns chose to adopt the state scheme.⁴⁸ These localities accounted for at least 83.4% of the Commonwealth's apartment dwellings in buildings of three or more units, 89.1% of the Commonwealth's dwelling units in buildings of five or more units, and 65% of the Commonwealth's two-family dwelling units.⁴⁹

The provisions of chapter 434 were similar to the basic provisions of the Housing and Rent Act of 1947 and its later amendments. All dwelling units were subject to control except for hotels, motor courts, trailer parks, and most units built or converted to housing purposes after February 1, 1947.⁵⁰ The controls were to be administered by a rent board of at least five members, a majority of whom were to be representatives of the "public interest," with the remainder equally representative of landlords and tenants.⁵¹ Maximum rents were to be set at the low levels established by the federal government with due consideration given to a fair net operating income and with all upward adjustments contingent upon the maintenance of services.⁵² The board could exempt any class of housing accommodation from maximum rent if, in its judgment, the need for such maximum rents no longer existed.⁵³ Any party aggrieved by an action of the board could file a complaint in the local district court.⁵⁴

A landlord who charged more than the maximum rent level was liable to the tenant for the greater of either liquidated damages of \$50

⁴⁷ Acts of 1953, c. 434, § 12. The Act, as clarified by Acts of 1954, c. 496, allowed a locality which had adopted the state rent controls to hold a second referendum to extend the life of the controls an additional nine months. Acts of 1955, c. 255, § 1 extended the state controls for an additional month in any locality which had, by a second referendum, extended the provision of the 1953 Act; § 2 of c. 225 allowed a city or town to extend rent control an additional eight months until December 31, 1955, by vote of the city or town council, but this additional extension could be rescinded by local referendum.

⁴⁸ The Community Research and Publications Group, *Less Rent More Control: A Tenants' Guide to Rent Control in Massachusetts 4* (1973) [hereinafter cited as *Less Rent More Control*].

⁴⁹ Report of the Special Committee Established to Investigate and Study the Subject of Rental Rates Currently Being Charged for Dwelling Apartments in the Commonwealth. Mass. H.R. Doc. No. 2575, at 12 (1957) [hereinafter cited as *Report of Committee on Rental Rates*].

⁵⁰ Acts of 1953, c. 434, § 2.

⁵¹ *Id.* § 4.

⁵² *Id.* § 5(a). The formula for determining a landlord's fair net operating income was adopted verbatim from the Housing and Rent Act of 1949. See note 34 supra.

⁵³ Acts of 1953, c. 434, § 5(b).

⁵⁴ *Id.* § 6.

or three times the amount by which the charged rent exceeded the allowable limits, plus court fees and costs.⁵⁵ In addition, violators were subject to criminal penalties of \$500 or imprisonment for not more than 90 days, or both.⁵⁶ Certificates of eviction prior to the initiation of an action for summary process were not required, although the grounds on which such process would be granted were limited.⁵⁷

State controls were allowed to expire two and a half years after they were created.⁵⁸ Not unexpectedly, decontrol triggered steep rent increases throughout the Commonwealth. A blue-ribbon panel created by the General Court⁵⁹ found that in the year following the expiration of rent control rents had increased an average of 9.2% throughout the state, with increases in some areas well in excess of the overall average.⁶⁰ The panel concluded that a housing shortage still existed, and it recommended that legislation be passed to enable hard-hit communities to re-establish local rent controls.⁶¹ This recommendation, however, was not acted upon. Ignoring the existence of a housing shortage did nothing to ameliorate the situation. For example, from 1960 to 1970, rents in Boston increased by 63%⁶² while total housing units decreased during the same period by 6,354.⁶³

Current rent control legislation. In 1969, the Massachusetts General Court, finally responding to the skyrocketing rents brought about by the general shortage of housing, enacted enabling legislation which empowered the Boston City Council, with the approval of the mayor, to appoint a rent board charged with the responsibility of controlling rents in residential properties having four or more units.⁶⁴ The gen-

⁵⁵ Id. §7(a).

⁵⁶ Id. §8(b).

⁵⁷ Id. § 10. The grounds for eviction were substantially the same as those of the OPA Rent Regulation for Housing § 6(a), *supra* note 16, with two exceptions: the OPA ground of a tenant's refusal to execute a renewal of an existing lease was eliminated and a new ground was added, *viz.*, when a landlord is a nonprofit religious, charitable, or educational institution and seeks in good faith to recover possession for the purpose of housing its staff members.

⁵⁸ See Message of Governor Christian A. Herter to Senate and House of Representatives, March 25, 1955, Journal of the House of Representatives 915-16 (1955), in which Governor Herter urged the end of rent control, arguing that such measures had been enacted in response to the economic dislocations brought on by war and were no longer necessary in a peacetime economy. *Id.*

⁵⁹ Mass. S. Order No. 830, Oct. 4, 1956, Journal of the Senate 1676 (1956), created a Special Committee on Rental Rates for Dwelling Apartments. The Committee was authorized to conduct a comparative investigation of rental rates as they existed in 1956 and as they had existed under rent control on Dec. 31, 1955. The purpose of the investigation was to determine whether an emergency existed requiring the reimposition of rent control.

⁶⁰ Report of Committee on Rental Rates, *supra* note 49, at 4.

⁶¹ *Id.* at 5.

⁶² Less Rent More Control, *supra* note 48, at 106.

⁶³ This figure is derived from U.S. Census, General Housing Characteristics for Massachusetts, Table 12 (1960), and U.S. Census, General Housing Characteristics for Massachusetts, Table 1 (1970).

⁶⁴ Acts of 1969, c. 797.

eral aim of the legislation was to freeze rents at their December 1, 1968 level, although higher rental charges were permitted in order to remove hardships or prevent inequity.⁶⁵ The town of Brookline also adopted a by-law in 1969 establishing rent control, but without the benefit of enabling legislation.⁶⁶ This latter attempt to control rent failed; the operation of the Brookline plan was enjoined and declared invalid by the Supreme Judicial Court on the ground that it violated the Massachusetts constitutional proscription of municipal legislative action governing civil relationships.⁶⁷

In 1970, the present structure of Massachusetts rent control was implemented. Enabling legislation, chapter 842 of the Acts of 1970, was passed which allowed all cities and those towns whose population exceeded 50,000 to adopt rent control mechanisms.⁶⁸ Chapter 842 empowers each locality to make its own determination as to the desirability of imposing rent control; if a locality then elects to control rents, the extent of coverage is limited and defined by the express provisions of the enabling legislation. The special enabling legislation for Boston was revised in 1970 in order to more closely parallel chapter 842.⁶⁹ The legislature in 1970 also passed enabling legislation giving to Brookline rent control powers tailored to that town's particular needs.⁷⁰ Generally, however, the workings of rent control are uni-

⁶⁵ *Id.*

⁶⁶ Brookline, Mass. By-Laws, Art. XXV (entitled "Unfair and Unreasonable Rental Practices in Housing Accommodations")(1969).

⁶⁷ *Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline*, 357 Mass. 709, 260 N.E.2d 200 (1970). The "Home Rule Amendment" to the Constitution of the Commonwealth reserves to the cities and towns the right of self-government on local matters. Mass. Const. amend. art. LXXXIX, § 1. However, local authorities may not enact "private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." *Id.* § 7(5). Finding no independent municipal power, the Court in *Marshal House* determined that the by-law was thus invalid. 357 Mass. at 719, 260 N.E.2d at 207.

⁶⁸ Acts of 1970, c. 842.

⁶⁹ Acts of 1970, c. 863, amending Acts of 1969, c. 797. The Boston enabling legislation, Acts of 1969, c. 797, was adopted by the Boston City Council in Ordinances of 1969, c. 10; the amendments set out in Acts of 1970, c. 863 were similarly adopted by Ordinances of 1970, c. 11. However, these ordinances expired at the end of 1972, and the City Council voted on November 27, 1972 to adopt the more expansive and procedurally fairer chapter 842, the general enabling statute, which is available to *all* cities of the Commonwealth. Nevertheless, Boston utilizes its special enabling legislation to extend coverage to include FHA units, housing which is arguably exempt under the general statute. See Ordinances of 1972, c. 19. Thus, Boston now operates under the directives of the general enabling statute, except that its FHA housing is controlled under Acts of 1969, c. 797, as amended by Acts of 1970, c. 863.

⁷⁰ Acts of 1970, c. 843, as amended by Acts of 1971, c. 673. See *Marshal House, Inc. v. Rent Control Bd. of Brookline*, 358 Mass. 686, 697-99, 266 N.E.2d 876, 884-85 (1971), which sustained the validity of the special Brookline enabling legislation in the face of a constitutional attack grounded on equal protection claims. See discussion in § 19.2 at n.33 *infra*.

Brookline, for the most part, operates under the general enabling statute, but it has attempted to utilize its own special enabling statute to limit the scope of the general statute's

formly governed by the procedures set out in chapter 842.

All rental units are covered by the general statute except units in hotels and motels catering to transient guests; units constructed or converted to housing use on or after January 1, 1969; units in which a government agency or authority owns, operates, or regulates the rents other than under the provision of the rent control act; units which are subsidized or financed by a governmental agency where the imposition of rent control would result in the loss of those subsidies; owner-occupied two and three-family dwellings; rental units in cooperatives and those maintained for charitable or educational purposes; and luxury units exempted by the municipality.⁷¹ The scope of the latter exemption is left to local determination in the sense that the local authority can define the rental value which constitutes luxury housing; such units will be excluded from the operation of the statute. However, at no time can a locality formulate a definition of luxury housing which will cause 25 per cent or more of the total housing stock to be exempted.⁷² The Brookline enabling legislation contained no such enumeration of exempt units; instead, the local regulatory authority is empowered to define the limits of the town's exemptions.⁷³ Both Boston and Brookline have attempted to utilize their own special enabling legislation to control rents in FHA units, a power seemingly not granted under chapter 842.⁷⁴

When a locality accepts rent control, it has the option of charging either a single administrator or a board with the operation of the program.⁷⁵ Such director(s) are appointed by the mayor or city manager in cities and by the board of selectmen in the eligible towns, and serve at the pleasure of the appointing authority.⁷⁶ The rent control board or administrator is vested with broad responsibilities including the power: to promulgate rules and regulations for the furtherance of the provisions of the act;⁷⁷ to recommend to the city or town the enactment of certain by-laws for the purpose of complementing the statutory scheme;⁷⁸ to hire necessary personnel, and to hold hearings

exemptions. See Cambridge Tenants Organizing Committee, *Tenants Handbook: Legal Tactics* 86 n.32 (2d ed. 1973).

⁷¹ Acts of 1970, c. 842, § 3. Compare these exemptions to those contained in Acts of 1953, c. 434, § 2, set out in text at note 50 *supra*.

⁷² Acts of 1970, c. 842, § 3(b)(7).

⁷³ See Acts of 1970, c. 843, as amended by Acts of 1971, c. 673.

⁷⁴ See notes 69, 70 *supra*. For a discussion of the FHA housing exemption, see § 19.3 *infra*.

⁷⁵ Acts of 1970, c. 842, § 5(a). G.L. c. 4, § 4 provides that acceptance of a statute shall be by vote of the city council in cities and by town meetings in towns. This process is markedly different from that authorized by Acts of 1953, c. 434, § 12, which allowed for a local referendum. See text at note 47 *supra*. Moreover, under the present legislation, there is no directive as to what interests shall be represented on the administrative body. Cf. Acts of 1953, c. 434, § 4. See text at note 51 *supra*.

⁷⁶ Acts of 1970, c. 842, § 5(a).

⁷⁷ *Id.* § 5(c).

⁷⁸ *Id.*

and conduct investigations as required for the promulgation of regulations or the formulation of orders.⁷⁹

Rents are generally set at the rental charge levied by the landlord six months prior to the adoption of rent control by the locality.⁸⁰ This rent ceiling may be removed for any class of units having common characteristics, rents, or locations by the local rent authority if it is decided that, as a result of sufficient construction of new rental units, the rental levels for the new units are comparable to the rental levels of the controlled class.⁸¹ The local authority is also empowered to make across-the-board adjustments for any class of rental units.⁸² Either action must be preceded by a hearing.⁸³

The bulk of decisions of the local rental authority involve two basic functions. First, the authority is charged with determining whether individual rent adjustments shall be made.⁸⁴ Requests for such adjustments may be made by either landlord or tenant, or on the authority's own initiative.⁸⁵ The decision concerning the adjustment is based upon a determination of the rent necessary to afford the landlord a "fair net operating income."⁸⁶ Additionally, the statute directs the authority to use six factors which affect the value of the rental unit,⁸⁷ and any other factors which the authority "by regulation may define."⁸⁸ The second major function of the local board or administrator is the issuance of certificates of eviction; a landlord can not recover possession of a controlled rental unit unless he has first obtained such a certificate.⁸⁹ The landlord must demonstrate that his

⁷⁹ Id. § 5(d).

⁸⁰ Id. § 6(a). Boston's initial rent level was set at the rental charged on December 1, 1968. See Acts of 1969, c. 797. The six-month roll-back provision of c. 842 introduces much needed flexibility into the establishment of initial rental levels. Cf. Emergency Price Control Act of 1942, ch. 26, § 2(b), 56 Stat. 25; Acts of 1953, c. 434, § 5(a). See text at notes 10, 52 supra.

⁸¹ Acts of 1970, c. 842, § 7(e). Compare Acts of 1953, c. 434, § 5(b), discussed in text at note 53 supra.

⁸² Acts of 1970, c. 842, § 8(b).

⁸³ Id. §§ 7(e), 8(b).

⁸⁴ Id. § 7(a).

⁸⁵ Id. § 8(a).

⁸⁶ Id. § 7(b). See § 19.4 infra.

⁸⁷ Acts of 1970, c. 842, § 7(b). The six factors which must be considered in determining maximum allowable rent are: (1) increases or decreases in property taxes; (2) unavoidable increase or decrease in operating or maintenance expenses; (3) capital improvement as distinguished from ordinary repairs; (4) increase or decrease in living space, services, furniture, furnishings or equipment; (5) substantial deterioration other than as a result of ordinary wear and tear; and (6) failure to perform ordinary repair and maintenance. Id. Compare id. with Acts of 1953, c. 434, §5(a) and the Housing and Rent Act of 1949, ch. 42, § 203(b), 63 Stat. 21, quoted in note 34 supra. The identical language is employed in all three statutes. For a further discussion of "fair net operating income," see generally § 19.4 infra.

⁸⁸ Acts of 1970, c. 842, § 7(b).

⁸⁹ Id. § 9(a). See generally § 19.5 infra.

reasons for seeking eviction fall within one of the ten grounds enumerated by the statute.⁹⁰ The tenant must receive notice of the landlord's application for the certificate and is allowed to contest its issuance.⁹¹

Any action by a board or an administrator, whether it be the setting of maximum rents or the issuing of a certificate of eviction, is subject to review in the district court having territorial jurisdiction over the locus of the controlled rental unit.⁹² Criminal and civil sanctions are available against one who demands or receives any rental in excess of the maximum lawful rent,⁹³ and criminal penalties may be imposed against one who willfully violates a provision of the Act.⁹⁴

The enabling legislation originally was to terminate on April 1, 1975, but it has since been extended to December 31, 1975.⁹⁵ As of this writing, only four cities and one town have adopted the rent control apparatus, despite the fact that the option remains for at least 38 other localities to control rents.⁹⁶

§19.2. Constitutionality of rent control. Due to the newness of

⁹⁰ Acts of 1970, c. 842, § 9(a). The ten grounds for determining whether the certificate of eviction should issue are: (1) tenant's failure to pay rent; (2) tenant's continued violation of a covenant of his tenancy after having received notice to cure said violation; (3) tenant's responsibility for creating a nuisance or causing substantial damage or interfering with comfort, safety, or enjoyment of landlord or neighbors; (4) tenant's conviction of using premises for illegal purposes; (5) tenant's refusal to renew lease; (6) tenant's refusal of reasonable access to landlord for purposes of repairs, inspection or showing to prospective purchaser; (7) subtenant not approved by landlord holding apartment at end of lease; (8) landlord seeks to use apartment for himself or others in his immediate family; (9) landlord seeks to demolish or otherwise remove unit from housing use; (10) any other cause not inconsistent with the Act. *Id.* Compare these grounds under c. 842 with statutory grounds for eviction under: the EPCA, set out at note 16 *supra*; the Housing and Rent Act of 1947, set out at note 27 *supra*; and the restrictions on grounds for summary process under Acts of 1953, c. 434, § 10, set out at note 57 *supra*. Again, the provisions are almost identical.

⁹¹ Acts of 1970, c. 842, § 9(b).

⁹² *Id.* § 10.

⁹³ *Id.* §§ 11, 12. Civil penalties include liability for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of one hundred dollars or not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent, whichever is greater, provided that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, the liquidated damages shall be the amount of the overcharge. *Id.* § 11. Note the similarity to Acts of 1953, c. 434, § 7 and the Housing and Rent Act of 1947. See note & text at note 25 *supra*. Criminal penalties include a fine of not more than \$500 or imprisonment for not more than 90 days or both for a first offense and a fine of not more than \$3000 or imprisonment for not more than one year or both for a second or subsequent offense. Acts of 1970, c. 842, §§ 12(a)-(c). Compare these criminal penalties with the criminal sanctions under Acts of 1953, c. 434, § 8(b), set out in text at note 56 *supra*.

⁹⁴ Acts of 1970, c. 842, § 12(c). The penalty is set out in note 93 *supra*.

⁹⁵ Acts of 1974, c. 360.

⁹⁶ Only the cities of Boston, Cambridge, Somerville, and Lynn and the Town of Brookline have adopted rent control. In toto, 39 cities and 4 towns have the option of bringing themselves within the purview of the Act.

the present rent and eviction control legislation, there is a relative dearth of case law which might elucidate the various provisions of the act. This section will examine those few decisions which have addressed the questions of the constitutionality of the act and the scope of its exemptions and will then scrutinize the substantive and procedural aspects of the statutory formulae for the granting of rent adjustments and certificates of eviction.

The Supreme Court of the United States first considered the constitutionality of rent control statutes in 1921. The Court had before it two cases, one attacking the validity of federal legislation, the other challenging New York's rent control law. In *Block v. Hirsh*,¹ the Court of Appeals for the District of Columbia Circuit had held unconstitutional a provision of the District of Columbia Rents Act² which allowed a tenant to hold over notwithstanding the expiration of his term so long as he complied with the other conditions fixed by his lease and the rent control commission.³ The District of Columbia Circuit found that application of the provisions served to divest the landlord of his right to a reversion in property without due process of law.⁴ Finding the entire act incapable of withstanding constitutional scrutiny, the court emphasized that the renting of property is a private business, and that a private business can not be made a public one by mere legislative fiat: "A public interest cannot be thus created, or property rights be divested, by an arbitrary exercise of the police power."⁵ The court conceded that Congress, through the exercise of its power of eminent domain, could designate the public use for which private property could be taken. Nevertheless, it refused to uphold the constitutionality of the rent control statutes on that basis, since those statutes contemplated the taking of private property for a purely private use.⁶

In reversing the circuit court's decision, the Supreme Court rejected the notion that a legislative enactment could not be characterized as having been instituted for the public welfare if it incidentally confers a private benefit. The Court emphasized that there are two legitimate courses of action which a government may take to adjust rights in property for the public good: the exercise of eminent domain, which results in a complete divesting of private rights for which the party so divested is justly compensated, and the exercise of the police power, which ultimates merely in a modification of private rights for which

§19.2. ¹ 256 U.S. 135 (1921).

² The Food Control and District of Columbia Rents Act, ch. 80, §§ 101-22, 41 Stat. 297, 298-304 (1919).

³ Id. § 109, 41 Stat. 301.

⁴ *Hirsh v. Block*, 267 F. 614, 619 (D.C. Cir. 1920).

⁵ Id. at 620.

⁶ Id. at 622.

no compensation is necessary. The Court went on to say that the private housing market, since it involves the distribution of a necessity of life inaccessible to some because of its high costs, is affected with a "public interest" which justifies some degree of governmental control over the private interest in rentals.⁷

It remained to be determined whether the District of Columbia rent control law was an excessive response to the admitted "public interest" involved such that it rose to the level of taking of property without due process of law. The Court found that although the statute prevented landlords from realizing potentially high profits from the large influx of people into Washington to participate in the war effort, the statute nevertheless provided that the landlords were to receive a reasonable rent.⁸ The Court analogized the legislative guarantee of reasonable but not excessive rents to usury laws which allow money lenders a reasonable but not excessive profit from their activities, and concluded that the restrictions imposed upon profits from rent violated no right of due process.⁹

In a companion case, *Marcus Brown Holding Co. v. Feldman*,¹⁰ the New York rent control scheme¹¹ was challenged by a landlord whose tenant was holding over under the authority of the statute. Unlike the landlord in *Block*, the plaintiff here, prior to the enactment of rent control, had leased the property to a third party whose term was to begin after the tenant-defendant's lease expired. The landlord sought to evict the holdover tenant, and, in addition, to enjoin the state from imposing criminal sanctions on him for refusing to furnish the hold-over heat, light, and water, as required by the terms of the already

⁷ 256 U.S. at 155-56. As examples of restrictions upon property rights which do not require compensation, the Court cited limitations placed upon the height of billboards erected on private property, *Welch v. Swasey*, 214 U.S. 91 (1909); requirements for the erection of safe pillars in coal mines, *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914); requirements that watersheds be kept clear, *Perley v. North Carolina*, 249 U.S. 510 (1919). 256 U.S. at 156.

⁸ 256 U.S. at 157. The statute provided that "all rents and charges . . . shall be fair and reasonable . . ." Food Control and District of Columbia Rents Act, Ch. 80, § 106, 41 Stat. 300 (1919). This section also provided that any landlord or tenant who believed a rental fee to be "unfair or unreasonable" could file a complaint with the District of Columbia Rent Commission and have the Commission make a determination of the fairness and reasonableness of the rental fee. *Id.*

⁹ 256 U.S. at 157. The Court also rejected the landlord's contention that he was deprived of a trial by jury on the question of possession. The Court answered this objection by pointing out that having already found valid the delegation to the Rent Commission to regulate the relationship between landlord and tenant, it was impossible to separate the regulation of that relationship from the deciding of facts affecting the relationship; therefore the suspension of the ordinary remedies was a reasonable part of a statute that was itself "reasonable in its aim and intent." *Id.* at 158.

¹⁰ 256 U.S. 170 (1921).

¹¹ Laws of Sept. 27, 1920, cc. 942-47, [1920] N.Y. Laws 2477-85.

expired lease. He argued that the statute's restriction of grounds for eviction to certain just causes (not including expiration of the tenant's lease) not only constituted a taking of property without due process of law but also unconstitutionally resulted in impairment of the obligation of contracts:¹² the statute discharged the obligation of the tenant to surrender possession of the premises at the expiration of the term specified in the lease; extended all of the lessor's obligations so long as the tenant chose to remain in possession; and prevented the lessor from performing his obligation under the second lease, which had been entered into before the enactment of the law. The Court rejected this contention by indicating that contracts are made subject to the *valid* exercise of the police power.¹³ Relying upon the reasoning of *Block*, the Court found the state rent control law to be a valid exercise of that power.¹⁴

In general, the federal judiciary has been ready to uphold the constitutionality of rent control statutes as valid exercises of the police power whenever the controls appear to be a response to a thoroughly researched legislative determination that a housing crisis exists.¹⁵ A recent statement by the Second Circuit indicates that the renting of low and moderate-income housing will no longer be considered a purely private matter so long as a shortage of such units continues:

While in those [earlier] cases the Court naturally stressed the war and post-war emergencies, we have no doubt that it would sustain the validity of rent control today. . . . The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utilities area [has] passed¹⁶

In *Russell v. Treasurer & Receiver General*,¹⁷ the Massachusetts Su-

¹² "No State shall . . . pass any . . . Law impairing the Obligation of Contracts" U.S. Const. art. I, § 10.

¹³ 256 U.S. at 198.

¹⁴ *Id.* The landlord also argued that for the Court to sanction the holding-over by the tenant would amount to the landlord being impressed with an involuntary servitude violative of the Thirteenth Amendment. The Court found that the services here involved were non-personal, and were instead "analogous to services that in the old law might issue out of or be attached to land" and therefore did not infringe the Thirteenth Amendment. *Id.* at 199.

¹⁵ See, e.g., *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969); *Israel v. City Rent & Rehab. Adm'n of City of New York*, 285 F. Supp. 908 (S.D.N.Y. 1968).

¹⁶ *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969). The Second Circuit viewed the holding of the Supreme Court in *Nebbia v. New York*, 291 U.S. 502 (1934), as putting to rest the notion that only the most pressing national emergencies provide sufficient grounds for governmental price controls. 421 F.2d at 567. In *Nebbia*, a statute regulating the price of milk was held not to violate the Due Process Clause of the Fourteenth Amendment on the ground that state regulation of retail prices was necessary to assure an available supply of milk to the public. 291 U.S. at 537.

¹⁷ 331 Mass. 501, 120 N.E.2d 388 (1954).

preme Judicial Court entertained an attack upon the validity of a Massachusetts rent control statute¹⁸ which has since expired.¹⁹ Petitioners sought to restrain the Commonwealth from reimbursing cities and towns for a part of the administrative expenses incurred in the implementation of rent control, as provided for by the act.²⁰ The prayer for relief was grounded on the alleged unconstitutionality of certain provisions of the act, particularly the section which exempted from control recently constructed units, vacant units, and luxury housing.²¹ Such exemptions, it was argued, were arbitrary and inequitable, and deprived the owners of controlled units of due process and of the equal protection of the law. The Court found the act to be a valid exercise of the state's police power,²² and, further, that the exemptions were by no means arbitrary, since they were reasonably related to the general purpose of the legislation, namely, the abatement of a housing shortage.²³ The exemption of newly-constructed units was necessary to encourage the building of sorely needed housing while the exemption of luxury units was found to be logical since there was no shortage of high rent accommodations.²⁴ The exemption of vacant units was upheld on the ground that it constituted a valid first step toward the ultimate decontrol of all rents.²⁵

The constitutionality of general provisions of the present rent control scheme²⁶ was challenged in *Marshal House, Inc. v. Rent Control Board of Brookline*.²⁷ *Marshal House* involved several proceedings instituted by landlords in superior court.²⁸ The judges of the superior

¹⁸ Acts of 1953, c. 434.

¹⁹ Acts of 1953, c. 434 expired on Dec. 31, 1955. For a discussion of the provisions of c. 434, see § 19.1 at text at notes 46-58 supra.

²⁰ Acts of 1953, c. 434, § 4(c) provided that 40 per cent of the amount expended by a locality for the purposes of the rent control act would be reimbursed by the Commonwealth.

²¹ Acts of 1953, c. 434, § 2(b)(3).

²² 331 Mass. at 507, 120 N.E.2d at 391.

²³ Id. at 507-08, 120 N.E.2d at 392.

²⁴ Id. at 508-09, 120 N.E.2d at 392.

²⁵ Id.

²⁶ See § 19.1 at text at notes 64-98 supra.

²⁷ 358 Mass. 686, 266 N.E.2d 876 (1971).

²⁸ Four cases were actually consolidated for this appeal. Three were class actions instituted on behalf of all landlords affected by local adoption of rent control legislation; they were *Marshal House, Inc. v. Rent Control Bd. of Brookline* (challenging c. 843 and town by-laws adopted thereunder); *Aiello v. Rent Control Adm'r of Cambridge* (challenging c. 842); and *Goldman v. Rent Control Bd. of Brookline* (also challenging the Brookline action, especially the fact that there was no owner-occupied exemption under c. 843 as there was in c. 842). See text of § 19.1 at text at note 75 supra. All three suits sought declaratory judgments as to the constitutionality of the act, as well as injunctive relief to restrain its implementation. The fourth suit, *Carroll v. Rent Control Adm'r of Cambridge*, was instituted by tenants challenging administrative decisions under the act. The Court found that the issues raised in *Carroll* had become moot. 358 Mass. at 708, 266 N.E.2d at 890.

court reserved judgment and reported the cases to the Supreme Judicial Court where they were consolidated for appeal.²⁹

The landlords first attacked the luxury-housing exemption. Chapter 842, section 3(b)(7) of the Acts of 1970 allows a municipality which accepts the act to exempt from control those units for which the rent charges exceed limits set by the municipality, provided that no more than twenty-five per cent of the total rental units in the municipality are so exempted. The landlords made two divergent challenges to this optional exemption, both of which were grounded in a theory of an overly broad delegation by the legislature. On the one hand, since the state delegated to each locality the power to formulate its own definition of luxury housing,³⁰ presumably a locality could exempt from control those accommodations at which the emergency legislation was aimed, *i.e.*, non-luxury units, so long as no more than twenty-five per cent of all rental units were thus exempted. On the other hand, since the exemption provision is merely optional, a locality which chose not to exercise it would regulate housing units which had no rational connection with the emergency the legislature sought to remedy; this failure to make the exemption mandatory, it was contended, constituted an abuse of the police power.

The Court held that the statutory formula is aimed at providing each locality with the flexibility to adapt the luxury housing exemption to its own particular need. That the General Court might have devised a better formula so that no low or middle-income housing

²⁹ All suits had been originally instituted in the superior court. They were reserved and reported without decision to the Supreme Judicial Court by two superior court judges upon the pleadings, exhibits, and statements of agreed facts pursuant to G.L. c. 231, § 111. Before reaching the merits in *Marshal House*, the Court had to first decide several threshold issues. First, the original jurisdiction of the superior court was challenged on the ground that the rent control acts give the district court exclusive original jurisdiction over complaints filed by any person "aggrieved by any action, regulation or order of the board or administrator." Acts of 1970, c. 842, § 10(a). The Court held that the original jurisdiction of the district courts would obtain where a complaint involved the validity of a particular order issued under the act, but not where, as here, the constitutionality of the entire statute was put in question. 358 Mass. at 692, 266 N.E.2d at 881. Second, the Court found that the request for declaratory relief under G.L. c. 231A, § 1, was a proper one since "[t]he pleadings demonstrate[d] a 'real dispute . . . [and] the circumstances . . . indicate that, unless a determination is had, subsequent litigation as to the identical subject matter will ensue.'" 358 Mass. at 692, 266 N.E.2d at 881. Finally, an objection was raised by one of the defendants that the tenants affected by cc. 842 and 843 had a right to be notified of the pendency of the class action since rent control was enacted for their benefit and the rent control board could not adequately represent their interest. The Court summarily rejected this assertion; it felt it absurd to require someone who challenged the constitutionality of a statute to name as defendants all those who might benefit under the act. 358 Mass. at 693, 266 N.E.2d at 882.

³⁰ Cf. Acts of 1953, c. 434, § 2(b)(3)(iv), which provided for a mandatory exemption of all units which rented at more than \$150 a month.

would fall within the exemption was not sufficient to strike down the exemption. So far as owners of luxury units which a locality chose not to exempt are concerned, their economic interests are afforded sufficient safeguards in the form of judicial review of all local decisions under the act.³¹

Plaintiffs then contended that the exemption for owner-occupied two and three-family dwellings³² violated the Equal Protection Clause of the Fourteenth Amendment in that it was an unreasonable classification as among landlords. The Court in response emphasized that the provision must be scrutinized in light of whether the classification it created bore a fair and substantial relation to the object of the legislation. It then found several rational grounds which justified the exemption. First, landlords who live with their tenants and see them daily are less likely to raise rents to an exorbitant level. Second, in light of the fact that preventing the deterioration of existing housing is an additional goal of the rent control laws, it is reasonable to expect that pride of ownership will sufficiently encourage resident landlords to carefully maintain the premises. Finally, owner-occupiers are not "true" landlords whose predominant or exclusive source of income derives from rentals, but rather are people letting out a portion of their homes not necessary for their daily living.³³

The plaintiffs next argued that the limitation of the rent control option to all cities and only those towns whose population exceeded 50,000³⁴ violated the Equal Protection Clause. The Court disagreed and again found that the challenged classification bore a fair and substantial relation to the object of the legislation, since the provision was based upon a "supportable legislative finding of a housing emergency in areas of the Commonwealth as so limited."³⁵

Plaintiffs urged that the provision which required rents to be frozen initially at the level which existed six months prior to the date of the

³¹ 358 Mass. at 694, 266 N.E.2d at 882. Judicial review of local administrative action is provided for in Acts of 1970, c. 842, §§ 8, 10.

³² Acts of 1970, c. 842, § 3(b)(6).

³³ 358 Mass. at 695-97, 266 N.E.2d at 882-85. Petitioners argued in the alternative that since c. 842 exempted owner-occupied two and three-family dwellings from control while Brookline's by-laws (Article XXX) passed pursuant to c. 843 did not recognize such an exemption, owner-occupiers in Brookline were denied the equal protection of the laws. See § 19.1 at text at notes 70-73 supra. Emphasizing that c. 843 enumerates the special needs of the Brookline housing emergency, the Court found that it did not amount to a denial of equal protection, since "any other city or town is free to follow the same procedure in seeking legislation . . . Should another municipality feel . . . that c. 842 . . . is not adequate for its needs in the area of rent control, the way is open for it to take the legislative avenue Brookline took. The result . . . would be constitutionally immune from attack, for it would be a product of differing local needs and conditions." 358 Mass. at 699, 266 N.E.2d at 885.

³⁴ Acts of 1970, c. 842, § 2.

³⁵ 358 Mass. at 700, 266 N.E.2d at 885.

act's acceptance by the municipality³⁶ violated both due process and equal protection in that it was an arbitrary cut-off point which bore no significant connection with any ascertainable rent increase. Under this mechanism, each locality could have a different date to which rents would be rolled back, depending upon the date on which it decided to enact rent control. The Court disagreed, holding that such a rollback would safeguard against last-minute rent increases and would assure that rents were set "at levels which landlords and tenants have worked out for themselves by free bargaining in a competitive market."³⁷ The fact that the exact rollback date might vary from city to city would not fatally affect the act's validity, since "[t]he effect . . . is to empower municipalities to administer their own rent control according to a mechanism which is carefully designed to insure fairness to both landlords and tenants."³⁸ Finally, even if the initial freezing of rents worked a hardship upon a landlord, such a result could be easily remedied since an adjustment to insure a fair net operating income could be sought either on the landlord's own petition³⁹ or on the initiative of the local rent board.⁴⁰

Lastly, plaintiffs argued that, since the term "fair net operating income" was not defined in the statute, such a standard could in practice be confiscatory since it did not explicitly assure landlords a reasonable return on their investment. The Court disposed of this complaint by reading the term to require that rents be set at a level which would insure all landlords a reasonable return on their investment.⁴¹

§19.3. Housing exempted from control. Under the general enabling statute, chapter 842 of the Acts of 1970, a "rental unit or units in an owner-occupied two-family or three-family house" is exempt from control.¹ In 1973 in *Trovato v. Walsh*,² the Supreme Judicial Court was faced with the question of how broadly "owner-occupied" was to be construed. Plaintiff-tenant appealed a final decree of the Middlesex Superior Court declaring certain premises to be owner-occupied. One of the defendants, Mrs. Walsh, had acquired and inhabited the two-family home in question in 1923 as a tenant by the entirety; she had continued to reside in the downstairs apartment ever since. In 1964, after her husband's death, Mrs. Walsh conveyed the property to her son without monetary consideration so that he

³⁶ Acts of 1970, c. 842, § 6(a).

³⁷ 358 Mass. at 701, 266 N.E.2d at 886.

³⁸ Id. at 702, 266 N.E.2d at 887.

³⁹ Acts of 1970, c. 842, § 7(e).

⁴⁰ Id. § 8.

⁴¹ 358 Mass. at 703, 266 N.E.2d at 887.

§19.3. ¹ Acts of 1970, c. 842, § 3(b)(6).

² 1973 Mass. Adv. Sh. 707, 295 N.E.2d 889.

would manage the property as "her agent;"³ he occupied the upper apartment until 1966. When Walsh departed, plaintiff entered the apartment as a tenant at will. Rental payments were made to the son.

In September 1970, Walsh raised the monthly rental charge. Four months later, rent control went into effect in Somerville, and rents were to be rolled back to their June 1970 level.⁴ Subsequently, Walsh was notified by the Rent Control Board of Somerville that the property would be subject to rent control so long as he held title to the building and was not an occupant of the premises. In August 1971, plaintiff-tenant first became aware of the rent control laws, and he informed Walsh that he intended to pay rent at the lower rolled-back rate. Later that same month, Walsh reconveyed the premises to his mother.

The Supreme Judicial Court affirmed the superior court's conclusion that, since the son had taken only naked title to the property, without monetary consideration and with the express understanding that his mother was to retain beneficial ownership, the premises qualified for the owner-occupied exemption. The Court, citing *Marshal House, Inc. v. Rent Control Board of Brookline*,⁵ concluded that the factors which led the legislature to treat owner-occupants differently from professional realtors indicate that the exemption must have been aimed at beneficial ownership rather than record ownership.⁶ It was the beneficial owner who was in daily contact with her tenants and would be accessible to tenants' complaints⁷ and who would be concerned with the maintenance and upkeep of the property, since she, too, made her home in the rental premises.⁸ Further, the beneficial owner here was clearly not engaged in the rental business.⁹ Thus, the qualifications which allowed the exemption to accrue to owner-occupants were present here with respect to Mrs. Walsh.

Limited to its facts, the holding in *Trovato* appears well-considered. The record owner was the beneficial owner's son; he managed no other properties, and he was presumably responsive to the tenant's complaints as they were related to him by his mother.¹⁰ Thus, the conventional tenant-landlord relationship did not exist, and under these circumstances, the arrangement did not serve to frustrate the intent of the legislature.¹¹

³ *Id.*, 295 N.E.2d at 900.

⁴ See Acts of 1970, c. 842, § 6.

⁵ 358 Mass. 686, 266 N.E.2d 876 (1971). See §19.2 at text at notes 32-33 *supra*.

⁶ 1973 Mass. Adv. Sh. at 709, 295 N.E.2d at 902, citing 358 Mass. at 694-96, 266 N.E.2d at 883-85.

⁷ 1973 Mass. Adv. Sh. at 710, 295 N.E.2d at 902.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 709, 295 N.E.2d at 902.

¹¹ Indeed, as the Court noted, to hold that record ownership was controlling would invite non-resident landlords to convey record ownership to a resident tenant in order to qualify for the exemption. *Id.*

Nevertheless, *Trovato* might well lay a foundation for abuses of the law. If Mrs. Walsh had transferred record ownership to a professional real estate agent instead of to a blood relative, it is doubtful whether the factors which led the legislature to create the owner-occupied exemption would exist. An owner-occupant might, for example, enter into a contract with a rental agency to have the agency manage the property and become the owner of record; the landlord could enjoy the financial rewards of beneficial ownership, and the agency would be responsible for the collection of rents and for responding to the maintenance requests of the tenants. Under an arrangement such as this, the person charged with upkeep would not be a neighbor who is in daily contact with fellow tenants, nor would he be one who is moved to discharge his responsibilities with promptness and care out of a sense of pride of ownership and residence.¹² A rental agency could establish a lucrative business by contracting with owner-occupants to take record ownership and collect rents in exchange for a monthly charge. The Supreme Judicial Court indicated in *Trovato* that it would not disapprove this abuse when it stated that "the statute does not distinguish between landlords or agents who are professionals and those who are amateurs."¹³

One running controversy over the present rent control laws has been the extent to which the Commonwealth or any of its political subdivisions may regulate the rents of federally-financed housing projects. In 1971 the town of Brookline passed a by-law¹⁴ which placed under rent control buildings constructed under various Federal Housing Administration (FHA) programs.¹⁵ The by-law was effectively invalidated by an opinion issued by the Massachusetts Attorney General's office¹⁶ which held the Brookline action to be in conflict with the federal scheme of regulating rents in the housing projects which the federal government subsidizes and supervises.¹⁷ Brookline is appealing the action of the Attorney General in a suit pending before the

¹² It must be remembered that the act is a response to "deterioration of a substantial portion of the existing housing stock." Acts of 1970, c. 842, § 1.

¹³ 1973 Mass. Adv. Sh. at 709, 295 N.E.2d at 902.

¹⁴ The by-law was enacted pursuant to authority granted the town of Brookline by special enabling legislation permitting rent control. Acts of 1970, c. 843.

¹⁵ The National Housing Act of 1937, §§ 207, 221(d)(3)-(4), 231, 236, as amended, codified in 12 U.S.C. §§ 1713, 1715(d)(3)-(4), 1715v, 1715z-1 (1970).

¹⁶ The Attorney General's power to invalidate local legislation derives from G.L. c. 12, § 9.

¹⁷ See letter from Carter Lee, Assistant Attorney General, to Thomas F. Larkin, Town Clerk of Brookline, Aug. 18, 1971. Mr. Lee characterized the town's action as an "attempt to superimpose local controls on housing already regulated and controlled by the federal government This appears to be in violation of the Supremacy Clause Congress having already occupied the field by adoption of the National Housing Act."

Supreme Judicial Court.¹⁸

A 1970 Boston ordinance extended rent control to certain types of FHA projects.¹⁹ Out of this municipal action arose the case of *Druker v. Sullivan*,²⁰ wherein the plaintiffs, owners and operators of the Castle Square development, which is financed under §221(d)(3) of the National Housing Act of 1937,²¹ petitioned the United States District Court for the District of Massachusetts to declare the ordinance invalid on the ground that it conflicted with the federal regulatory scheme. At issue in both Brookline and Boston is whether the local municipal action, instituted under valid enabling legislation, constitutes an invasion into a field which the federal government intended to preempt by the use of its own rent-regulation apparatus. Since the issue is not yet resolved, an examination of *Druker* might serve to better frame the issues.

The Castle Square project is subject to a mortgage which is insured by the federal government. In March 1968, the plaintiffs contracted with an agent of the Secretary of Housing and Urban Development to "make dwelling accommodations and services of the project available to occupants at charges not exceeding those established in accordance with a schedule approved by the commissioner."²² The regional FHA commissioner, acting as the Secretary's agent, was to be responsible for approving "a rental schedule that is necessary to compensate for any net increase . . . in . . . expenses over which owners have no effective control."²³ Pursuant to the agreement, plaintiffs sought a rent increase of \$28 per month in May 1969. An increase of \$22 per month was authorized; half of the increase was to take effect in February 1970, the other half in February 1971. However, the Boston Rent Board informed the plaintiffs that the increase would not be given effect since they had failed to comply with the city's rent adjustment procedures.

Plaintiffs urged that the federal government, through its contractual arrangements with FHA landlords, had the sole authority to regulate rents in federally-funded and supervised projects. Therefore, the Boston ordinance could not be applied to the Castle Square project without violating the Supremacy Clause of the United States

¹⁸ *Town of Brookline v. Attorney General*, Supreme Judicial Court No. 15,196. The case was heard by the full bench and by an order dated May 16, 1973, it was remanded to a single justice for further findings of fact.

¹⁹ City of Boston Ordinances of 1970, c. 11, § 1(e). Those programs brought under control include §§ 207, 220, 221(d) (3) and 236 of the National Housing Act of 1937, as amended. See also Ordinances of 1972, c. 19.

²⁰ 322 F. Supp. 1126 (D. Mass. 1971); 334 F. Supp. 861 (D. Mass. 1971), *aff'd* on other grounds, 458 F.2d 1272 (1st Cir. 1972).

²¹ 12 U.S.C. § 1715(d)(3) (1970).

²² 322 F. Supp. at 1128 (D. Mass. 1971).

²³ *Id.* at 1129.

Constitution.²⁴ The court, doubting that the plaintiffs would ultimately prevail on the merits,²⁵ refused to grant injunctive relief. The test as to the merits of the plaintiffs' complaint, the court said, had been explicitly set out by the United States Supreme Court in *Florida Lime & Avocado Growers v. Paul*.²⁶

The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing federal superintendence of the field, not whether they are aimed at similar or different objectives. . . . [F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.²⁷

While conceding that the federal government has the authority to approve rent increases, the court nevertheless found neither a congressional declaration of preemption nor a conflict between the two sets of regulations since the contract between the developers and the FHA called for rents to be set "at charges *not exceeding* those . . . approved by the commissioner."²⁸ Thus, the court found that "[t]here appears to be no necessary conflict with the Boston Ordinance, even if the Boston Rent Board were to establish a rent below the maximum permitted but not required by the regulatory agreement."²⁹

Despite the plaintiffs' argument that they would not be able to meet their debt service obligations to the FHA if their federally-approved rent increases were not given effect, the court also found no potential for irreparable harm. The court emphasized that the plaintiff landlords were merely remanded to the local rent adjustment procedure, which assures the landlord a "fair net operating income,"³⁰ and that the statutory formula would require the local administrative unit to set rents at a level sufficient to meet any debt obligations as they might become due.³¹

Following the directive of the court, the plaintiffs petitioned the Boston Rent Board for a rent increase. Applying their own rent ad-

²⁴ "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

²⁵ 322 F. Supp. at 1129.

²⁶ 373 U.S. 132 (1963).

²⁷ *Id.* at 142.

²⁸ 322 F. Supp. at 1130.

²⁹ *Id.*

³⁰ See generally § 19.4 *infra*.

³¹ 322 F. Supp. at 1130.

justment formula, the local board approved a total rent increase of \$16 per month, thus granting the plaintiffs a rent increase which was \$6 less than the rent schedule approved by the federal administrator. Plaintiffs then returned to the district court and requested a summary judgment on the ground that the outcome of the local adjustment hearing which reduced their federally-approved rent adjustment indicated conclusively that the federal and state regulations conflicted irreconcilably.³² The court refused to grant summary judgment, stating that it could not as a matter of law find that the reduction in the rent increase would render the plaintiffs incapable of meeting their debt obligations.³³ Rather, the court felt that the plaintiffs would have to establish that the rent increase of only \$16 (instead of \$22) per month would not be sufficient for them to make their mortgage payments.

The court also refused to grant the defendants a dismissal of the action since the denial of plaintiffs' motion for summary judgment was not a final adjudication of the plaintiffs' allegation. Instead, the court felt that it would be proper to abstain until the plaintiffs had exhausted the remedies available under the state rent control provision for state judicial review of local rent board actions.³⁴ In other words, the local rent authority was required by state statute to adjust the landlord's rates to a level that would yield a fair net operating income; if the adjustment rendered the landlord incapable of meeting the mortgage obligations, then the local board's action, having violated the state assurance of a fair return to the landlord, would be reversed upon review by the state judiciary. "[N]ot only would such action run afoul of the Boston Rent Control Ordinance but would arguably violate the special enabling act for Boston. . . . Whether the action of the Boston Rent Board contravened . . . State law . . . is a matter particularly suited to state court determination."³⁵ Thus, the federal district court felt that it was proper to await a final state determination of the proper amount of rent increase before deciding whether the local regulations actually conflicted with the federal FHA scheme.

Because of the abstention of the district court, further federal litigation awaits the outcome of the state court review of the rent board's action. It is submitted that no conflict need be found; it is not a case where "the nature of the subject matter permits no . . . conclusion"³⁶ other than preemption. The federal regulations for the granting of rent adjustments require that consideration be given to the amount of

³² *Druker v. Sullivan*, 334 F. Supp. 861 (D. Mass. 1971).

³³ *Id.* at 863.

³⁴ *Id.* at 864.

³⁵ *Id.* at 865. The decision was affirmed by the First Circuit. *Druker v. Sullivan*, 458 F.2d 1272 (1st Cir. 1972).

³⁶ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

rental income necessary to both maintain the economic soundness of a project and to provide a reasonable return on the original investment, consistent with the goal of providing reasonable rents to tenants.³⁷ Under the state enabling legislation, the landlord is assured that he will receive a fair net operating income, and that increased operating costs will be considered so that he may receive a reasonable return on his investment.³⁸ Thus, both the federal and local overseers will administer formulae to assure that the landlord will be compensated above his costs.

The fact that both administrators will seek to ascertain the level of a fair return is not fatal. As *Florida Lime* indicates:

[The Supreme] Court has . . . sustained state statutes having objectives virtually identical to those of federal regulations, . . . and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar. . . . The test . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.³⁹

Since the contract between the FHA and the private entrepreneur stipulates that the federal administrator will set a rent *ceiling*,⁴⁰ a local determination of the allowable rent might be less than that set by the federal administrator and at the same time not violate the federal assurance to the landlord of a reasonable return. Any local adjustment which prevents the FHA landlord from meeting any of his operating costs or even from realizing a reasonable return will violate the state guarantee of a fair net operating income and will arguably be reversed in the course of state judicial review. Any local decision which interferes with the federal scheme will also run afoul of the state law. The two modes of regulation can accommodate each other.

As a matter of policy, local review of rent increases granted by the federal authority appears desirable. Although the FHA is vested with the responsibility of seeing that the landlord's reasonable return is "consistent with providing reasonable rentals to tenants,"⁴¹ the First Circuit has decided that FHA tenants have no standing to assert their own interest during the federal rent adjustment procedure.⁴² On the

³⁷ See 24 C.F.R. § 221.531(c) (1974).

³⁸ See Acts of 1969, c. 797, as amended by Acts of 1970, cc. 863, 842, §§ 7(a),(b).

³⁹ 373 U.S. at 142.

⁴⁰ See text at note 27 *supra*.

⁴¹ 24 C.F.R. § 221.531(c).

⁴² See *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). This case also involves the tenants and landlords of the Castle Square development. The tenants were denied the right to a hearing as to the \$22 per month rent increase granted by the regional FHA administrator on the grounds that "[t]hese procedures would . . . place a significant burden on the relationship between the landlord and the FHA Such procedures may delay economically necessary rent increases and discourage private investors from entering the program at all." *Id.* at 1248.

other hand, under the Massachusetts statutes the tenants have a right to a hearing in regard to the requested rent increase.⁴³ Given the absence of tenant representation throughout the federal rent adjustment procedure, the federal administrator might well lose sight of his duty to assure reasonable rents to tenants, and might not be made aware of decreases in the services supplied by the landlord. He will be motivated by the express and concededly legitimate purpose of making the FHA project appear as lucrative as possible to potential investors,⁴⁴ but he will lose sight of another express and equally legitimate congressional purpose—to supply inexpensive and adequate housing.⁴⁵ The Massachusetts statutory scheme, on the other hand, entitles the tenant to procedural and substantive safeguards which will compel scrutiny not only of the landlord's increased operating expenses but also of decreases in the services he might have promised to supply and deterioration which he might have promised to remedy.⁴⁶ Further, the concern expressed as to the possible disincentive to prospective private entrepreneurs caused by local review of FHA rent adjustments is totally illusory, since all new construction is exempted by statute from control.⁴⁷

It must be noted that the general enabling legislation would seem to preclude any of the other Massachusetts cities and towns from controlling rents in FHA housing, since it excludes from its definition of rental units subject to control those "units which a government unit, agency, or authority either owns or operates; or regulates the rents"⁴⁸ However, this problem can be circumvented by seeking special enabling legislation such as Brookline did, which extends the coverage of rent control to certain classes of rental units exempt under the general enabling legislation.⁴⁹ If such special legislation is enacted, all that remains is the preemption question.

In a recent development subsequent to the end of the Survey year, the Department of Housing and Urban Development (HUD), concluding that local rent controls have become a significant factor in

⁴³ See Acts of 1969, c. 797, as amended by Acts of 1970, cc. 863, 842, §§ 7(a), (b). See also § 19.4 at text at notes 1-7 *infra*.

⁴⁴ See S. Rep. No. 281, 87th Cong., 1st Sess. 3 (1961).

⁴⁵ *Id.* It must also be noted that since the FHA is secondarily liable on the mortgages in such projects, they have a vested interest in keeping rents as high as possible in order to protect their own secondary liability on the mortgages. It is at best dubious whether such a concern is valid in light of the ultimate goal of the FHA, i.e., to provide housing for the poor. It is submitted that the only method for insuring that this ultimate goal be kept in mind is to allow tenants a forum at the local level for the protection of their own interest.

⁴⁶ See Acts of 1969, c. 797, as amended by Acts of 1970, cc. 863, 842, §§ 7(a), (b).

⁴⁷ Acts of 1970, c. 842, § 3(b)(2).

⁴⁸ *Id.* §§ 3(b)(3)(i), (ii).

⁴⁹ See Acts of 1970, c. 843. See also § 19.1 at notes 69-70 *supra*.

causing defaults by landlords with federally-insured mortgages,⁵⁰ promulgated interim rules which attempt to remove from local control those units whose inclusion in a state regulatory scheme makes it impossible, as HUD perceives it, for the owner to maintain the building and also meet his mortgage obligations.⁵¹ On their face, the new federal regulations will not invalidate local rent supervision since, under the Massachusetts enabling legislation, the landlord is entitled to sufficient rental income to meet mortgage requirements and, in addition, to receive a reasonable return on his investment. It seems, however, that the agency decision will have a more far-reaching effect in that it will lend support to those who argue that the federal government intended to preempt the regulatory field in this area.

Boston has already instituted a court challenge to this ruling.⁵² The technical aspects of its argument will be altered, however. While previously resting its position on the absence of any congressional expression of an intention to preempt, the city will now be compelled to demonstrate that HUD has exceeded the scope of its delegated authority by promulgating this declaration of federal preemption.

§19.4. Rent adjustments. Procedure. As mentioned above,¹ the landlord who seeks an individual upward adjustment of rent or the tenant who seeks to reduce the monthly rental rate in a controlled unit must petition the local board or administrator.² Notice must be given to the adverse party, who has the right to a hearing³ wherein the moving party can be required to establish the necessity of an adjustment by producing relevant books, records, receipts, and similar evidence.⁴ The statute empowers the local rent board "to compel the attendance of . . . witnesses and the giving of testimony" by applica-

⁵⁰ See 40 Fed. Reg. 8189 (1975).

⁵¹ See 40 Fed. Reg. 8189-90 (1975). These interim rules became finalized on April 25, 1975.

⁵² See N.Y. Times, March 28, 1975, at 48, col. 5.

§19.4. ¹ See §19.1 at text at note 85 supra.

² Acts of 1970, c. 842, § 8(a). It should be recalled that § 8(b) allows the local board to grant an across-the-board percentage increase in maximum rent for any class of controlled units in the city or town. This is called a "general adjustment." The statute requires that public notice of the proposed general adjustment be given through at least three newspaper publications, and that a public hearing be held before the adjustment is effected. *Id.*

³ *Id.* § 8(a).

⁴ *Id.* § 5(d), which reads in pertinent part:

The board or administrator may . . . conduct such hearings, and obtain such information as it deems necessary in . . . administering and enforcing this act For the foregoing purposes, a person may be summoned to attend and testify and to produce books and papers Any person who rents or offers for rent . . . may be required to furnish under oath any information required by the board or administrator, and to produce records and other documents and make reports.

tion for subpoenas to the Supreme Judicial Court or to the superior or district courts.⁵

The conduct of the hearing is regulated by the requirements incident to the adjudicatory proceedings of agencies.⁶ Thus, rules of privilege will be recognized, reasonably reliable evidence will be required, cross-examination and rebuttal will be permitted, and an official record of the hearing will be made.⁷ The purpose of the hearing is to determine whether changes in costs or other conditions require that the rental charges be adjusted.

The exact procedure for rent adjustment hearings is not fixed by the statute. However, in *Nayor v. Rent Board of Town of Brookline*,⁸ decided under an earlier Massachusetts rent control statute,⁹ a tenant challenged the granting of a rent increase to his landlord on the ground that the board had failed to consider whether the landlord was already receiving a fair net operating income from the rental rate which existed prior to his petition for an upward adjustment.¹⁰ Plaintiff's counsel opposed the board's use of the statutory formula,¹¹ and he requested that it allow him to summons a representative of the landlord in order to examine him as to the existence of a reasonable return before the landlord was allowed to offer proof as to the necessity of an increase. The board refused and, applying its own formula, granted the landlord an increase.

The tenant exercised his right to judicial review. Although the Supreme Judicial Court dismissed the case on the grounds of mootness because of the expiration of the statute, the court indicated that it did not feel that the statute "made mandatory a determination of whether or not any petitioning landlord was receiving rent adequate to produce fair net operating income as a condition precedent to permitting any increase."¹²

This dictum works a serious disadvantage to tenants. The statutory formula for rent adjustment, although ostensibly requiring a determination of a fair net operating income, merely orders the local authority to consider changes in the expenses incurred and services rendered by the landlord.¹³ Thus, a landlord might merely produce rec-

⁵ Acts of 1970, c. 842, § 5(d) expressly incorporates G.L. c. 233, § 10 (giving the Supreme Judicial Court and the superior court subpoena power) into the rent control scheme. The former provision also vests the district courts with the identical subpoena power given to the Supreme Judicial Court and superior courts by G.L. c. 233, § 10.

⁶ Acts of 1970, c. 842, § 8(d). See G.L. c. 30A, §§ 11(1)-(6).

⁷ G.L. c. 30A, §§ 11(1)-(6).

⁸ 334 Mass. 132, 134 N.E.2d 419 (1956).

⁹ Acts of 1953, c. 434, § 5.

¹⁰ 334 Mass. at 133, 134 N.E.2d at 421.

¹¹ The factors ostensibly applied were similar to the six statutory factors found in Acts of 1970, c. 842, §§ 7(b)(1)-(6).

¹² 334 Mass. at 136, 134 N.E.2d at 422.

¹³ See text at notes 14-16 *infra*.

ords of increased expenses and be granted a rent increase, without any scrutiny as to whether he was receiving a fair net operating income prior to his petition. The rental income which he was receiving at the initiation of rent control will therefore escape examination.

Substantive standards for rent adjustments. Adjustments in rental levels are to be determined so as to yield the landlord a fair net operating income. The general enabling act directs that six factors, "among other relevant factors,"¹⁴ shall be considered in the determination of whether the rental level should be increased. They include: (1) changes in property taxes; (2) unavoidable increases, or any decreases, in operating expenses; (3) capital improvements; (4) increases or decreases in living space, services, furniture or furnishings; (5) substantial deterioration of the rental unit aside from ordinary wear and tear; and (6) failure to perform ordinary repair, maintenance, and replacement.¹⁵ The statute does not clearly indicate how much weight is to be accorded to each of these factors, nor does it define in explicit terms "fair net operating income."¹⁶

In 1971 in *Marshal House, Inc. v. Rent Control Board of Brookline*¹⁷ the Supreme Judicial Court expressed its understanding that a fair net operating income includes not only reimbursement for the expenses of and services rendered by a landlord, but also a reasonable return on the landlord's investment. The Court felt that a parallel could be drawn to the statutory standard of "adequate, just, [and] reasonable"¹⁸ rates for insurance premiums, which had been interpreted as requiring premium levels to be set at the midpoint between the lowest rate which is not confiscatory and the highest rate which is not excessive or extortionate.¹⁹ The Court refused to specify what percentage return would constitute a "reasonable" return on the landlord's investment,

¹⁴ Acts of 1970, c. 842, § 7(b).

¹⁵ *Id.* Although the statute does not so indicate, it would seem that the duty implied by the sixth factor would accrue to the tenant, and that failure to perform would operate in favor of a landlord's request for a rent increase.

¹⁶ The Brookline enabling statute defines fair net operating income as:

[T]hat income which will yield a return, after all reasonable operating expenses, on the fair market value of the property equal to the debt service rate generally available from institutional first mortgage lenders or such other rate of return as the board, on the basis of the evidence presented before it, deems more appropriate to the circumstances of the case. The fair market value of the property shall be the assessed valuation of the property or such other valuation as the board . . . deems more appropriate to the circumstances of the case.

Acts of 1970, c. 843, § 3. There is no similar language in the general enabling statute; furthermore, the Brookline language cannot be read into the general statute since it is clear that the Brookline statute is a special one enacted in response to Brookline's own particular needs.

¹⁷ 358 Mass. 686, 266 N.E.2d 876 (1971). See § 19.2 at text at notes 27-41 *supra*.

¹⁸ See G.L. c. 175, § 113B.

¹⁹ 358 Mass. at 704, 266 N.E.2d at 888, citing *Massachusetts Bonding & Ins. Co. v. Commissioner of Ins.*, 329 Mass. 265, 270, 170 N.E.2d 807, 811 (1952).

since it felt that a rigid standard "which did not empower the local authority to deal with the changing needs of the locality as they developed might well only aggravate the conditions [the rent control laws were] designed to alleviate."²⁰

This broad grant of discretion to local rent boards has resulted in some controversy. In Cambridge, a rent control administrator, in allowing an eight to twelve per cent return on a landlord's investment, measured the investment by the current market value of the controlled property rather than by its initial cost to the landlord. Such a measure produces windfall profits for landlords for two important reasons. First, current market value reflects the shortage of low and middle-income residential housing. To use market value as the base not only allows landlords to profit from the dearth of rental units but also frustrates the purpose of the act, *i.e.*, to increase the supply of such housing. It would provide a disincentive to increase housing supply, since a consequence of such an increase would be the deflation of the value of existing housing. Second, the use of market value fails to consider the fact that many landlords holding multiple-unit properties own twenty per cent or less of the equity in such property. To base their rate of return on market value would offer them a return far in excess of the money which they have at risk in such an enterprise. Also, it would encourage speculation in the housing market and short-term ownership of rental property—clearly counterproductive to the goals of the act. It is submitted that a formula which takes into account only the *actual* investment of the landlord would be more consistent with the purposes of the rent control legislation.

The Cambridge formula was eventually challenged in district court by dissatisfied tenants.²¹ The formula was voided for two reasons. First, the Cambridge administrator had merely set guidelines which were not sufficiently exact; they did not satisfy the statutory requirement that there be "relevant factors which the Administrator has by *regulation* defined"²² available for the determination of the landlord's reasonable return. Second, the court properly recognized that market value was not the correct starting point for a determination of the reasonableness of the landlord's return. It agreed that current market value of residential property is usually higher than the landlord's purchase price since the value of such property increases as the shortage of rental housing becomes more acute. To measure a landlord's "reasonable return" on the basis of such an inflated value would permit a landlord to profit from the present housing shortage in a way inimical to the purpose of the act. Thus, fair net operating income

²⁰ 358 Mass. at 705, 266 N.E.2d at 889.

²¹ *Ackerman v. Corkery*, Equity No. 17 of 1971 (Middlesex Dist. Ct., March 2, 1972) (slip opinion).

²² *Id.* at 5. For the statutory language, see Acts of 1970, c. 842, § 7(b).

should be based upon operating expenses as they relate to the landlord's initial investment in the property, and not to the current market value of the property.²³

At approximately the same time that the district court rendered its decision, a judge of the Middlesex Superior Court continued a restraining order enjoining the successor Cambridge Rent Control Administrator from voiding rent adjustments made pursuant to the challenged formula.²⁴ The Supreme Judicial Court, in resolving the inconsistency, found that the conclusions of the district court (invalidating the use of market value as the base) were in accordance with both the statutory purpose and the *Marshal House* opinion and therefore dissolved the restraining order issued by the superior court.²⁵

Cambridge has instituted a system whereby an amount equal to the net receipts of the landlord from his rental property in 1967 is used as a starting point and is increased by a profit inflater similar to a cost of living increase.²⁶ The landlord is thus assured that his rental income will maintain a constant real value. Such maintenance of the landlord's purchasing power is apparently not required by law²⁷ and is questionable on policy grounds: it forces the tenant to bear the entire cost of inflation.

The rent adjustment method employed by the city of Boston²⁸ appears to be more equitable. It creates a rebuttable presumption that the rents received by the landlord in December 1971 yielded him a fair net operating income at that time.²⁹ Adjustments are then made in accordance with the six statutory factors.³⁰ Finally, further amounts are added or subtracted "as may be necessary to avoid gross inequity and extreme hardship to the landlord or to the tenants . . ."³¹ Under

²³ *Ackerman v. Corkery*, Equity No. 17 of 1971 (Middlesex Dist. Ct., March 2, 1972) (slip opinion), at 7.

²⁴ *Gifford v. Healy*, Docket No. 33159 (Middlesex Super. Ct. 1972).

²⁵ *Rent Control Bd. of Cambridge v. Gifford*, 1972 Mass. Adv. Sh. 1342, 285 N.E.2d 449.

²⁶ *Cambridge Rent Control Board Regulations* 72-01 (1972).

²⁷ It should be noted that in *Spaeth v. Brown*, 137 F.2d 669 (Emer. Ct. App. 1943), claimant landlord argued that the Price Administrator's formula for fixing maximum rents under the Emergency Price Control Act of 1942, § 2(b), 50 U.S.C. § 902(b) (appendix 1942), was invalid because it did not take into account the reduction of the landlord's purchasing power due to inflation. In rejecting that contention, the court held that "[t]o increase rents in order to maintain a landlord's purchasing power might well result . . . in the impairment of the standard of living and purchasing power of large numbers of consumers and wage earners having an equal claim to protection." 137 F.2d at 671. The new Cambridge formula is being challenged in *Twomey v. Lefkowitz* in Middlesex Superior Court.

²⁸ See *Boston Rent Regulations* § 6 (Feb. 1, 1974).

²⁹ *Id.* § 4.

³⁰ *Id.* For a list of the statutory factors, see text at note 15 supra.

³¹ *Boston Rent Regulations* § 4(i) (Feb. 1, 1974).

this formula, it appears that landlords will not automatically receive an upward adjustment simply because the value of the dollar has decreased.³² Moreover, the pre-rent control rental charge will not automatically escape scrutiny by being utilized as the rigid starting point for the determination of fair net operating income.

The built-in flexibility of the rent control statutes, which allows local authorities to define fair net operating income in light of local needs and circumstances, is a desirable feature. But in implementing its goal of flexibility, the legislature has been unnecessarily vague and has left local rent boards without any direction at all. The controversy over how to measure "investment" is an example of the injustices which inevitably result from such a statutory void. One solution might be to have the legislature draw up several different formulae for determining fair net operating income. A local board could then choose to use the formula most suited to its needs and circumstances. Such a scheme would allow for flexibility within legislatively defined limits of fairness to both landlords and tenants.³³

§19.5. Issuance of certificate of eviction. *Procedural aspects.* Under the general enabling act, no action for recovery of a controlled rental unit can be initiated unless the landlord has obtained a certificate of eviction from the local rent control authority;¹ criminal sanctions may be applied against any landlord who seeks to recover possession without such certification.² Upon receipt of the landlord's application for a certificate, the rent control administrator notifies the tenant.³ If the tenant wishes to oppose the application, he is usually required to file information in support of his position.⁴ Most localities provide for a hearing at which the landlord must produce evidence to justify his claim that the certificate should issue.⁵ Such a hearing,

³² Section 8(b) of chapter 842 of the Acts of 1970, the general enabling act, provides for downward adjustments where the landlord is making more than a fair net operating income. In this regard, two of the factors listed in § 7 are generally influential: (1) decrease in living space, services, furniture, furnishings, and equipment, and (2) substantial deterioration other than ordinary wear and tear. (Arguably, failure to perform ordinary repair, replacement, and maintenance is a duty which accrues to the tenant. See note 15 supra). The town of Brookline has come up with an imaginative implementing procedure for this last factor: the rent control board will grant rent decreases within thirty days after code violations are certified to exist. The reduction is twenty per cent of rental price if such violations are "serious" and ten per cent if not.

³³ For several suggested formulae to determine fair net operating income, see The Community Research and Publications Group, *Less Rent More Control: A Tenants' Guide to Rent Control in Massachusetts* 57-76 (1973).

§19.5. ¹ Acts of 1970, c. 842, § 9. See § 19.2 supra at notes 89-91.

² Acts of 1970, c. 842, § 9(d). For a discussion of sanctions, see § 19.1 at note 95 supra.

³ Acts of 1970, c. 842, § 9(b).

⁴ See, e.g., *Boston Eviction Regulations* § 10 (1974).

⁵ Boston gives the Rent Control Administrator discretion to order a hearing notwithstanding the tenant's failure to so request. *Id.* § 12.

however, is not expressly required by the statute.

In *Gentile v. Rent Control Board of Somerville*,⁶ decided during the Survey year, an aggrieved tenant made two claims: first, that the rent control laws impliedly grant a tenant a right to an adversary hearing on a landlord's application for a certificate of eviction; and second, that even if such an implication could not be read into the statute, notions of due process require that such a hearing be granted. The local board, after receiving an application for a certificate from a landlord, had notified the tenant. The tenant opposed the application and filed supporting documents. The landlord then filed additional information with the board. Without allowing the tenant an opportunity to respond to this supplemental information, the board granted the certificate. No hearing was conducted, and the board failed to issue either a statement of reasons or findings of fact to explain its decision. The landlord thereupon commenced a summary process action in the Somerville District Court; at the same time, the tenant initiated a suit in district court to have the board's decision set aside on the ground that he had been deprived of his right to a trial-like adversary proceeding. In the tenant's suit, the district court found for the board, and upon tenant's appeal, the superior court affirmed. The tenant thereupon appealed to the Supreme Judicial Court, which rejected his claims for two reasons. First, the Court pointed out that, since the statute expressly provided for an adversary proceeding with respect to a landlord's petition for a rent adjustment,⁷ the absence of such a provision in the section relating to eviction procedures indicated that the legislature did not intend to encumber the certificate of eviction process with the trappings of a formal trial.⁸ Second, while not conceding that the tenant had any constitutional ground for his claim to an adversary proceeding, the Court concluded that any such requirement would be fulfilled by the statutory provision for a hearing in the course of judicial review of the board's action.⁹ The act provides that a district court, in reviewing a decision of the rent board, may act in the same manner that a superior court does in reviewing proceedings originally brought in a district court under the provisions of chapter 231A of the General Laws.¹⁰ This means that any question of fact in dispute which was resolved by the board without an adversary proceeding may be determined by the district court as if the board had made no finding of fact. Therefore, the Court reasoned, whatever procedural rights belong to a tenant are adequately safeguarded through this scheme of review.

⁶ 1974 Mass. Adv. Sh. 809, 312 N.E.2d 210.

⁷ See Acts of 1970, c. 842, § 8. See § 19.4 at text at notes 4-7 supra.

⁸ 1974 Mass. Adv. Sh. at 814, 312 N.E.2d at 215.

⁹ Id.

¹⁰ Acts of 1970, c. 842, § 10.

It is clear that the rent control statutes grant both tenants and landlords a right to appeal a board decision to the district court which has territorial jurisdiction over the locus of the controlled rental unit.¹¹ The statute does not make clear, however, whether an appeal from a district court review of a board decision is to be lodged in the superior court or in the appellate division of the district courts. This question of forum was raised during the Survey year in *Freedman v. Rent Control Administrator of Cambridge*.¹² Plaintiff-tenant commenced an action in district court to set aside the action of the administrator in granting a certificate of eviction. After an adverse determination by the district court, the tenant filed a claim of appeal in the superior court which incorporated a claim for a de novo jury trial. The landlord, who was joined with the rent administrator as a co-defendant, moved to dismiss on the grounds that the appeal was improperly before the superior court. The court denied the motion and reported its decision to the Supreme Judicial Court pursuant to chapter 231, section 111 of the General Laws. The Court then transferred the matter to the Appeals Court pursuant to chapter 211A, section 12 of the General Laws. The Appeals Court rejected the landlord's contention that the appellate division of the district courts was the proper forum for the appeal. The court based its decision on the language of the enabling statute, which provides, first, that all orders and judgments of the district court may be appealed in a manner provided in the case of a civil action in that district court¹³ and, second, that the district court having territorial jurisdiction over the area in which the controlled rental unit is located shall have exclusive original jurisdiction over all actions brought under the rent control statute.¹⁴ Since the district court had exclusive original jurisdiction, the defendant could not have removed the matter to the superior court; where the action cannot be brought originally in the superior court and the parties have no election as to forum, an appeal must go to the superior court rather than to the appellate division of the district courts.¹⁵ Thus, the second level of review is in the superior courts.

If the question of whether a certificate of eviction was properly issued is ultimately determined in favor of the landlord, he may initiate a summary process action to recover possession. This, in turn, raises the question of whether the tenant has a right to defend the summary process action by alleging that none of the statutory grounds for the

¹¹ *Id.* In Boston, the Boston Housing Court has concurrent jurisdiction with the district court to review determinations of the rent administrator. See Acts of 1969, c. 797, as amended by Acts of 1970, c. 843, § 1.

¹² 1973 Mass. App. Ct. Adv. Sh. 461, 298 N.E.2d 868 (rescript opinion).

¹³ Acts of 1970, c. 842, § 10(a).

¹⁴ *Id.* § 10(b).

¹⁵ See G.L. c. 231, § 97. See also *Mancini v. Columbus Auto Body, Inc.*, 359 Mass. 586, 270 N.E.2d 399 (1971).

issuance of the certificate of eviction were present. The *Gentile* Court commented on this problem in dictum. The Court concluded that since the enabling act provides for judicial review of a rent control administrator's finding with respect to the existence of adequate grounds for the issuance of a certificate, the legislature must have intended that all questions arising out of that determination are to be resolved in the tenant's appeal against the board.¹⁶ Therefore, the grounds for the certificate of eviction are not to be placed in issue in a summary process action.¹⁷

In light of the express statutory language, the Supreme Judicial Court was no doubt correct in concluding that the legislature did not intend to provide for an adversary hearing at the local rent board level. Nevertheless, when read in this manner the law does not afford the tenant adequate protection. It has been the observation of this writer that some district court judges, when supposedly resolving issues of fact as if the rent board had made no determination of them, often attach great weight to the granting of the certificate; it is as if the tenant is confronted with an almost irrebuttable presumption of the validity of the board's action. Coupled with the *Gentile* dictum as to the conclusiveness of the judicial review of the board's action for the purposes of summary process, the original decision of the board takes on great significance, and any hasty or unfair determination by the local board can serve effectively to deprive the tenant of any opportunity to assert a valid defense. It is therefore submitted that the legislature should extend to the certificate of eviction proceedings the identical procedural niceties that are available to applications for rent adjustments.

*Substantive grounds for the issuance of the certificate: late payment of rent.*¹⁸ In *Gentile*, the plaintiff-tenant had argued that the certificate of eviction, which apparently had been granted on grounds of non-payment of rent,¹⁹ did not satisfy the statutory criteria for what constitutes non-payment.²⁰ The landlord had stated in his application for the certificate of eviction that the tenant had always been behind in his rent, which became due on the first day of each month. The tenant, in his written response, claimed that the landlord had agreed to accept late payments, which were a consequence of the tenant's hos-

¹⁶ 1974 Mass. Adv. Sh. at 816, 312 N.E.2d at 216.

¹⁷ The Court also indicated by way of a footnote that if a complaint is filed pursuant to G.L. c. 842, § 10(a), challenging the issuance of the certificate, in many instances that complaint and the summary process action may be consolidated for trial. 1974 Mass. Adv. Sh. at 816 n.7, 312 N.E.2d at 216 n.7.

¹⁸ For the full list of the statutory grounds for eviction certificate issuance, see § 19.1 at note 90 *supra*.

¹⁹ Since the board is not required to make a record of its deliberations, see text at notes 6-10 *supra*, one can only speculate as to upon which of the statutory grounds a certificate is issued.

²⁰ Acts of 1970, c. 842, § 9(a)(1).

pitalization and inability to work. The landlord denied the existence of any such agreement, however, and stated that his monthly mortgage obligation to the bank precluded any such arrangement. The landlord also submitted a schedule which demonstrated that rent payments had been late in every month from February 1970 until May 1971. Moreover, the landlord indicated that he had previously sent the tenant an eviction notice in September 1970 which was subsequently withdrawn upon receipt of tenant's late payment. The tenant's sole substantive defense was that late payment is not a statutory ground for eviction; since his rent was paid up at the time the landlord applied for the certificate of eviction, there was no justification for its issuance.

The Supreme Judicial Court refused to pass on the question of whether repeated late payment of rent falls within the statutory ground of non-payment. Instead, the Court found ample ground for issuance of the certificate in the "catch-all" provision of the section on evictions, which allows the granting of a certificate when "the landlord seeks to recover possession for any just cause [other than the nine specified grounds for eviction], providing that his purpose is not in conflict with the provisions and purposes of this act."²¹ The Court reasoned that the term "conflict" is addressed to a disharmony between the landlord's purpose in seeking the eviction and the "provisions and purposes of this act."²² The Court concluded that no such conflict existed since there was no indication that the eviction was aimed at removing the unit from the rolls of controlled rental units.²³ The Court rejected a reading of the statute that would interpret "conflicts" as referring to a disharmony between "any other just cause" and the nine specified grounds for eviction. Such a reading of the statute most likely would preclude chronic late payment as grounds for eviction since it would, as the tenant insisted, conflict with the statutory provision for issuance of the certificate for non-payment of rent.²⁴

However, the Court did suggest that, in certain circumstances, late payment would not justify the issuance of a certificate. The Court drew a parallel to the Massachusetts statute which allows the tenant to bar a landlord's recovery of possession by curing the non-payment within five days of receipt of notice to quit.²⁵

²¹ *Id.* § 9(a)(10).

²² 1974 Mass. Adv. Sh. at 813, 312 N.E.2d at 214.

²³ *Id.*

²⁴ See Acts of 1970, c. 842, § 9(a)(1).

²⁵ 1974 Mass. Adv. Sh. at 814 n.5, 312 N.E.2d at 214 n.5. The statute relied upon by the Court is G.L. c. 186, § 2. Since the statute carves out an exception where the tenant has received a similar notice to quit based upon non-payment of rent within the preceding twelve months, the Court felt that the parallel was not applicable here; the landlord had previously applied for a certificate of eviction under § 9(a)(10) which he withdrew after tender of payment by the tenant.

Substantive grounds: renovation of rental units. In *Mayo v. Boston Rent Control Administrator*,²⁶ decided during the Survey year, the landlord, intending to make substantial renovations of the premises in question, argued that such renovations could be made only if the apartments were vacated. The administrator concluded that the landlord's stated purpose for seeking the evictions was a "just cause" that did not conflict with the purposes of the rent control laws,²⁷ and thus issued the certificates. Tenants appealed the decision, and the Boston Housing Court reversed.²⁸ The Supreme Judicial Court, finding no error in the factual determinations or the application of law made by the housing court, affirmed that decision. The findings of the housing court emphasized the recital, contained in the preamble to the act, *i.e.*, that the statute's enactment was a direct response to the "'substantial and increasing shortage of rental accommodations for families of low and moderate income.'"²⁹ Since the record reflected that the proposed renovation would increase the rental costs by at least \$120 per month, and since such a price hike would permanently remove the units from the low and moderate-income rental market, the "result would be in conflict with what is clearly a central purpose of the act":³⁰ it would subtract from the stock of low and moderate-income housing. Additionally, the Court rejected the landlord's contention that evictions were required to make necessary minimal repairs, as opposed to optional upgrading of the units, in order to insure the continued suitability of the units for human habitation. The Court disagreed, concluding that necessary repairs could be performed without evictions. Moreover, if such repairs required extraordinary financial outlays, the landlord would be entitled to apply for an upward adjustment of his fair net operating income. Finally, although the Court conceded that its decision prevented the landlord from realizing his maximum potential profit, it found no constitutional infirmity in its result, since its decision was based upon a statute enacted pursuant to a legislatively-recognized public emergency.³¹

²⁶ 1974 Mass. Adv. Sh. 1109, 314 N.E.2d 118.

²⁷ See Acts of 1970, c. 842, § 9(a)(10); Acts of 1969, c. 797.

²⁸ Acts of 1969, c. 797 vests concurrent jurisdiction in the district courts and the Boston Housing Court.

²⁹ 1974 Mass. Adv. Sh. at 1113, 314 N.E.2d at 121, quoting Acts of 1970, c. 842, § 1 (emphasis added by Court).

³⁰ 1974 Mass. Adv. Sh. at 1114, 314 N.E.2d at 122.

³¹ Chief Justice Tauro, in a vigorous dissent, questioned the constitutionality of the majority's decision, since it "allows the tenants to take from the landlord a substantial property interest, namely, the right to make substantial alterations on his property and to obtain correspondingly higher rents." *Id.* at 1120, 314 N.E.2d at 127 (dissenting opinion).