

**PREVENTING DETERIORATION AND ABANDONMENT
OF RENTAL PROPERTIES IN BUFFALO**

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EXECUTIVE SUMMARY

The City of Buffalo faces a severe abandoned housing crisis. One component of this immense problem is the abandonment of rental housing due to dilapidated conditions. Forcing landlords to keep their properties in good repair will help to reduce abandonment of rental housing. Several mechanisms hold landlords in Buffalo accountable for the poor conditions of their buildings. The warranty of habitability requires landlords to maintain decent, safe, and sanitary housing. However, remedies available to tenants under this legal doctrine, such as rent withholding and repair and deduct, are inadequate and dangerous. The lack of adequate protections for tenants seeking to address the poor conditions in their apartments is a major deterrent to tenant initiation of action.

A less threatening, tenant-based remedy would be much more effective. New York already has the basis for the development of such a remedy in the New York Real Property Actions and Proceedings Law Article 7-A section 769, which provides for tenant initiation of suits against landlords for repair problems and allows tenants to deposit rent with the court. This section only applies to New York City, Nassau, Suffolk, Rockland, and Westchester Counties. Rent depositing provisions have many benefits in terms of getting landlords to make repairs. A rent depositing law applicable to the entire state does exist in New York Real Property Actions and Proceedings Law Article 7 Section 755, but is not put to good use due to its complexity. It is also limited in effectiveness as it does not allow for tenant initiation of suits, a critical component contributing to enforcement of the warranty of habitability.

The New York legislature should broaden its existing rent escrow statute to mirror a Minnesota rent escrow law that combines rent depositing and tenant initiation of actions to protect tenants and encourage the enforcement of the warranty of habitability.

Allowing tenants to bring suits would eliminate the risk inherent in the current remedies. Under Minnesota's law, tenants avoid the long-term negative consequences, such as bad credit and tenant screening reports, that result from eviction actions, and landlords avoid the costs of filing eviction actions. Also, with a rent escrow law, the court may make the money available to pay the landlord's repair bills – something that may make a difference for some of the more cash-strapped landlords of Buffalo. Expanding this even further to allow tenants to deposit rent with the court in actions initiated by housing inspectors would increase the use of the rent escrow proceeding and further increase the number of rental properties saved from abandonment due to deterioration.

Housing inspectors and the Housing Court can play a significant role in dealing with the problem of abandonment of dilapidated rental housing through code enforcement. In addition to the well-functioning code enforcement system that is already in place, Buffalo should consider a more aggressive approach to code enforcement for the worst repeat offenders. Emulating the Minneapolis repeat offender model would be useful in Buffalo. This method targets the five landlords with the worst record for maintaining building conditions and assigns each one to work with one inspector to come into compliance. This would not add substantial costs and would only add five landlords at a time to the inspectors' caseload.

The enactment of a broader rent escrow law and the creation of a repeat offender code enforcement program would both help reduce the number of rental properties

abandoned due to the landlords' failure to maintain their properties in good condition.

These two steps would contribute to the efforts to revitalize Buffalo and maintain a quality standard of living for all within the city.

ABANDONED HOUSING CRISIS AND RENTAL PROPERTIES

The City of Buffalo is facing an abandoned housing crisis that contributes to the downward spiral of Buffalo's neighborhoods. When examining Buffalo's housing problems, it is important to distinguish between abandonment of owner-occupied properties and abandonment of rental properties. Different laws regulate the rights and responsibilities of owner-occupants and landlords. Any discussion of potential solutions to the housing dilemma in Buffalo must acknowledge this distinction and take account of considerations unique to Buffalo's abandoned rental properties.¹

Out of the 37,967 housing units that were vacant in 2005 in Erie County, 11,129 were rental units.² In 2006 in the City of Buffalo, there were approximately 61,823 renter-occupied housing units of which 46.1 percent had two apartments, 10.7 percent had three or four apartments and 18.2 percent had ten or more apartments. Roughly 66 percent of these were built before 1940.³ The Buffalo Metropolitan Statistical Area had a rental vacancy rate of 13.1 in 2006 and 8.6 in 2007.⁴ This is high compared to state rates. In 2006 in New York State the rental vacancy rate was 5.8 and in 2007 in New

¹ This paper will focus on private, non-subsidized rental property.

² 2005 American Community Survey Summary available at http://smpbff2.dsd.census.gov/TheDataWeb_HotReport/servlet/HotReportEngineServlet?emailname=whazard@census.gov&filename=ed_hous_gen_v2.html&2.ConVar.CVValue=1892.36.029.Erie+County,+New+York&forward16=2.ConVar.CVValue.

³ 2006 American Community Survey available at http://factfinder.census.gov/servlet/STTable?_bm=y&-context=st&-qr_name=ACS_2006_EST_G00_S2504&-ds_name=ACS_2006_EST_G00_&-CONTEXT=st&-tree_id=306&-redoLog=false&-geo_id=31200US153803611000&-format=&-lang=en.

⁴ Census Data available at <http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t5.html>.

York State it was 6.1.⁵ Some of these vacancies might not be attributable to abandonment. Nonetheless, these statistics are useful as high rates of vacancy in apartment buildings may lead to abandonment of the building and some of these vacancies are due to tenant abandonment. A main cause of vacancies in and abandonment of rental properties is that the conditions in the building have been allowed to deteriorate to such an extent that the building is no longer habitable. Forcing landlords to keep their buildings in good repair is one important strategy to combating Buffalo's abandoned housing crisis.

To implement this strategy, it is useful to understand the existing methods used to force landlords to maintain their properties. Two general avenues currently used in Buffalo are the tenant remedies available under the concept of the implied warranty of habitability and code enforcement actions brought by inspectors in the Buffalo Housing Court. While both mechanisms have been useful in furthering the goal of maintaining and improving the condition of rental housing in Buffalo, more can be done. Emulating the Minnesota rent escrow statute and the Minneapolis code enforcement scheme would greatly enhance the ability of government and private citizens to hold landlords accountable for violations of their responsibilities to make repairs and keep their properties in good condition.

EXISTING TENANT REMEDIES FOR BREACH OF WARRANTY OF HABITABILITY IN BUFFALO

⁵ Census Data available at <http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t3.html>.

The warranty of habitability is a legal concept derived from the common law that puts the burden on the landlord to supply the tenant with a residence that is clean, safe, and decent. Under the feudal law principle of caveat lessee, leases were viewed as real estate conveyances and tenants were solely responsible for the condition of the premises during the term of the lease.⁶ Gradually, laws developed to hold landlords accountable for the condition of common areas, negligent repairs, failure to make promised repairs, and failure to identify defects known to them.⁷

In New York, courts recognized the warranty of habitability as early as 1922 and have since adopted the principle that landlords must keep rental property fit for human habitation, fit for the use reasonably intended by the parties, and in a state that does not endanger life, health, or safety.⁸ New York codified the common law concept of warranty of habitability in 1975 in New York Real Property Law Article 7 Section 235-b. This provision states that:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.⁹

In response to a landlord breach of the warranty of habitability, tenants may withhold rent, use the repair and deduct method, or assert breach of the warranty in a defense or counterclaim to an eviction action. These enforcement mechanisms have been

⁶ Barbara Jo Smith, *Tenants in Search of Parity With Consumers: Creating a Reasonable Expectations Warranty*, 72 Wash. U. L.Q. 475, 478 (1994).

⁷ George M. Armstrong, Jr. *The Implied Warranty of Habitability: Louisiana Institution, Common Law Innovation*, 46 La. L. Rev. 195, 197 (1985).

⁸ *Id.* at 204.

⁹ N.Y. REAL PROP. LAW § 235-b.

useful in Buffalo but contain barriers deterring tenants from seeking them and detracting from landlords' abilities and motivations to repair.

Rent Withholding

Tenants may withhold payment of rent until their landlords make necessary repairs.¹⁰ However, to do so, tenants must demonstrate that their landlords refused to comply with their verbal and written requests prior to the tenants' withholding.¹¹ It is also advisable that tenants keep the rent money they otherwise would owe on hand to show to the court in case their landlords institute proceedings against them.¹² Rent withholding is not an ideal solution for tenants facing poor living conditions. First of all, tenants may want and/or need to spend the rent money they are withholding instead of saving it to show the court in case their landlords initiate eviction proceedings against them. This is especially true for low-income tenants who have a greater need to use funds that become available to cover expenses of daily living.¹³ Secondly, the risk that the landlord will commence an eviction action against the withholding tenant is high. While there is an anti-retaliation statute in place, it is often overcome by landlords.¹⁴ Even if a tenant wins the case, if the eviction proceeding remains on the record it may deter future potential landlords from renting to the tenant and can affect the tenant's credit rating. Although the Court sometimes expunges the record of eviction actions when tenants are successful at defending against them, tenant screening agencies may

¹⁰ Neighborhood Legal Services, Inc. Legal Information Letter "Withholding Rent Due to Bad Conditions." Available at <http://www.nls.org/housing/withhold.htm>.

¹¹ *Id.*

¹² *Id.*

¹³ Interview with Grace Andriette, Supervising Attorney, Neighborhood Legal Services Housing Unit.

¹⁴ *Id.*

still record and publicize the fact that a landlord brought an eviction proceeding against the tenant.¹⁵

Repair and Deduct

The repair and deduct technique is when tenants make the repair or pay a professional to make repairs and then reduce their next month's rent by the cost they incurred.¹⁶ The right to repair and deduct is not guaranteed by statute in New York but is generally recognized by the courts.¹⁷ The costs incurred must not be outrageous.¹⁸ Before using this method, tenants must give their landlords notice and a reasonable opportunity to make the repair.¹⁹ The problems with this remedy are that it requires the tenant to have the money and resources to do the repair upfront. It also exposes the tenant to the risk of eviction.²⁰ Furthermore, the landlord may sue to recover the portion of the rent that was deducted to pay for the repair or take this amount out of the tenant's security deposit when the tenant moves.²¹

Habitability Action

The warranty of habitability is typically used in defense or counterclaim to an eviction proceeding against a tenant. New York appellate courts did not even recognize that the warranty of habitability statute could be used to affirmatively bring a suit for property damage until 1980, five years after the passage of the warranty of habitability

¹⁵ Interview with Professor Magavern, Professor of Law, University at Buffalo Law School.

¹⁶ Neighborhood Legal Services Legal Information Letter "Repairing Your Apartment and Deducting It From Your Rent." Available at <http://www.nls.org/housing/deductdm.htm>.

¹⁷ Community Training Resource Center Fact Sheet "How Tenants Can Avoid a New Equipment Rent Increase." Available at <http://tenant.net/Rights/CTRC/ctrcf101.html>.

¹⁸ 46 La. L. Rev. 195, 221 (1985).

¹⁹ *Id.*

²⁰ Nassau/Suffolk Law Services Committee, Inc. "What Every Tenant Should Know." Available at http://www.nslawservices.org/sh_tenantsrights.shtml.

²¹ The Housing Council, "Tenant Rights & Responsibilities." Available at http://www.thehousingcouncil.org/downloads/tenant/Tenants_Rights.pdf.

statute in New York.²² It is less common for a tenant to initiate a warranty of habitability action against his/her current landlord than for a tenant to use the warranty of habitability as a defense or counterclaim due to the risks to the tenant and other deterrents described above. Hence, the effectiveness of the existing remedies to force landlords to make repairs to their rental properties is limited.

THE EXISTING NEW YORK STATE RENT ESCROW AND STAY OF EVICTON PROCEEDINGS PROVISION

New York's eviction law contains a rent deposit provision.²³ This provision allows courts to stay actions to evict the tenant for non-payment of rent or actions for rent or rental value if the court determines that proper proof exists showing a notice or order has been issued for conditions that either constructively evict the tenant or threaten the tenant's life, health, or safety. The tenant must deposit rent with the court for such a stay to be granted.²⁴ The amount of rent due is the amount the tenant paid in rent in the preceding month or the amount agreed upon in the original lease.²⁵ After a stay of the proceeding is granted, the court has the ability to order that the escrowed funds be used to pay a contractor or other professional to do the needed repair work or to pay bills to maintain the premises.²⁶ The rent money can also be released directly to a municipal agency that performed repairs on the building or that incurred expenses for the

²² 46 La. L. Rev. 195, 205 (1985).

²³ N.Y. REAL PROP. ACTS. LAW § 755.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

maintenance of the building.²⁷ This option is available only if the tenant can show that the landlord failed to live up to his/her legal obligations to repair or maintain the property.²⁸

Depositing rent with the court serves several beneficial purposes. Having the court hold the rent due protects the landlord from a tenant abandoning the residence without paying the back rent that accrued during the suit.²⁹ The landlord is also able to make repairs without incurring excessive costs since the deposited rent is available to cover these costs.³⁰ Benefits for the tenant inhere in rent escrow schemes as well. For the tenant who loses the suit, depositing rent with the court allows the tenant to avoid the risk of eviction for nonpayment when the suit is over.³¹ For the tenant that prevails in the suit, depositing rent with the court allows the tenant to avoid the risk of forfeiture of the lease for inability to pay the rent in arrears.³² Other tenants are protected from cutbacks and further declines due to a landlord's loss of income with rent escrow provisions as well.³³

While Article 7 §755's rent depositing scheme would seem to be highly useful in furthering the goal of prompting landlords to repair their properties, it actually has limited effectiveness. It is rarely used in Buffalo due its complicated nature.³⁴ The fact that the Court staff is unfamiliar with it makes it even more difficult to use, especially for pro se

²⁷ *Id.*

²⁸ *Id.*

²⁹ 46 La. L. Rev. 195, 216 (1985).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 217.

³⁴ E-mail from Eric Walker, Community Organizer, People United For Sustainable Housing, to Professor Magavern, Professor of Law, University at Buffalo Law School (Feb. 5, 2007 16:37:24) (on file with author)(quoting Grace Andriette, Supervising Attorney, Neighborhood Legal Services Housing Unit).

litigants.³⁵ The Court does not encourage its use and usually prescribes other remedies.³⁶

There is also the risk that the Court will issue an Order To Vacate if the violation the tenant raises is a serious enough threat to health.³⁷ Furthermore, tenants are only able to draw upon this statute after their landlord files an eviction action against them. Tenants have no right to initiate an action for maintenance violations that would allow them to deposit rent with the court. Rent depositing only occurs if a landlord initiates an action against the tenant and if the court determines that there has been a notice or order to make repairs and the needed repairs constitute a constructive eviction or threat to the tenant's life, health, or safety.

EXPANSION OF RENT ESCROW PROVISIONS – APPLYING THE MINNESOTA MODEL TO BUFFALO

Buffalo, and all of New York State, would benefit greatly from the implementation of a broad rent escrow law that allows for tenant initiation of suits against landlords for repair problems. The existing rent depositing provision described above provides a basis for such a law. New York already has a rent escrow statute that allows tenants to initiate suits against landlords and deposit rent with the court to use in repairing conditions dangerous to life, health, or safety. However, this law only applies to New York City, Nassau, Suffolk, Rockland, and Westchester Counties.³⁸ It would be useful to

³⁵ *Id.*

³⁶ Interview with Grace Andriette, Supervising Attorney, Neighborhood Legal Services Housing Unit.

³⁷ While Orders To Vacate are used sparingly in Buffalo Housing Court, their use deters tenant initiation of actions when the tenant fears he/she may be ordered to leave his/her property. *Id.*

³⁸ 7-A N.Y. REAL PROP. ACTS. LAW § 769.

extend this statute to all of New York State in a law similar to Minnesota's rent escrow statute.

Minnesota's current rent escrow law, which permits tenants to initiate suits, is an excellent model for the broadening of New York State's rent escrow mechanism. It is codified in section 504B.385 of the Minnesota Statutes. If a housing inspector orders repairs, then, if the landlord does not make the repairs within the inspector's time period, or if the time period is deemed excessive, the tenant can deposit rent with the court along with written notice of the code violations that exist. Alternately, the tenant himself/herself can give written notice of any violation and give the landlord 14 days to repair. If after this 14 day period has elapsed the landlord has not made the repair, the tenant can deposit rent with the court along with an affidavit. The tenant does not need to deposit rent if none is due at the time of filing but thereafter must make deposits with the court of the rent that becomes owed.³⁹ The remedies available to a prevailing tenant under the Minnesota ordinance include the following: retroactive rent abatement, using all or part of the rent in escrow to make the needed repairs, rent abatement or court withholding rent deposited by the tenant due to the landlord until the landlord makes the needed repairs, and/or fines.⁴⁰

Certain features of the Minnesota statute contribute to its effectiveness, in particular, low filing fees that are waived for low-income tenants, the simplicity and efficiency of the procedure, and the fact that tenants can bring actions without the help of

³⁹ MINN. STAT. § 504B.385.

⁴⁰ *Id.*

a lawyer.⁴¹ This is in stark contrast to New York's Article 7 procedure, which is complicated and not amenable to pro se proceedings nor to tenant initiation of suits. Additionally, the Minnesota law can be triggered by an expired inspector's orders or by a tenant letter, and may be brought by the tenant or by the city attorney.⁴²

New York, and specifically, Buffalo, would greatly benefit from broadening its rent escrow law to mirror the Minnesota rent escrow scheme as such an ordinance would empower tenants to take proactive steps toward ensuring that landlords keep their properties in good repair. Such a law would likely decrease vacancies in apartment buildings, would diminish the chances of landlords abandoning whole buildings due to deterioration, and would help both landlords and tenants avoid unnecessary evictions. The law would prove effective due to its mix of deterrent effects of having the rent withheld from the landlord and practical considerations of providing the deposited money to help landlords be able to afford the needed repairs. The procedure for initiating and trying such an action should be simple so as not to consume too much of the Court's time and resources. Expansion of the law in this manner would not overburden the Court as it would barely add anything to the court's caseload. Rather, it would allow for the replacement of eviction proceedings, which have long-term negative consequences for tenants and take away revenue from landlords by diminishing the number of paying tenants, with tenant-initiated suits focusing on the true problem of building dilapidation.

Expanding the law further to require tenants to deposit rent with the court upon an action against their landlord commenced by a housing court inspector, would also be

⁴¹ Minnesota Attorney General Website available at http://www.ag.state.mn.us/Consumer/housing/lt/LT_2.asp.

⁴² E-mail to author from Professor Magavern, Professor of Law, University at Buffalo Law School (Apr. 2, 2008) (on file with author).

beneficial. The more individuals empowered to take proactive steps to identify repair problems, the more likely these problems will be resolved favorably, without having to evict the tenants. This is especially important in light of the growing number of absentee landlords who have never stepped foot in Buffalo and who have no idea about the condition of their properties.⁴³

CODE ENFORCEMENT AS A TOOL FOR PROMPTING LANDLORDS TO MAKE REPAIRS

Tenants do not bear the sole burden of pressuring landlords to keep properties in good repair and fulfill their duties. Inspectors and code enforcement officers as well as the Buffalo Housing Court bear most of the burden. A code enforcement scheme, modeled after the Minneapolis approach, would help these officials to be more efficient at forcing landlords to make repairs.

BUFFALO'S EXISTING CODE ENFORCEMENT SCHEME

Housing Codes regulate residential dwelling units with respect to maintenance and repair.⁴⁴ They generally impose requirements related to “ ‘structural elements, facilities, services, and number of occupants.’”⁴⁵ New York’s early Housing Codes came

⁴³ Brian Meyer, *Vacant Buildings Feeding Spread of Arson*, CitiStat Buffalo in the News available at http://www.ci.buffalo.ny.us/Home/Mayor/Leadership/CitiStat_Buffalo/CitiStat_Buffalo_in_the_News/Vacantbuildingsfeedingspreadofarson (noting the high number of absentee landlords in Buffalo).

⁴⁴ Serena D. Madar, *Mandatory Rent Escrow: A Bill Relative to Rent Withholding*, 36 New Eng. L. Rev. 283, 298-99 (2001).

⁴⁵ *Id.*

in the form of the 1867 Tenement House Law, enacted in response to public health concerns arising from the horrendous conditions in New York's tenement houses.⁴⁶

Today in Buffalo, both the New York State Codes and the City of Buffalo Code govern building condition requirements. These codes are enforced through the building inspection process. Building inspectors are each assigned to one inspection district. Right now, the building inspectors largely respond to complaints made by residents. The days of housing inspectors walking the streets inspecting properties are long since past. The Buffalo Housing Court plays an important role. Building inspectors typically give landlords notice of violations, and if violations persist the inspectors write them up for Housing Court where the landlords are arraigned on criminal charges. The overarching goal of the Housing Court is not punishment. Rather, the Court acts mainly to bring the landlords into compliance to improve the buildings in Buffalo, thereby improving the entire city. Hence, the Court grants landlords who come into compliance a conditional discharge, ensuring no penalty is rendered as long as the landlord agrees to avoid further violations.⁴⁷

REPEAT OFFENDER PROGRAM AND THE MINNEAPOLIS CODE ENFORCEMENT MODEL

Minneapolis has taken an innovative approach to the problem of negligent landlords allowing their properties to fall into disrepair. Like Buffalo, Minneapolis has a Housing Court that began as a three year program in 1989.⁴⁸ Around the same time, the Minneapolis City Attorney's Office created the Repeat Offender Code Compliance

⁴⁶ *Id.*

⁴⁷ Interview with Attorney Mary Bowman.

⁴⁸ Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 Fordham Urb. L.J. 159, 173 (1993).

Initiative (ROCCI).⁴⁹ This program identifies the landlords with the worst record of allowing their properties to fall into disrepair. For the initial run of this program, the Minneapolis City Attorney chose landlords in the following manner. First, a list was created of landlords owning at least 12 properties in Minneapolis, half of which had 10 or more violations in the past five years. To make the list, the landlords also needed at least one violation within the past year. Next, the City Attorney ranked the landlords on this list according to the percentage of properties with ten or more violations in the past five years and entered the top five landlords into the program.⁵⁰ The selected landlords worked with one inspector and were threatened with the sanction of jail instead of fines for failure to come into compliance with orders to repair.⁵¹

Minneapolis has experienced a great deal of success with the ROCCI program. The program saw a high incidence of landlord cooperation. Housing inspectors did not need to obtain search warrants to be able to enter the properties to inspect and landlords met deadlines. This may be attributable to the threat jail as a sanction.⁵² Additionally, the ROCCI program succeeded at bringing the majority of the properties of the landlords in the program up to code. By April 1993, 67 percent of the original properties brought into ROCCI were brought into compliance such that their owners could register them under the new stricter rental registration guidelines.⁵³

To implement such a program in Buffalo would not seem to pose too much of a challenge. As the program involves a small number of landlords it would not greatly

⁴⁹ *Id.* at 174.

⁵⁰ *Id.* at 175.

⁵¹ *Id.* at 176.

⁵² *Id.* at 177.

⁵³ *Id.* at 177-78.

increase the caseload of the current housing inspectors. Landlords who might own multiple properties in multiple inspection districts would work with one inspector to bring all of their properties into compliance. Threats of jail could be used to shape the behavior of these landlords. When it is clear that the reason for the poor condition of the property is lack of resources, inspectors can help connect these landlords with sources of funding or can help these landlords sell the property to an individual or other entity that would be able to secure the resources to keep it in good repair.

CONCLUSION

Buffalo faces an abandoned housing crisis that is accelerating the already alarming pace of deterioration of the city. Landlords must be held accountable for their actions in allowing rental properties to deteriorate to the point of being uninhabitable leading eventually to abandonment. The policy expansions described in this paper would greatly benefit the city's renters and all its residents by lessening the likelihood of abandonment of rental property due to poor conditions. These ideas can be easily implemented and would help revitalize Buffalo.

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