

THE ROAD HOME

WORKING WITH SMALL PROPERTY OWNERS TO PRESERVE AND CREATE AFFORDABLE RENTAL HOUSING

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INTRODUCTION

The price of housing in Massachusetts is currently a hot topic for reporters and politicians, but the media-generated image of high rents everywhere is simply not true. Rent and income trends differ widely, even within neighborhoods. As we shall see later, rapidly rising rents occur in relatively few areas. Meanwhile, just one or two neighborhoods away from these local hot markets, rents can be markedly lower, and one can actually see the supply of housing decline as multi-family properties are abandoned and stand empty, boarded up. This ongoing loss of housing from deterioration and abandonment in lower-income neighborhoods goes almost completely ignored by policymakers and the media alike. Yet the problem of housing loss is at least as serious as the problem of rising rents during an economic boom. Stopping this loss would improve housing supply at the most affordable end of the rental market and could ease the pressures pushing rents upward elsewhere.

Over the past two decades, rental housing in Massachusetts has been abandoned at a high rate. The city of Boston maintains an abandoned housing list that still numbers well over 200 properties, down from 822 properties in 1997 and 496 properties in 1998 because of better economic times.¹ A large majority of the abandoned housing lies in Dorchester and Roxbury, smaller amounts in Boston's other low-rent neighborhoods. For every abandoned house in a low-income neighborhood, there are many more houses not being maintained, gradually heading toward demolition, and ripe for abandonment if anything goes wrong. The cities of Brockton, New Bedford, and Fall River have experienced

high levels of abandoned housing with its associated problems of drug dealing and other crime.

Housing is abandoned not just in urban areas, but in the older industrial centers of almost every city and town in Massachusetts. Often it is very beautiful, vintage housing. Often it is in good condition when abandoned. Almost nothing similar is being built to replace it anywhere in the state. Abandoned housing is even a reality in some of the smallest towns in Massachusetts, in the old mill-worker housing built for turn-of-the-century manufacturing centers. Housing inspectors in Easthampton, Greenfield, and Montague in central Massachusetts told us how frustrated they are by their almost intractable problems with deteriorating and abandoned housing, saying their localities are experiencing "all the problems of the inner-city." These inspectors want reform of the housing laws that are contributing to their local problems.²

In 1992, the city of Lawrence blazed into national headlines as the "City of Fire" as it wrestled with widespread abandoned housing that had become the target of arson. Since then, more than 400 abandoned houses have been torn down by the city, mostly three-family houses, at a cost of about \$12,000 per property. Lawrence still has over 200 buildings on its list of abandoned properties, almost all residential multi-family houses. The head of inspectional services in Lawrence has been outspoken for years on the need to require tenants to escrow rent during disputes.³ Currently tenants may withhold rent until the dispute is resolved; for low-income landlords, this drop in income can make it impossible to maintain the property or pay the mortgage on it and can ultimately lead to its being abandoned.

¹ The current list of abandoned housing was obtained from the Boston Department of Neighborhood Development and analyzed by neighborhood.

² See "Are landlord-tenant laws creating slums?" *Small Property Owners News*, November 1998.

³ See "Why abandoned housing?" *Small Property Owners News*, February 1999.

A national housing expert, Cushing Dolbeare, affiliated with the National Center for Lead-Safe Housing, remarked at a 1997 New England conference on lead paint abatement that abandoned housing she has seen across the country was “often in good shape” at the time it was abandoned.⁴ What pushed this housing over the edge? One particularly costly part of the habitability codes in many states, including Massachusetts, is the requirement to abate the lead paint in any rental unit in which a young child resides. Often owners are faced with an impossible situation—costly mandated abatement, tenants who legally are withholding their rent for code non-compliance, and no prospect

of recovering costs because tenants simply cannot pay higher rents—that gives them little choice but to abandon their properties.

RENTAL HOUSING IN BOSTON

A comprehensive view of the housing market is necessary to correct popular misconceptions and draw attention to real problems. Media accounts typically focus on Boston and convey an image of “high and increasing rents” everywhere, ignoring large neighborhood variations in rents, incomes, rent burdens, and other relevant parameters. A recent editorial in the *Boston Globe* read, “Market-rate rents are above \$1,000 for small apartments in the city’s most modest

Table 1. Change in Rent Burdens in Boston’s Neighborhoods, 1995-1998

Boston Neighborhoods	1998 Rent for 2 BR (\$)	Change in Rent Burdens ^a
1. High rents, high-income neighborhoods		
Back Bay / Beacon Hill	1970	-19
West Roxbury	1000	-5
South End	1500	-5
Charlestown	1550	-5
2. Stable low-rent neighborhoods, endangered housing		
Mattapan	700	0
Hyde Park	838	0
Dorchester	750	+1
Roxbury	775	+3
Roslindale	900	+3
3. Mild pressure on the middle class		
Fenway/Kenmore	1,350	+5
Central downtown	2,200	+6
Allston/Brighton	1,200	+7
4. Three shifting neighborhoods		
South Boston	1,200	+10
East Boston	1,000	+15
Jamaica Plain	1,100	+20

^aThis column provides the numerical difference from 1995 to 1998 in the percentage of residents in each neighborhood who paid more than 30 percent of household income in rent. A + sign means rents rose faster than incomes, affordability decreased; a - sign means rents rose slower than incomes, affordability increased; 0 means rents and incomes rose at exactly the same rate, with no change in affordability.

Source: Boston Department of Neighborhood Development chart identified as “Housing90-98.xls” and dated 1/19/99, at which time it was circulated to the media. This chart identifies its sources as “Income projections from Pcensus software” and “City of Boston Rental Survey.”

⁴ See “Abatement is dying,” *Small Property Owners News*, November 1997.

Table 2. Boston's Neighborhoods: Rent Burdens, Incomes, and Household Size (1998)

	Average Household Size	Average Per-capita Income (\$)	% Households over 30% Rent Burden	1998 Median Rent for 2 BR (\$)
East Boston	2.43	15,952	62	1,000
Charlestown	2.11	36,196	53	1,550
Central	1.69	37,162	77	2,200
Back Bay/Beacon Hill	1.56	63,270	58	1,970
South Boston	2.18	22,312	61	1,200
Fenway/Kenmore	1.72	16,240	77	1,350
South End	2.08	28,142	63	1,500
Allston/Brighton	2.24	22,327	60	1,200
Jamaica Plain	2.53	21,591	53	1,100
Roxbury	2.83	12,882	53	775
Dorchester	2.85	18,021	38	750
Mattapan	3.13	14,306	42	700
Roslindale	2.61	20,583	40	900
Hyde Park	2.64	21,140	34	838
West Roxbury	2.35	28,627	35	1,000

Source: Boston Department of Neighborhood Development: chart identified as "Housing90-98.xls" and "PCensus for MapInfo/City of Boston, Median Income, National Decision Systems 1998."

neighborhoods."⁵ Less than two weeks before, however, the *Globe* had printed the official statistics showing median rents between \$700 and \$900 for a two-bedroom apartment in five of Boston's lowest-income neighborhoods.⁶ The city of Boston's rental survey shows a 2 percent increase in citywide rents over the past year, yet a local television reporter recently reported a 50 percent increase in Boston rents over an unspecified time period.⁷

Tables 1 and 2 present the latest data comparing rents, incomes, and changing rent burdens in Boston's neighborhoods, as reported by the Boston Department of Neighborhood Development. Table 1 distinguishes four groups of neighborhoods by their various rent burden changes. Table 2 highlights an important cluster of lower-income neighborhoods.

First let us note that the phenomenon of rents rising markedly faster than incomes is confined to a few districts and areas in Boston. They are group 4 in table 1, consisting of three very modest-rent neighborhoods looking attractive to

outsiders and experiencing high demand. But the impact is on just 17 percent of Boston's neighborhoods (weighted by population) during the three-year period from 1995 to 1998 immediately after rent control's end. Moreover, these neighborhoods are not turning into high-rent districts; at the end of the three years, their median rents remained next to the lowest as a group in Boston. Outside Boston, up-to-date statistics are not available, but Cambridge (also a former rent-controlled community), Waltham, and areas along the Route 495 corridor appear to be similar hot-spot markets.

Now consider the neighborhoods in group 3 in table 1, neighborhoods with fewer families and more singles and students, where another 23 percent of Boston residents live. Here rents have gone up marginally faster than incomes, the equivalent of \$60 on a \$1,000 rent without a corresponding increase in income. This modest pressure, however, is falling largely on middle-class residents or young people with high future earning potential. The high population of students with low incomes here makes rent burdens appear higher.

The upward trend in both groups 3 and 4 cannot be considered long-term because of the one-time impact of rent control's end.

Now let us note a surprising phenomenon: neighborhoods with generally very high rents, but where rent burdens *declined* because incomes in this economic boom rose faster than

⁵ "Degentrification in the South End," *Boston Globe*, editorial, August 11, 1999, p. A18.

⁶ "High cost of housing remakes a city," *Boston Globe*, August 1, 1999, p. A26.

⁷ Real Estate Trends, City of Boston Department of Neighborhood Development, First Quarter Report 1999, p. 4. The television report appeared in a two-part series entitled "Housing Crunch," on Boston's WBZ-TV Channel 4 evening news during the week of September 6, 1999.

rents. This is group 1 in table 1. These are life-style renters choosing and well able to pay more for convenience, proximity, and status in these choice neighborhoods. This situation shows that high rents and rising rents do not, by themselves, indicate an affordability problem; rent-to-income ratios are the only real measure.

Finally we look at five of Boston's lowest-income neighborhoods, group 2 in table 1 and the boxed group in table 2. A number of important characteristics cluster in these five neighborhoods: (1) they have substantially lower rents than other neighborhoods; (2) they have markedly lower rent *burdens* (rent-to-income ratios); (3) they experienced virtually zero change in rent burdens over the three years after rent control's end and during the current economic boom; (4) they have the largest households; and (5) they are among the lowest in income of Boston's neighborhoods. These unusually stable, low-rent, family neighborhoods are Boston's largest neighborhoods, with 41% of the city's residents. The problem here is not rising, unaffordable rents, but housing deterioration and abandonment, because most of Boston's abandoned housing occurs in these neighborhoods, especially in Dorchester and Roxbury.

Thus, a comprehensive picture shows different trends in different neighborhoods, not a blanket rise in rents or rent burdens. Those Boston neighborhoods with virtually zero change in rent burdens or *declining* rent burdens (groups 1 and 2) accounted for a sizable 59% of Boston residents. Smaller and larger increases in rent burdens (groups 3 and 4) affected a smaller 41% of residents. Across all neighborhoods, the various trends produced a modest net average change in rent burdens, weighted by neighborhood size, of +3.167 – remarkable, again, in coinciding with rent control's end.

State and regional statistics show a similar variation in the rental market. Within most localities, the range of rents from high to low is extremely broad and well distributed for apartments of the same basic features. Higher levels of modernization and more desirable locations draw higher rents. Table 3 shows the distribution of rents for two-bedroom apartments in Massachusetts as a whole and the Metropolitan Boston area for 1990, the most recent data available. Each percentile is the cut-off point below which the rents fall. For example, the table shows that

Table 3. Distribution of rents for a 2BR apartment in Massachusetts and Metropolitan Boston, 1990

Percentile	Massachusetts (\$)	Metro Boston (\$)
90 th	966	1,038
80 th	895	958
70 th	778	905
60 th	718	855
50 th	669	778
40 th	609	735
30 th	555	680
20 th	473	580
10 th	346	430

Source: 1990 Census of Population and Housing, PUMS tapes, tabulations by Center for Labor Market Studies.

10 percent of all two-bedroom apartments in Massachusetts rented for \$346 or less in 1990, and 40 percent rented for \$609 or less.

The problem has not been an inherent lack of apartments at lower rent levels. Rather, the fact is that so many apartments at the lower end of the range are in older buildings in lower-income neighborhoods. Low (and sometimes interrupted) rent streams often do not provide sufficient income to preserve this economical housing for the long term.

THE PROBLEM: HOUSING AT RISK

For decades housing policy has ignored the fact that the vast bulk of rental housing is owned by small property owners, by which we mean “mom and pop” landlords. The rental property they own is a family business, big enough to support a single family or supplement its income but not big enough to hire full-time employees. Often the business is part-time, as with the state's large stock of two- and three-family owner-occupied homes. Sometimes the business is full-time, involving a collection of small properties managed by a husband and wife, mother and son, etc.

These “mom and pop” landlords own and manage a very sizable chunk of the rental housing market—about 75 percent of all rental housing in Massachusetts.⁸ It is safe to assert that small owners predominate in the low- and

⁸ This estimate is based on 1990 U.S. census figures for Massachusetts housing types and sizes, owner-occupied and non-owner-occupied.

moderate-income neighborhoods, while larger owners predominate in higher-rent areas. Thus, small property owners are the providers of the state's lowest-rent housing. Nationally, almost three-quarters of all low-income households live in private housing without any government subsidies.⁹ In most cases, then, low-income families have small owners as their landlords.

With little exception, the properties of these small owners is modest wood-frame housing built 50 to 150 years ago. It is typically two-and-a-half to three stories high, in structures with two to six units. This housing is a great historical heritage, it is plentiful, but it is easily endangered if not well cared for. It is a resource that can never be replaced: relatively low market value, yet excellently built, with big rooms, high ceilings, and historic character. By comparison, what is constructed today—with government subsidies—as so-called affordable housing comes in tiny quantities at a very dear price for small rooms and zero style.

Why are the rents so low in the older wood-frame housing of small property owners? Small owners, usually just one step or two above their tenants on the income scale, do their own management and repairs and often delay costly capital improvements as long as they can. They will nurse along a leaky roof and old plumbing just to squeeze out a few more years of life before doing big-buck capital replacements.

Let us do a hypothetical cost comparison of a new kitchen replaced every 20 years by an economy-minded, do-it-yourself small family-based owner *versus* a new kitchen replaced every 10 years by a larger, bureaucratic owner who hires a contractor. A contractor-built kitchen typically costs 50 percent more. As the chart shows, in net monthly cost, the small-owner kitchen costs one-third of the bureaucratic-owner kitchen.

⁹ Ronald F. Ferguson and William T. Dickens (eds.), *Urban Problems and Community Development*, Brookings Institution Press, Washington, D.C., 1999, p. 459. In its 35-page chapter on low-income housing, this book has barely a page and a half on private nonsubsidized low-income housing, where it notes the large number of low-income households dependent on it, points to “destruction of a significant part of the stock,” and remarks “how little is known about the dynamics of low-income housing stock and low-income households.”

Kitchen Replacement Cost Comparison

	Small owner	Bureaucratic owner
Cost of kitchen	\$10,000	\$15,000
Life of kitchen	20 years	10 years
Cost per year	\$500	\$1,500
Cost per month	\$42	\$125

This hypothetical example is not grossly unrealistic. The cost per month can be directly translated into the ongoing rent required to sustain kitchen replacements over the long term under the two different management styles.

The management style of small owners thus reduces rents by hundreds of dollars a month, but at the same time it puts the housing at risk in the face of several difficult state laws: the state sanitary code, rent withholding, and the warranty of habitability. These laws require code-perfect apartments—and allow tenants in code-imperfect apartments to withhold their rent. Owners of older housing in lower-income neighborhoods are caught in a Catch-22. Operating at a close margin, these small owners cannot possibly improve their property without a steady and reliable rent stream. Yet legally, owners are often helpless to evict non-paying, damaging, or uncontrollable tenants. Protracted landlord-tenant disputes consume owner time and resources. All too frequently, owners go bankrupt, or just give up and walk away from their properties, or adopt a hands-off, slumlord management approach as the only practical option. Often, the housing is sold to absentee owners, it steadily deteriorates, and when events turn suddenly bad, it is abandoned.

HOUSING REGULATION

About three decades ago, a bundle of statutory and case laws was established in Massachusetts (and, indeed, similar laws spread across the country) that fundamentally changed the regulation of private rental housing.

1. The state sanitary code governs habitability standards for all rental housing. Less than 40 years ago, a tenant could choose to rent a cold-water flat with no hot water heater or an apartment with cheaper space heaters rather than central heating. Today the code mandates far more than obviously dangerous structural or mechanical conditions. It covers minor conditions

like cracks in walls, poorly painted surfaces, holes in screens, and weather-stripping. And it continuously adds costly, new, lifestyle requirements not even envisioned when most of Massachusetts' housing was first built: bathroom fans, water-impermeable surfaces on kitchen floors and up to four feet in bathrooms, and plumbed washing machine outlets for all units. By this standard, virtually every housing unit in Massachusetts has at least a half dozen violations, while most housing in lower-income neighborhoods has been made, by simple definitional fiat, seriously substandard.

2. The warranty of habitability, established by the 1973 *Hemingway* court case,¹⁰ authorizes rent reductions for state sanitary code violations on the assumption that the agreed-upon market rent reflects and warrants a code-perfect apartment at all times. It holds rental property to the virtually impossible standard of a new consumer product and punishes for not achieving it.

3. The rent withholding law, as we have indicated, allows tenants to withhold the entire rent for even the smallest defects. It is an affirmative defense against eviction, blocking eviction until all code violations are repaired.

4. The consumer protection law, known as Chapter 93A, awards triple damages and attorneys' fees for any alleged unfair and deceptive practice, which includes knowingly renting an apartment with code violations.¹¹ Virtually every lawyer-assisted defense against eviction alleges great malfeasance of the landlord regarding the condition of the apartment and makes 93A claims for tens of thousands of dollars in triple damages plus yet-to-be-decided attorneys' fees.

Forty years ago, owners had the right, after giving notice, to enter and remove an unlawful tenant "without unnecessary force."¹² While it

¹⁰ *Boston Housing Authority v. Hemingway*, 363 Mass. 184 N.E. 2d 831 (1973).

¹¹ Massachusetts General Laws, Chapter 93A.

¹² The state sanitary code was established in 1965, the rent withholding law in 1965, the consumer protection law ("93A") in 1967. The *Hemingway* case established the warranty of habitability in 1973. Other laws restricting owner rights and imposing new burdens were enacted in this same period: forcible entry forbidden, i.e., self-help, lock-out evictions (1974), retaliatory evictions forbidden (1967), lead paint abatement required (1971), discrimination in housing forbidden (initially enacted in 1940, with 31 amendments between 1959 and 1980). Rent control was enacted in 1969 (and repealed in 1994).

would have been fair to curb the obvious dangers in such self-help evictions, the laws that developed rapidly during the 1960s and 1970s were designed not just to curb abuses, but to transfer privately owned housing to the public sector. In other words, they were driven by a political agenda to end privately owned housing and to put "ever-larger portions of the housing stock under social ownership."¹³

As Boston University professor Michael Stone wrote in 1973, in *The Right to Housing: A Blueprint for Housing the Nation*, the national focus was on government housing, and it was time to "decommodify" the private housing sector.¹⁴ The strategy, Stone said, was to impose increasingly strict regulations on private housing. Among his recommendations, Stone enumerated anti-discrimination ordinances, strict "livability" standards, rent and eviction controls, condominium conversion bans, and "anti-speculation" or deed transfer taxes to prevent profit-making on "both multi-family and single-family housing"¹⁵—a list that closely resembled the laws coming on the books when Stone was writing. The goal, at least among those conscious of the bigger picture, was to limit profitability, cause private owners to disinvest, and create financially stressed, even abandoned housing that could be bought out by federal funds and other public or "social" resources. Stone points with approval to New York City where, in 1973, 20,000 rental units were being "abandoned each year by private landlords."¹⁶

While Stone seemed happy 25 years ago with abandoned housing that might be infused

¹³ Michael Stone, *The Right to Housing: A Blueprint for Housing the Nation*, 1973.

¹⁴ Stone's 63-page booklet explains that "social ownership" is ownership "by the locality itself (for instance, by the local housing authority) or...another social owner...[i.e.] a community organization or a resident association of former occupants" (p. 35). Local non-profit entities like community development corporations and limited equity cooperatives are other examples (p. 25-6). Under all these forms of social ownership, "resale for profit [is] prohibited" (p. 25). All forms of housing, old or new, single-family or multi-family, are targeted, as indicated by the goals to "produce and finance new and substantially rehabilitated housing for social ownership" (p. 29), to fix up "the existing stock of public and subsidized housing, under social ownership" (p. 29), and to "expand...the stock of social housing to include single-family and other owner-occupied homes" (p. 39).

¹⁵ Stone, pp. 32-22.

¹⁶ Stone, pp. 35-6.

and socialized with public funds, it has by now become apparent that the government can never replace the private sector. Regulations once designed to put owners out of business need to be changed.

HOUSING THEFT

Marginal housing in lower-income neighborhoods, as we have seen, often has a fair number of violations of the state sanitary code. Even in better neighborhoods, almost every apartment in an older wood-frame structure, under steady tenant use, will have a half dozen or more code violations. Whether extensive or minor, these violations are often not a problem to the occupants, since they are factored in as a lower rent. The Massachusetts rent withholding law, however, operates ostensibly as a consumer protection law for a defective product but with a twist. If you buy a stereo and discover it is defective, you can get a refund if you return the stereo. One would not expect to get a refund and *keep* the stereo (or any other defective product). In rental housing, however, this is the standard rule, as Lucy Panian of Waltham, Massachusetts, discovered.

Lucy Panian's Story

Lucy Panian and her husband, a jeweler, are hard-working Eastern European immigrants who 13 years ago bought a two-family house in a mixed-income, multi-family neighborhood. Four years ago, Lucy's tenants, who lived downstairs, paid rent for the first three months and then stopped paying and started complaining about the apartment. For two and a half years they stayed living in Lucy's apartment claiming it was defective and paying almost no rent. It drove Lucy and her family into bankruptcy.

The first complaint was mice. Lucy had never had mice before. The tenants did not want poison. They agreed on a different extermination. It cost \$120. Next day, the tenants, not satisfied, forced Lucy to order another round of extermination. Then they complained about the stove. Lucy paid \$150 to repair it. Two days later, the stove was "not working again." Lucy bought a new \$400 stove. Total cost of mice and stove: \$790, more than a month's rent.

Lucy gave her tenants an eviction notice. She immediately got an inspection report from the Waltham Health Department citing numerous minor violations of the state sanitary code,

like a draft under the front door. She also got a letter from a legal assistance bureau saying that her tenants "had a right to withhold rent from you until repairs were complete."

That is, indeed, Massachusetts law.¹⁷ Tenants can keep a defective apartment *and* not pay for it—at least not until after all the repairs are completed and they are ordered to pay up the back rent or move. Most tenants just move out, not to be found again, having not paid rent for many months. This is, in effect, housing theft.

Instead of encouraging tenants to cooperate in getting the required repairs, the law gave Lucy's tenants the incentive to sabotage Lucy's efforts. "Please give 24-hour written notice." "Now is not a good time." "You are harassing us." After each round of repairs was finally completed, the tenants found another set of violations of the state sanitary code.

After a second eviction notice, the tenants complained about lead paint. Lucy had already delead the apartment; the scrape marks on the doors and window frames were obvious. But Lucy had installed wall-to-wall carpeting, so the scrape marks went up to 4 feet 11 inches, one inch short of the legal requirement. So—to correct that one inch—Lucy had to delead once again, at a cost of \$3,700. That included three nights at a local motel for her tenants.

The tenants stretched their complaints and non-payment out for two and a half years before a judge finally evicted them. But it was too late for Lucy and her husband. The combination of very little rent and high repair costs forced them into bankruptcy. Lucy and her husband faced a painful decision: their home or their family business. To save their home, Lucy's husband sold his jewelry business, and they lost their principal source of income. Even though the judge ruled that the tenants owe Lucy almost \$4,000 in unpaid rent, Lucy cannot find them. The tenants' free lawyers refuse to tell Lucy their new address.

Lucy Panian's story, though fairly extreme, illustrates a common problem in rental housing: expensive and often inappropriate or unnecessary repairs demanded precisely when rental income has stopped. The demands are made by tenants trying to delay eviction. Their demands

¹⁷ Massachusetts General Laws, Chapter 239, Section 8A.

Table 4: Shortest Possible Eviction, 59 Days

Month 1

- Day 1: Tenant fails to pay rent due.
- Day 10: After 10-day grace period, owner serves 14-day notice to quit.
- Day 25: 14-day period ends. Tenant is served with a summons to court.

Month 2

- Day 3: The entry date, a Monday at least 7 days after summons, is the filing of the landlord's complaint in court.
 - Day 13: The court date, the second Thursday or 10 days after the entry date.
 - Day 14: Judgment entered in favor of landlord.
 - Day 25: End of tenant's 10-day appeal period.
 - Day 26: Landlord requests execution from court.
 - Day 27: Sheriff or constable serves 48-hour notice of eviction on tenant.
 - Day 29: Sheriff can move tenant's possessions to storage at landlord's cost.
- Now 59 days from the 1st of Month 1.

Rent withholding and other delays that extend the 59-day minimum:

- Owner waits weeks or months before giving notice to quit.
- Owner serves a 30-day notice for possession rather than a 14-day notice for non-payment.
- Tenant requests discovery, an automatic 14-day trial postponement.
- Owner fails to act promptly at each legal step.
- Court fails to act promptly; judgments and executions can take days or weeks longer than officially needed.
- Owner commits technical errors that set back the process, sometimes to the start.
- Tenant appeals for a complete new trial from scratch; indigent tenants do not post bond, so they can continue to live rent free.

typically fall on small-scale “mom and pop” landlords with little financial flexibility.

THE HIGH COST OF EVICTIONS

Each year the state's housing courts and district courts process about 50,000 eviction cases.¹⁸ Of these cases, 90 to 95 percent are for non-payment of rent, and about two-thirds or more entail some claim of state sanitary code violations as a defense against eviction.¹⁹ Housing and health inspectors report variously that between 50 percent and 95 percent of requests for inspections come *after* tenants receive eviction notices.²⁰ Legal services lawyers (publicly funded free lawyers for tenants) admit that 95 percent of their cases involve non-paying tenants claiming code violations as an eviction defense.²¹

By our calculations, Massachusetts rental housing loses at least \$78 million every year to the practice of rent withholding and its delay of eviction for non-paying tenants. Half of that amount is unpaid rent never to be recovered, the other half is unnecessary repair costs from tenant obstruction or deliberate damage, plus additional legal fees caused by delayed eviction.²² But the impact of eviction delay is most obvious when looking at the eviction process itself, where unchecked rent withholding adds thousands of dollars to a process that at a minimum is already very costly.

With self-help, lock-out evictions outlawed some 30 years ago, owners must use a court procedure in which the shortest possible uncontested eviction takes 59 days, assuming a 14-day notice and no delays. This shortest pos-

¹⁸ Annual Report on the State of the Massachusetts Court System, Fiscal Year 1998.

¹⁹ This common estimate is supported by a statement of the chief judicial assistant of the Boston Housing Court.

²⁰ See “Are landlord-tenant laws creating slums?” and “Why abandoned housing?” *Small Property Owners News*, November 1998 and February 1999, respectively.

²¹ Reported in the *Cambridge Chronicle*, April 1999.

²² This annual loss is estimated by assuming an average eviction delay of two months attributable to rent withholding only, an average (unpaid) rent of \$650 for each of those two additional months of lost rent, and repair costs and legal fees roughly equal to the lost rent. Calculation: \$650 rent X 2 months + \$1,300 in repair costs and legal fees X 50,000 cases X 90% cases involving rent non-payment X 67% cases involving code violation reports used as an eviction defense = \$2,600 X 30,150 = \$78,390,000. Sixty-seven percent is a conservative estimate.

U.S. Supreme Court on rent escrowing:

“We see no constitutional barrier to [the State’s] insistence that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor. The Court has twice held that it is permissible to segregate an action for possession of property from other actions arising out of the same factual situation....The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages....There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided..., the tenant would be able to deny the landlord the rights of income....Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think [the State] was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes....Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.” *Lindsey v. Normet*, 92 S.Ct. 862 (1972).

sible eviction costs the landlord three months in lost rent (\$1,800 or more) plus court fees, contestable fees, and attorney’s fees, for a minimum loss of \$3,000. Other factors—the landlord waits to initiate eviction, the tenant uses procedural delays, the landlord must pay to move and store the tenant’s possessions—add thousands more in lost rent and additional costs.

Finally, the tenant can claim rent withholding for code violations, which is the easiest device to stop the eviction cold. It also has the most expensive and troublesome impact on owners. A month’s delay for these repairs is the practical minimum, and a little ingenuity on the tenant’s part can easily push the code violation delay into several months, occasionally even a year or longer, as we have seen in Lucy Panian’s case. From a minimum of \$3,000 for a no-contest eviction, the cost quickly escalates to \$5,000 or \$10,000 or more. This amount of loss wipes out a year’s entire rent or more from the affected unit, yet owners still face fixed expenses (mortgage, taxes, insurance, utilities) and obligations to other tenants.

This sudden high cost of protracted non-payment evictions is not the type of chronic low-level loss with which most retail businesses live.²³ Most vulnerable are small property owners and marginal housing in lower-income neighborhoods.

²³ The Massachusetts Retailers Associations reports national figures of 2.6 percent of gross retail sales spent on “inventory shrinkage” (employee theft, shoplifting, vendor fraud) and loss prevention personnel. Similarly, a local mall management company said that average losses from shoplifting, including the cost of security, that exceed 3 percent are considered high.

ONE SOLUTION: RENT ESCROWING

The immediate solution to housing theft and a weapon against housing loss is mandatory rent escrowing. A tenant would not be able to claim rent withholding for code violations as a defense against eviction unless the rent is paid into an escrow account. If the rent is not escrowed, the tenant, if non-payment continues, would be subject to eviction. Non-payment could not be turned into rent withholding.²⁴

Rent escrowing is already established in about 35 states and was ruled constitutional by the U.S. Supreme Court in 1972. In every other area of Massachusetts civil law, a pre-trial mechanism exists to ensure that a court’s judgment can be paid (for example, liens on real property). Rent escrowing would apply a similar legal safeguard to rental housing and landlord-tenant disputes.

How It Would Work

Whenever a tenant wishes to withhold rent for code violations and be protected from eviction for non-payment, the following would have to occur:

²⁴ While judges in Massachusetts currently have the discretionary power to order tenants to escrow their rent (Massachusetts General Laws, Chapter 239, Section 8A), it is done rarely (in less than half of 1 percent of eviction cases, according to a survey of six courts in Eastern Massachusetts) and can only be done after a hearing. To be effective against fraudulent claims and to stop deliberate tenant damage to apartments, escrowing must be required at the moment that rent withholding is claimed. Fairness also requires that the owner be given prior notice of deficiencies and an opportunity to repair.

- 1) An official inspection citing the code violations must be made prior to any rent withholding.
- 2) The owner must receive a copy of the inspection report and be given 15 days to repair the violations.
- 3) If the owner fails to do the repairs, the tenant deposits all rent due and accruing into a special escrow account withdrawable only on the signatures of both landlord and tenant or by court order. The rent can also be deposited with the court (at the court's discretion) or into any attorney's escrow account.
- 4) The amount of rent to be escrowed is the standard agreed-upon contract rent, not including any demanded rent increase to which the tenant has not agreed. Tenant payments made for bona fide repairs after proper notice following the Massachusetts repair-and-deduct law would be deductible from the required escrow amount.
- 5) Prior to final settlement of the dispute, the court can order escrowed funds to be spent on repairs or paid to an owner facing mortgage foreclosure or other serious financial distress.

Requiring rent escrowing would remove the incentive in present law for tenants to report code violations and obstruct their repair in order to gain additional months of free rent and delay their eviction. The legitimate health and safety functions of the state sanitary code would remain intact. The code has its own criminal enforcement mechanisms and is administered by a large statewide network of local housing and health inspectors. In fact, these local officials, freed from the burden of fraudulent and diversionary tenant claims, could direct more of their attention to real issues of housing safety and preservation.

With mandatory rent escrowing as a safeguard against abuse, the device of rent withholding would be turned into a bona fide mechanism to enforce negligent owners to do demanded repairs. Indeed, with the accruing rent held in escrow, owners will be far more motivated than at present because they will know they can count on receiving most of the escrowed rent after repairs are completed. If necessary, a judge can order those escrowed funds to be used for repairs. Banks also can rely on those funds and will be encouraged to lend un-

der otherwise adverse conditions.²⁵ Even public officials could orchestrate rent escrowing in targeted buildings to remedy long-standing problems, a more positive approach than condemning buildings, throwing out tenants, and boarding up.

If eviction costs are reduced significantly, as we expect, steady rental income will be available for better maintenance and more capital improvements. In lower-income neighborhoods especially, evictions are so frequent and so costly that they consume most of the already limited rent stream, leaving very little left over to service and preserve the housing. This situation could change substantially with rent escrowing.

Finally, rent escrowing will have no untoward effects on tenants. In most cases, the claim of rent withholding to delay eviction just puts off the inevitable, directs attention away from the tenant's real problems, and gives the tenant a poor record for referral in future housing. Escrowing would stop the viciousness in most eviction proceedings, and tenants and their legal advocates would naturally shift from litigation to mediation. By shifting the matrix of incentives around the involved parties, a new and increasingly common approach called tenant stabilization would come to the fore and, through landlord-tenant agreements, would help tenants deal directly with the problems most often prompting their eviction: poor money management, job loss, substance abuse, and various disruptive behaviors. Owners usually prefer any approach less unpleasant than eviction, so their behavior would also be moderated.

ANOTHER PROBLEM: CODE ENFORCEMENT

The strong, built-in, legal incentive for tenants to use rent withholding to delay their eviction twists the enforcement of the state sanitary code toward trivial, cosmetic details, to the neglect of serious structural conditions and long-

²⁵ The Massachusetts Bankers Association supports rent escrowing and has gotten support from member banks to help administer special two-party landlord-tenant escrow accounts. For banks, the incentive is clearly fewer foreclosures and a better lending environment in lower-income neighborhoods and in any housing that is subject to pending tenant litigation.

term housing preservation. The story of Vernon Taylor illustrates the problem.

Vernon Taylor's Story

Mr. Taylor, as he likes to be called, is a sprightly, 75-year-old black landlord in one of the toughest sections of Dorchester, one of Boston's lowest-income neighborhoods. A lifetime tenant until just a few years ago, Mr. Taylor managed to get the down payment for his three-family rowhouse where he now lives on the first floor. When the third-floor tenants stopped paying rent for several months and then finally moved out, Mr. Taylor left that apartment vacant. Then the second-floor tenants stopped paying, called in the health inspector, and began several rounds of obstructed repairs followed by citations of new violations. It lasted through 10 months of non-payment and threatened to cause Mr. Taylor to default on his mortgage.

At the end, there remained one code violation that Mr. Taylor had a hard time figuring out: weather-stripping, not on the bottom edge of the outside front door, but on the inside hallway apartment-entrance door. The 80-year-old house had never had such weather-stripping; most apartment houses do not have it. "Just do it," said the inspector, "and get me out of your hair." Once he understood it, Mr. Taylor installed it.

Meanwhile, Mr. Taylor's building had a serious structural and preservation problem: a major leak at a sagging, rot-weakened low point of its flat roof, the result of faulty roofing over the back half of the building. Mr. Taylor temporarily remedied the leak (except in heavy rains) by setting up buckets in the vacant upstairs kitchen and heavily caulking the vinyl sheet flooring at the edges, turning it into a sort of catch basin when the buckets overflowed. This leaking roof was a real challenge both financially and structurally for Mr. Taylor, and it is clearly the most important repair he needs to make. Yet the inspectors and the tenants ignored it because it did not leak through to the second floor, and the landlord-tenant dispute focused attention on minor infractions of the state sanitary code.

A LONG-TERM SOLUTION: A MULTI-TIERED CODE

The current state sanitary code mandates that all violations of whatever severity and character be remedied within 30 days. While rent escrowing will remove the exaggerated focus on cosmetic and minor repairs at times of tenant crisis, a multi-tiered code would establish enforcement priorities and allow marginal rental housing to be preserved in a cost-effective way for the long term.

1) A multi-tiered code would give priority to serious structural/safety conditions, thus encouraging long-term preservation. A realistic amount of time needs to be allowed to get funding and do well-planned work.

2) A multi-tiered code would more vigorously "grandfather" older housing, allowing it to stay "as is" as much as feasible and avoiding the current code pressure toward costly, ill-conceived modernization. Grandfathering would preserve both historic qualities and lower rents.

Such a multi-tiered system²⁶ would be far more sensitive to the realities of Massachusetts rental housing, most of it built over 75 years ago and owned by well-intentioned small owners whose tenants cannot generate a lush income stream.

Several other closely related issues should be addressed:

- The high cost of lead paint abatement is one of the most serious burdens on lower-income housing and a source of widespread discrimination against families as well. The real health hazards involved and sources of exposure should be investigated dispassionately. New approaches to controlling lead hazard exposure could conceivably reduce the costs substantially.
- Currently, only licensed contractors are legally permitted to do repairs on most rental property, yet most carpentry repairs and simple plumbing and electrical repairs can be (and often are) done safely by moderately skilled homeowners.
- Technical assistance should be available to small property owners, emphasizing long-term building maintenance over cosmetics, emphasizing preservation rather than gut-rehab.

²⁶ Multi-tiering would need to encompass not just the state sanitary code (the habitability code) but also the building, electrical, and plumbing (or structural) codes.

- All multi-family housing built before 1950 should be given special historical designation. The goal is to raise public awareness of the value of this older housing and to encourage its preservation, not to add cost burdens or impede owners in managing or improving their properties.²⁷

COSTS OF IMPLEMENTATION

The cost of instituting mandatory rent escrowing and a multi-tiered code is little more than changing the law. Rent escrowing would actually reduce the labor wasted by housing inspectors on fraudulent code violation claims, freeing them to take on new roles, such as technical advisors to property owners. Similarly, publicly funded free tenant lawyers would shift towards mediation and foreclosure prevention, which would just rechannel already funded programs. Mediators, moreover, cost less much than lawyers.

Opposition is to be expected from some who have vested interests in the state sanitary code and landlord-tenant law: the officials who establish and administer the code (but by no means all of them, especially not local officials), lead paint abatement regulators and the allied industry, and the statewide network of legal services agencies that provide free legal assistance to tenants and lobby for anti-private-housing laws. The media, to the extent that they sensationalize a housing crisis, demonize landlords, and paint an unbalanced picture of the housing market, are also an obstacle.

CONCLUSION

In the last two decades, the pace of government spending in general has slowed; the problems in large-scale public housing projects are proving intractable; the new subsidized alternative—small-scale, scattered-site, mixed-income projects—provides housing for very few families at an exorbitant cost. It has become apparent to most that the government simply cannot replace the private sector in the housing market. The regulatory environment needs to reflect this new policy awareness and encourage, or at least

not discourage, private rental housing ownership.

The housing issue in Massachusetts has been so politicized for so long that attention is seldom paid to the facts or to making rational policies. Rent control, a housing disaster by any measure, was a major contributor to this super-charged atmosphere. But if Massachusetts steers clear of reinstating rent control, polarized politics will likely subside. True concern for the viability of private rental housing and for reducing the regulatory burden on it may draw people to practical proposals such as those described above. Finally, after the obvious failure of public housing, national policy is shifting towards a greater focus on public-private partnerships. These proposals hopefully move a step further in this national dialogue on housing.

ABOUT THE AUTHORS

Lenore Schloming has been president of the Small Property Owners Association since 1995. Ms. Schloming holds degrees from Harvard University and Boston University and served as assistant professor of sociology at Emmanuel College. She was co-director of Dunbrook School in Farmington, Maine.

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The Small Property Owners Association (SPOA) was formed in 1987 in Cambridge and spearheaded the 1994 statewide referendum ending rent control in Massachusetts. It is now a statewide organization speaking for the concerns of owners of one to 10 rental units.

²⁷ An obvious starting guide is George Stephen, *New Life for Old Houses*, National Trust for Historic Preservation, 1989.

APPENDIX: A MANDATORY RENT ESCROWING PROPOSAL

Senate Bill No. 541: An Act To Clarify the Law Relative to Rent Withholding
[currently before the Massachusetts Legislature]

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

SECTION 1.

Section 8A of Chapter 239 of the General Laws is hereby amended by striking out the second, third and fourth paragraphs and inserting in place thereof the following: -

Whenever any counterclaim or claim of defense [against eviction] under this section is based on any allegation concerning conditions affecting the premises or services or equipment provided therein, the tenant or occupant shall not be entitled to relief [dismissal of landlord's eviction request] under this section unless:

(1) (a) the board of health or other local enforcement agency has certified that such conditions constitute a violation of the standards of fitness for human habitation as established in the state sanitary code, the state building code, or any other law, ordinance, by-law, rule or regulation establishing such standards, and that the health, safety or well-being of the persons occupying the premises is endangered or materially impaired as a result of such conditions,

(b) the tenant or occupant, following such certification, notified the landlord thereof in writing at least 15 days in advance of the date on which the tenant or occupant became in arrears in his rents, and

(c) such conditions were not substantially remedied within said 15 day period or such longer period as may be required, in the exercise of due diligence, to substantially remedy such conditions;

(2) the landlord does not show that such conditions were caused by the tenant or occupant or any other person acting under his control, except that the defendant shall have the burden of proving that any violation appearing solely within that portion of the premises under his control and not by its nature reasonably attributable to any action or failure to act of the landlord was not so caused;

(3) the premises are not situated in a hotel or motel, or in a lodging house or rooming house wherein the occupant has maintained such occupancy for less than three consecutive months;

(4) the landlord does not show that the conditions complained of cannot be remedied without the premises being vacated, provided however that nothing in this clause shall be construed to deprive the tenant or occupant of relief under this section when the premises are temporarily vacated for purposes of removal or covering of paint, plaster, soil or other accessible materials containing dangerous levels of lead pursuant to chapter one hundred and eleven; and

(5) the tenant shows proof that all rent due and accruing has been deposited (a) into an account with the court at the court's discretion, (b) into an escrow account controlled by an attorney, or (c) into an escrow account under the provisions of Section 32C of Chapter 167D of the General Laws, payable only on the signatures of both the tenant or occupant *and* the landlord or person to whom rent is customarily paid. Any amounts so deposited shall be paid over in accordance with the direction of the court after hearing the case or as the parties may mutually agree. If the landlord is required by law to make repairs to the premises or is suffering severe financial hardship, any amounts so deposited and otherwise payable to the landlord shall be used for such purposes if the court so orders.

SECTION 2.

Chapter 167D of the General Laws is hereby amended by inserting after section 32B the following new section 32C:

Any bank or federally chartered bank, upon request of a person claiming relief under section 8A of Chapter 239 of the General Laws, shall create an account payable only (except as provided below) upon the signatures of two named parties, one being the person claiming relief, the tenant, and the other being any person named by the person claiming relief, the landlord. The bank shall not require any signature or identity verification of the person named by the person claiming relief in order to create the account nor until such time as a payment from the account is requested. The bank shall provide, upon demand of either of the named parties on the account or the court, a statement of the deposits to the account and the named two-party authorized payors. At the time that a payment from the account is requested, the bank shall accept a standard signature guarantee as sufficient authorization for payment by the person named by the person claiming relief. If such signature guarantee is executed in the normal and customary manner, the bank shall not be held liable for claims of incorrect payment. The bank shall also make payment from such account upon court order. The bank may deduct from the account all ordinary and reasonable expenses for operating the account at any time. If the account is left inactive for longer than two years, the bank shall make payment of the entire amount in the account (less ordinary and reasonable banking fees) to the person named by the person claiming relief, upon receipt of a duly executed signature guarantee.