

## SELECTIVE HOUSING CODE ENFORCEMENT AND LOW-INCOME HOUSING POLICY: MINNEAPOLIS CASE STUDY

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### I. Introduction

During the last fifty years, low-income people have witnessed massive cutbacks in the federal government's role as a provider and subsidizer of affordable housing.<sup>1</sup> Nonetheless, the federal government still subsidizes the private market both directly, via Section 8 rental vouchers,<sup>2</sup> and indirectly, via Aid to Families with Dependent Children ("AFDC")<sup>3</sup> cash subsidies, which recipients often use to pay for housing. Yet government subsidies alone do not insure that the housing, which the government directly or indirectly finances, will meet even minimal health and safety standards. While the Section 8 program requires that a building must meet "housing quality standards"<sup>4</sup> if a voucher is to be used there, AFDC has no similar requirement.<sup>5</sup> Consequently, an AFDC re-

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1. See generally Janet Larsen & Joanne Vail, *The Effect of the 1986 Tax Reform Act on Affordable Multi-family Housing in the Twin Cities Area* (1989) (unpublished report on file with author); Janet Larsen, *Sooner or Later . . . The Disappearance of Federally Subsidized Low-income Rental Housing in Minnesota* (1988) (unpublished report on file with author).

2. The Section 8 Existing and Moderate Rehabilitation Program ("Section 8") is designed to utilize existing rental units in the private market. Section 8 pays a rent subsidy to landlords on behalf of low-income tenants who are required to pay a fixed percentage of their incomes toward rent. Section 8 will not subsidize rent for a unit that exceeds the "Fair Market Rent" for the local market. In February, 1989 the Fair Market Rent for a two bedroom apartment in Minneapolis was \$528. M. DENISE BEIGBEDER, *HOUSING AMERICA: FIFTY YEARS OF FEDERAL INVESTMENT* 21-22 (1989).

3. 42 U.S.C. §§ 601-617 (1988) [hereinafter AFDC Legislation]. Minnesota has implemented the AFDC program via MINN. STAT. §§ 256.72-256.935 (1992).

4. 24 C.F.R. § 887.207(b)(2) (1993); see also *id.* § 887.251 (Housing Quality Standards); *id.* § 887.255 (Owner responsibility to maintain unit); *id.* § 887.257 (PHA periodic unit inspection to ensure unit continues to meet HQS); *id.* § 887.261 (PHA recourse if unit does not meet HQS).

5. See AFDC Legislation, *supra* note 3.

ipient can use his or her grant money to pay rent on an uninhabitable apartment.

To prevent government financing of unsafe and unhealthy rental properties, municipal governments must enforce local housing maintenance codes. Legal academics have debated the utility of code enforcement as an element of housing policy for more than twenty years. Some argue that code enforcement is a justifiable method that will insure safe and decent housing for all renters.<sup>6</sup> Others argue that code enforcement will decrease the housing supply and, as a result, hurt low-income tenants by forcing them onto the streets.<sup>7</sup> Nevertheless, none of the theorists to date have been able to establish conclusively that code enforcement will precipitate unaffordable rent increases or landlord abandonment of properties.

This Article examines the results of a Minneapolis, Minnesota case study of selective code enforcement in the context of the theoretical debate surrounding code enforcement as a method of insuring safe and decent housing for the poor. In so doing, this Article will demonstrate that municipalities can administer selective code enforcement programs under certain market conditions without causing rent increases.

Understanding the procedural framework of a selective enforcement program requires an appreciation of the problem that such a program aims to stop. The mere existence of a municipal housing maintenance code ("housing code") will not prevent landlords from allowing their properties to deteriorate—a process called "milking."<sup>8</sup> A selective enforcement program must address the systemic problems that allow landlords to milk their properties with impunity.

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6. See, e.g., Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971) [hereinafter *Regulating Slum Housing Markets*]; Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973) [hereinafter *More on Slum Housing*]; Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987); Richard S. Markovitz, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

7. See Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975); Edward Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

8. See *infra* text accompanying note 66.

Part II of this Article reviews the theoretical debate over the utility of housing code enforcement. Part III describes such systemic problems as they have occurred in Minneapolis, Minnesota. Part III also reviews Minneapolis's responses, including a selective enforcement program. The discussion of the Minneapolis selective enforcement program is divided into three parts: selection criteria, operating procedures, and reactions of targeted landlords. This Article then assesses the program's results, comparing the outcome with that predicted by some theorists. Part IV addresses the question of whether other municipalities should consider implementing the Minneapolis program. Municipalities must address these basic issues: whether such a program will precipitate rent increases; whether the program will be cost-effective; and whether there are lessons that could be incorporated in the future administration of such programs. This Article answers these questions and concludes that, if economic conditions are right, selective housing code enforcement is a viable means for increasing low income housing.

## II. A Brief Review of the Academic Literature<sup>9</sup>

### A. Ackerman: Regulating Slum Housing Markets

Bruce Ackerman started the academic debate on the utility of code enforcement by arguing that, under certain conditions, code enforcement could redistribute income from landlords to tenants by improving housing conditions without precipitating rent increases.<sup>10</sup> Ackerman's hypothesis required the existence of economic conditions under which landlords would be unable to pass on the costs of housing code compliance ("code costs") to tenants through rent increases. Ackerman posited that code enforcement would not lead to rent increases if it is comprehensive, as opposed to selective, and if there exists a group of tenants, the "lukewarm" families, who are unwilling to pay extra rent for the improved housing.<sup>11</sup> If such lukewarm families exist and convincingly threaten landlords that they will either double-up or move out rather than pay increased rents, then "equilibrium will not be at-

9. This review is not intended to be exhaustive, but merely to familiarize the reader with the central points of the academic debate concerning code enforcement. This review is confined to the articles' discussions of the utility of code enforcement. I do not claim to dispel an entire generation of academic debate in this article. However, where the case study raises reasonable points of disagreement with the articles, those points will be noted and discussed.

10. *Regulating Slum Housing Markets*, *supra* note 6.

11. *Id.* at 1104-05.

tained until the competing landlords absorb all of the code costs and rent all of their units at the pre-code price."<sup>12</sup>

If landlords are unable to pass code costs to tenants, then income is indirectly distributed from landlords to the tenants. To demonstrate this effect, Ackerman utilized the example of a tenant living in a formerly rat-infested apartment that has become rat-free because the landlord was forced to comply with the housing code. Based on the assumption that the landlord was unable to pass on the extermination cost to the tenant, the tenant received a free benefit. Ackerman computed the value of the benefit by assessing the amount of cash grant which the government would have to have given the tenant to stay in the rat-infested apartment.<sup>13</sup> For example, "if the typical tenant would refuse to return to his former life among the rats even if he were given a monthly cash grant of \$5 in compensation, code enforcement has in effect put an additional \$5 a month in his pocket."<sup>14</sup>

#### B. Komesar: A Critique of Ackerman

In a stinging critique of Ackerman's article<sup>15</sup>, Neil Komesar began his assault with the statement: "While Professor Ackerman deserves commendation for his courage in assaulting established doctrine, his analysis is basically flawed and his conclusions suspect."<sup>16</sup>

Komesar attacked Ackerman's claim of the "leverage" effect<sup>17</sup> of code enforcement. The leverage effect assumes that landlords' costs in bringing properties up to code cannot be considered governmental costs of code enforcement since they are not government expenditures. In a footnote, Komesar stated: "[Ackerman's assertion] places *no* societal value on a dollar taken from the landlord so long as it is given to the tenant . . . . Considering Professor Ackerman's own realization that many slum landlords are low-income slum dwellers, such a scheme of societal value seems

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12. *Id.* at 1106.

13. *Id.* at 1096.

14. *Id.*

15. Komesar, *supra* note 7.

16. *Id.* at 1176.

17. *Regulating Slum Housing Markets*, *supra* note 6, at 1122. The leverage effect occurs when an implemented government program results in benefits of greater value than cost to the government. In Ackerman's example, the government has allocated funds to administer a code enforcement program, regardless of property improvements. The fact that properties are improved has, in effect, increased the value returned on funds allocated solely to administer the program.

harsh."<sup>18</sup> Komesar argued that, taking Ackerman's assertion to its logical extreme, any social program funded by landlords would have the leverage effect.<sup>19</sup> In the balance of his commentary on the leverage effect, Komesar attempted to prove that, contrary to Ackerman's arguments, code enforcement is inferior to an income maintenance program<sup>20</sup> supported by a tax on landlords.<sup>21</sup>

Next, Komesar attacked Ackerman's empirical assumptions, on the ground that they "contain critical analytical errors and . . . present an erroneous impression of the state of knowledge."<sup>22</sup> Komesar argued that Ackerman's assumption that code enforcement would not reduce present housing supply failed to account for future effects of code enforcement.<sup>23</sup> According to Komesar, the landlords' costs of complying with housing codes would precipitate abandonment of rental properties as revenues slip below variable costs.<sup>24</sup> Komesar also attacked Ackerman's assertion that increased code costs on slum housing would have a *de minimis* effect, if any, on low-income housing construction and newly available low-income housing.<sup>25</sup>

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18. Komesar, *supra* note 7, at 1178 n.7.

19. *Id.* at 1180.

20. An income maintenance program provides cash subsidies directly to low-income families. *Id.* at 1175.

21. *Id.* at 1181-86.

22. *Id.* at 1187.

23. *Id.* at 1187-88.

24. *Id.*

[It] is . . . a proposition of economic analysis that fixed costs become variable costs over time. In more common sense terms, the physical structure which houses the rental units depreciates over time. At some point as time passes, each of the structures will need refurbishing or rebuilding. At this point, the variable cost relevant to the decision to continue in the rental business will include elements of formerly fixed costs and the decision to remove rental units will be contingent upon a sufficient return on investment in housing.

*Id.*

25. Komesar, *supra* note 7, at 1188-91. Newly available low-income housing becomes available through the "filtering" or "trickle-down" theory which posits that:

Whenever new units appeared on the market that were of higher quality than those originally at the top [of the "housing quality" ladder], the housing ladder extended upward by an additional rung. The household who occupied the former highest quality unit then moved into the new highest quality unit. The household on the next rung down, moved up into the now vacated unit . . . [H]ouseholds moved up the housing ladder and out of old neighborhoods into newer, higher quality ones.

Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 798 (1993). Thus, the creation of new units at the top of the ladder leads to depreciation, and eventual abandonment, of the buildings at the bottom end. *Id.*

Finally, Komesar rejected Ackerman's assumption that, even though pre-code enforcement rents are maintained, the increased housing quality would not generate immigration from the relatively wealthier, lower-middle-class areas. Komesar argued that immigration would occur because code enforcement would generate "a substantial improvement in slum housing quality[, raising it to a] level as great as, or greater than, the quality of the housing possessed by families somewhat further along the continuum."<sup>26</sup>

### C. Ackerman: More on Slum Housing

Ackerman's response to Komesar's article was that Komesar "plainly failed" to undermine his arguments.<sup>27</sup> Ackerman agreed with Komesar's assertion that any program funded by a tax on landlords could have a "leverage" effect.<sup>28</sup> In fact, Ackerman argued, he made that very point in his original article when stating that the "mere possibility of 'leverage' does not of itself imply that it is fair to impose a special burden upon landlords."<sup>29</sup> Therefore, Ackerman asserted, Komesar has failed to undermine his primary thesis that, under certain economic conditions, code enforcement will improve the housing conditions of poor tenants.<sup>30</sup>

Ackerman countered Komesar's critique of his empirical assumptions by pointing out Komesar's failure to suggest any helpful alternatives.<sup>31</sup> Ackerman stated that "Professor Komesar's refusal to make intelligent guesses may simply conceal a belief that, unless an overwhelmingly empirical case can be made for governmental intervention, laissez faire represents the best policy."<sup>32</sup>

Answering Komesar's critique of his assertion that code enforcement will not significantly affect the future construction of housing, Ackerman asserted that Komesar's attempt to quantify future code costs failed for two reasons. First, it was based on a worst-case scenario assumption that such housing would certainly filter to poor tenants within twenty years of construction—an assumption that Ackerman found unrealistic.<sup>33</sup> Second, even if the planner did

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26. *Id.* at 1191.

27. *More on Slum Housing*, *supra* note 6, at 1195.

28. *Id.*

29. *Id.*

30. *Id.* at 1196.

31. Ackerman also argued against Komesar's assertion that code enforcement is inferior to other income-transfer programs. These arguments, however, are irrelevant for our purposes and, therefore, will not be considered.

32. *More on Slum Housing*, *supra* note 6, at 1203.

33. *Id.* at 1205.

choose to adopt the worst case scenario and compute future code costs, such costs, using Komesar's figures, would amount to only 0.02 percent of a construction project's entire cost—a percentage that Ackerman believed was clearly *de minimis*.<sup>34</sup>

#### D. Meyers

In his article, "The Covenant of Habitability and the American Law Institute,"<sup>35</sup> Charles Meyers critiqued the American Law Institute's (ALI) discussion of a non-waivable duty of habitability.<sup>36</sup> Meyers charged that the non-waivable duty of habitability was based not on contract law, but on "the moral principle of redistribution of wealth from landlord to tenant."<sup>37</sup> Meyers argued that the non-waivable duty was inappropriate because 1) it is based on a vision of a rich slumlord, which may be inaccurate, 2) it will not necessarily lead to improved urban housing conditions, and 3) if improvement of slum property is not economical, a non-waivable duty will not change the relative bargaining positions of landlords and tenants.<sup>38</sup> Meyers's two principal objections to the non-waivable duty were: "1) the legal system does not have the resources to administer [ALI's] . . . proposed new rules and 2) the new rules are more likely than not to make housing conditions worse, not better."<sup>39</sup>

Meyers divided housing into three theoretical categories to demonstrate the economic consequences of the non-waivable duty of habitability. The first category is composed of dwellings that do not comply with the housing code and are considered unsuitable for residential use; these dwellings can, however, be brought up to code standards by additional investment, which can later be recovered through higher rents.<sup>40</sup> The economic consequence of a non-waivable duty of habitability on this category of housing is that tenants living in such housing will be forced to pay higher rents.<sup>41</sup> Meyers criticized the adoption of the non-waivable duty as paternalistic in that it dictates how poor tenants living in the first category of housing must spend their money.<sup>42</sup>

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34. *Id.* at 1206.

35. Meyers, *supra* note 7.

36. *Id.* at 879-85.

37. Meyers, *supra* note 7, at 882.

38. *Id.* at 881.

39. *Id.* at 885.

40. *Id.* at 889.

41. *Id.* at 890.

42. *Id.*

The second category is composed of non-complying dwellings that can be brought up to code through an expenditure that will preserve the landlord's positive return on capital investment, though reducing his rate of return because rents cannot be raised sufficiently to cover repair costs.<sup>43</sup> Meyers conceded that the imposition of a non-waivable duty of habitability on such landlords would produce a transfer of wealth to tenants.<sup>44</sup> That transfer would be short term, however, because landlords will only make repairs as long as such costs are recoverable from profits.<sup>45</sup> In the long term, Meyers argued, unless rents fully reflect the costs of additional repairs required by the non-waivable duty, the quantity of this category of housing will decrease by attrition, and new investment in such housing will be discouraged.<sup>46</sup>

Meyer's third category of housing is composed of non-complying dwellings for which the cost of code-mandated repairs, together with other expenses, will result in a negative return on sunk capital.<sup>47</sup> Meyers asserted that the consequence of the imposition of a non-waivable duty of habitability on such housing would be eventual abandonment, the timing of which would depend on the "landlord's perceptions and the financing arrangements for the property."<sup>48</sup>

In summary, Meyers posited that:

The [ALI] Property Restatement [proposes changes] . . . that are likely to involve courts in costly and time-consuming litigation; that are likely to injure the interests of many tenants by pricing them out of some housing and causing the abandonment of other housing; and that are likely to transfer wealth from some landlords to their tenants, although the landlords themselves may be as victimized by present housing policies as the tenants.<sup>49</sup>

#### E. Markovitz

In his analysis of the effects of housing code enforcement upon the poor, Richard Markovitz began with the premise that similar previous studies were overly simplistic.<sup>50</sup> Markovitz, therefore,

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43. *Id.* at 889.

44. *Id.* at 890.

45. *Id.*

46. *Id.* at 891.

47. *Id.* at 889.

48. *Id.* at 892.

49. *Id.* at 903.

50. Markovitz, *supra* note 6.



sought to complete the evaluation so that an effective comparison of the utility of housing code enforcement against untied dollar transfer programs or housing subsidies could be made.<sup>51</sup>

First, Markovitz examined the effect of housing code enforcement on poor tenants collectively. Examining the effect from three different economic assumptions, Markovitz contended that code enforcement would benefit the entire group, although the extremely poor would benefit less than slightly wealthier tenants.<sup>52</sup> Nevertheless, negative critiques of this disparity in benefit are outweighed by other, less directly quantifiable factors. For example, the children of poorer tenant families, who cannot exercise any economic choice in favor of better housing conditions, would benefit from the safer living environments created by code enforcement.<sup>53</sup> Code enforcement would even benefit non-renters in the neighborhoods, "by reducing their exposure to fire and disease, by lowering the risk of crime, and by redistributing income in directions they favor."<sup>54</sup>

Assuming code enforcement would harm some individuals—the poorest tenants who cannot afford improved housing, the landlords, and taxpayers who finance the administrative costs of code enforcement—Markovitz compared the distributional desirability of these harms to the benefits obtained by poor renters as a whole.<sup>55</sup> Markovitz believed that many people would approve of this distribution, opining that the value of the "average dollar won by the beneficiaries of housing code enforcement [is higher than] . . . the average dollar lost by its victims."<sup>56</sup>

Next, Markovitz examined the allocative efficiency of housing code enforcement. Markovitz attacked the common assumption that code enforcement is inefficient *per se* because it forces landlord investment beyond the value to tenants. Under that premise, tenants are unwilling to pay rents that are commensurate with code-mandated repairs in the unregulated market place.<sup>57</sup> Markovitz asserted that this common assumption ignores the value of important code enforcement generated externalities, including prevention of the spread of disease and fire, aesthetic improvement, decreased crime, skills training for inhabitants, and better

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51. *Id.* at 1815.

52. *Id.* at 1828.

53. *Id.* at 1829.

54. *Id.* at 1827.

55. *Id.* at 1829.

56. *Id.* at 1830.

57. *Id.* at 1830-31.

health of poor children.<sup>58</sup> Markovitz concluded that by including the value of these previously unacknowledged external benefits in the equation, the analyst can more realistically determine the benefits of code enforcement.

#### F. Rabin

In his article documenting the changes in landlord-tenant law,<sup>59</sup> Edward Rabin analyzed the proposition that the changes would hurt tenants more than it would help them. In tracing the academic debate through a series of key point summaries of the major articles, Rabin largely confined his commentary to outlining the academic point-counterpoint. For instance, Rabin declined to summarize Komesar's article, which was "extremely critical" of Ackerman's article.<sup>60</sup> Nevertheless, Rabin found some of Ackerman's assumptions untenable, such as the assumption that non-slum dwellers will refrain from moving to former slums brought up to code.<sup>61</sup> Rabin believed that the possibility of this assumption holding true had been refuted by the existence of the phenomenon of gentrification.<sup>62</sup>

Rabin critiqued Markovitz's article as "fatally flawed," stating, "at most, he [Markovitz] proves only that certain tenants will be helped by a code enforcement program more than certain other tenants will be injured."<sup>63</sup> Rabin argued that, as Markovitz's article attempted to prove the net benefit of code enforcement, it implicitly conceded that some tenants would be harmed by code enforcement and that those tenants would be poorer than tenants who were benefited by code enforcement.<sup>64</sup> Therefore, Rabin concluded, Markovitz's article "tends to support the mainstream posi-

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58. *Id.* at 1832.

59. Rabin, *supra* note 7.

60. *Id.* at 559.

61. *Id.* at 560.

62. *Id.*

Gentrification, the influx of high-income dwellers into low-income neighborhoods, has in the past decade become a serious cause of concern to low-income tenants in older American cities. Although gentrification has had some positive effects, one important negative effect has been the displacement of existing neighborhood residents.

*Id.*; See Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 508 (1991), (citing N. SMITH & P. WILLIAMS, *GENTRIFICATION OF THE CITY* (1986)). See also Aoki, *supra* note 25, at 699-700.

63. Rabin, *supra* note 7, at 560.

64. *Id.* at 560-61.

tion that code enforcement policies will hurt more than help poor tenants."<sup>65</sup>

### G. Kennedy

Within the broad debate over the utility of code enforcement, Duncan Kennedy has discussed the more narrow topic of "milking" landlords. Kennedy defined "milking" as the "decision to reduce maintenance below the level necessary to keep a building in existence as a residential unit."<sup>66</sup> Kennedy demonstrated that, from the perspective of the landlord, premature milking—the treatment of a building as a wasting rather than renewable asset by cutting off maintenance before rents fall below expenses—may be rational in a declining market.<sup>67</sup> Nevertheless, what may be rational from the landlord's perspective can be socially detrimental. Milking and subsequent abandonment by one owner may affect other property owners' perceptions of the future of the neighborhood, inhibiting them from maintaining their properties and ultimately causing neighborhood blight.<sup>68</sup> Therefore, Kennedy stated, municipalities should attempt to prevent premature milking through selective<sup>69</sup> code enforcement.<sup>70</sup> Such selective code enforcement will force landlords to maintain their properties at renewable levels—a change that will increase incidentally the housing supply by extending building utility and slowing the rate of abandonment.<sup>71</sup> Under conventional principles of supply and demand, this increase in supply should depress rents.<sup>72</sup>

65. *Id.* at 561.

66. Kennedy, *supra* note 6, at 489; see also Aoki, *supra* note 25, at 764.

67. *Id.* at 490-96.

68. *Id.* at 512-13.

69. Kennedy advocates selective code enforcement against those landlords who are prematurely milking their properties. He outlines a model of selective enforcement that would attempt to identify those buildings about to be milked prematurely, while ignoring buildings in such bad condition that their owners would abandon them rather than comply and buildings that could be upgraded by their owners to raise rents. In general, Kennedy advocates selective enforcement in declining neighborhoods, but does not provide any definitive identification criteria. *Id.* at 500.

70. Kennedy used the terms "code enforcement" and "enforcement of the warranty of habitability" interchangeably. For ease of comparison with other authors in the literature, this Article uses the term "code enforcement" universally to refer to the official enforcement actions of local government officials, as distinguished from private actions, such as tenant rent withholding and tenants' remedies actions, that are also extremely important in providing collateral enforcement of housing maintenance codes.

71. Kennedy, *supra* note 6, at 500.

72. *Id.* Demand is commonly defined as the amount of a certain good that people will buy at a particular price. Supply is the amount of goods that suppliers will offer

Kennedy's theory of selective code enforcement clearly conflicts with the "mainstream" view of those theorists who insist that code enforcement will precipitate rent increases and abandonment.<sup>73</sup> Nonetheless, the results of the "Repeat Offender Code Compliance Initiative" ("ROCCI"), a selective code enforcement program against milking landlords, which is currently being administrated by the city of Minneapolis, Minnesota, support Kennedy's theory of selective code enforcement.<sup>74</sup>

### III. A Study of Minneapolis's Selective Code Enforcement

#### A. Systemic Gaps that Allow Landlords to Milk

New York City adopted the first housing code in 1867.<sup>75</sup> By 1968, nearly 5,000 American municipalities had adopted housing codes.<sup>76</sup> Merely having housing code legislation, however, does not insure that landlords will not milk their properties. Landlords freely milk their properties in violation of housing codes if the municipality does not enforce the code or if systemic gaps exist, which allow landlords to abuse the system with impunity. In Minneapolis prior to 1990, landlords arguably were able to take advantage of systemic gaps in enforcement and milk their properties.

In Minneapolis, the Department of Regulatory Services, Inspections Division ("Inspections Department") bears primary responsibility for housing code enforcement. Theoretically, inspectors are supposed to methodically inspect all buildings within their respective districts to insure that the entire city is inspected ("scored") periodically.<sup>77</sup> Inspections conducted in response to complaints from tenants or neighbors are to supplement this periodic scoring.<sup>78</sup> Due to budget constraints, however, the Inspections Department cannot hire enough inspectors to score the entire city on a

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at a particular price. The point of intersection of the supply and demand curves is the equilibrium price. This price will change with changes in either supply or demand. So long as demand remains the same, an "increase in supply causes the equilibrium price to fall and the equilibrium quantity to rise." PAUL R. GREGORY & ROY J. RUFFIN, *ESSENTIALS OF ECONOMICS* 66 (1986).

73. See, e.g., Komesar, *supra* note 7; Meyers, *supra* note 7; Rabin, *supra* note 7.

74. The results reflected in this Article pertain to the initial group of ROCCI landlords and are as of April 1, 1993.

75. Rabin, *supra* note 7, at 551 (citing L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* 26 (1968)).

76. *Id.* (citing Samuel B. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1, 44 (1976)).

77. See generally OFFICE OF THE CITY COORDINATOR, MINNEAPOLIS INSPECTIONS DEPARTMENT, *HOUSING SECTION: PROCEDURES AND POLICY REVIEW* (1985).

78. *Id.*

periodic basis.<sup>79</sup> Inspectors spend virtually all of their time responding to complaints.<sup>80</sup>

If an inspector receives a complaint about a particular building, the Minneapolis enforcement procedures require the inspector to inspect the building. If the inspection reveals a condition that violates the housing code, whether or not the condition is the subject of the complaint, the inspector is required to send the landlord a letter describing the violation and requesting that he repair or "abate" the violation within a certain amount of time, usually thirty-five to forty days.<sup>81</sup> This letter is called an "order," although "request" would be a more appropriate term than "order," because the Inspections Department has no vested power to enforce the order. This lack of enforcement power impairs the effectiveness of the code enforcement system.

If, after the time period stated in the order expires, the owner has not abated the violation, the inspector may either grant the owner a time extension or file a criminal citation against the owner.<sup>82</sup> The criminal citation, referred to as a "tag," is like a traffic ticket.<sup>83</sup> The tag does not require the landlord to abate the violation; it only requires him to pay a fine as punishment for his failure to comply with the order.<sup>84</sup> In the meantime, two years or more may have passed between the original inspection and payment of the fine.<sup>85</sup>

In 1990, the Minnesota State Legislature increased the maximum fine for housing code violations from \$50 to \$250 for the first violation and \$500 to \$750 for subsequent violations.<sup>86</sup> These increases came in response to complaints that low fines were insufficient to compel landlords to abate violations, yet some landlords still did not see the new maximum fine as a large penalty.<sup>87</sup> These landlords continued to evade inspectors' orders and tags, considering

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79. *Id.*

80. *Id.* Due to budget constraints facing many large cities today, the pattern experienced in Minneapolis is probably common.

81. *Id.* at 7.

82. *Id.*

83. *Id.* at 9.

84. *Id.*

85. Memorandum from Bill Korn, Assistant City Attorney, Criminal Division, City of Minneapolis, to Mitchell Rothman, Director, Criminal Division, City of Minneapolis (Oct. 9, 1990) (on file with author).

86. MINN. STAT. ANN. § 566.35. (West 1993).

87. Interview with Bill Korn, Assistant City Attorney, Criminal Division, City of Minneapolis, in Minneapolis, Minn. (Jan. 19, 1993).

the fines as merely part of the cost of doing business.<sup>88</sup> In the meantime, they were able to continue milking their properties by collecting all of the rents without making any expenditures for maintenance.<sup>89</sup> Some landlords would go even further than milking their properties and allegedly would engage in "equity skimming," that is taking in rents while not paying mortgage and taxes on the property.

Eventually, either the mortgage holder would foreclose on the property due to the unpaid mortgage, or the city would seize the property due to unpaid property taxes and/or water bills. In either situation, the recipient owned a building from which most of the equity had been lost and also often owed delinquent taxes and/or water bills. If the city became the new owner, it would either demolish the building, causing a permanent loss from the housing stock, or vacate the building and sell it to the Minneapolis Community Development Agency ("M.C.D.A."), which would try to rehabilitate and resell the property. A mortgagee who had foreclosed on the property would usually try to recoup some of its losses by selling the property to a new owner.

Whether the M.C.D.A. or a mortgagee tried to sell the property, the property was considered "distressed" and could only be sold for little of its original value. Due to the desperate situation, the seller was usually forced to hold a mortgage on the building with little or no security from the new owner. Frequently, the new owner was another of the small group of Minneapolis landlords who consistently milked their properties; the process of milking and equity skimming would start anew. In the meantime, tenant complaints increased, neighborhood complaints increased, and the housing stock deteriorated.

#### B. Public Policy Responses

The injustice of this situation did not escape the attention of advocates and public officials. Between 1989 and 1991, state and local governmental bodies passed important legislation, creating enforcement vehicles designed to improve the situation.<sup>90</sup> This legislation set the stage for a viable selective enforcement program.

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88. *Id.*

89. *Id.*

90. See 1989 Minn. Sess. Law Serv. Ch. 328, art. 2, § 17(1) (West) [hereinafter Housing Court Consolidation Legislation]; MINNEAPOLIS, MINN., ORDINANCE 90-01-235 (Jan. 1, 1991) [hereinafter Rental License Ordinance].

### 1. Housing Courts

In 1989, housing and code enforcement advocates successfully lobbied the Minnesota State Legislature to establish a three year pilot housing court program for Hennepin (Minneapolis) and Ramsey (St. Paul) counties.<sup>91</sup> The housing courts replaced a system in which different county judges, many of whom had little or no familiarity with housing law, rotated through the unlawful detainer court, where they would sit for a one week term, handle all of the eviction and code enforcement cases, and then rotate back to their respective courts.<sup>92</sup>

The housing court legislation consolidated the hearing and determination proceedings of actions related to residential rental housing, including code violations, rent escrow proceedings, landlord-tenant damage actions, actions for rent abatement, and unlawful detainer proceedings.<sup>93</sup> A permanent referee, who is familiar with housing law, directs the housing court.<sup>94</sup> The referee has power to levy increased fines for unabated orders, to award retroactive rent abatements, and to authorize city officials to collect rents and use them to pay for repairs.<sup>95</sup> Advocates and legislators presumed that the unified system would provide greater uniformity, efficiency, and justice.<sup>96</sup>

### 2. Rental Licensing

Soon after the housing courts were created, the City Council passed a rental licensing ordinance that requires all owners of rental property to obtain a rental license.<sup>97</sup> Under the rental licensing ordinance, either the Director of Inspections or the designated rental licensing inspector ("inspector") issues initially a provisional license after a property owner has completed the required application.<sup>98</sup> If, however, the property is in substandard condition, the inspector may recommend license revocation to a special committee of the City Council.<sup>99</sup> The committee considers

91. Housing Court Consolidation Legislation, *supra* note 90.

92. James Walsh, *The Home Court Advantage*, L. & POL., Nov. 1990, at 26, 27.

93. Housing Court Consolidation Legislation, *supra* note 90.

94. *Id.*

95. Walsh, *supra* note 92.

96. *Id.*; Housing Court Consolidation Legislation, *supra* note 90, § 1.

97. Rental License Ordinance, *supra* note 90.

98. Letter from Craig Eliason, Licensing Inspector, City of Minneapolis, Department of Regulatory Services, Inspections Division, to Robin Powers Kinning (Apr. 15, 1993) (on file with author).

99. *Id.*

the inspector's recommendation and informs the City Council as to its recommendation. Ultimately, the City Council has the power to revoke a license.<sup>100</sup>

The classification of a property as substandard is determined by a thorough inspection of the building in which every item that violates the housing code receives a score.<sup>101</sup> The scores for various items are graduated according to the severity of the threat posed to health and human safety and the extent of noncompliance.<sup>102</sup> A licensing inspector will classify a building as either passing, substandard, or condemnable according to numerical thresholds determined by a building's size.<sup>103</sup> A licensing inspector will not recommend that the City Council convert a provisional license to a permanent license until the building receives a passing classification. "Passing" means that a building is not classified as substandard.

While the provisional license has no expiration period, the inspector can recommend revocation if the owner does not repair the premises in a timely manner. The ability to recommend license revocation provides the Inspections Department with a substantial threat against landlords who refuse to comply with housing orders.<sup>104</sup>

### C. Selective Enforcement and ROCCI

#### 1. The Creation

Nearly contemporaneously to the inception of the new housing court and rental licensing program, the Minneapolis City Attorney's Office ("city attorney") created the Repeat Offender Code Compliance Initiative ("ROCCI").<sup>105</sup> Although the Minneapolis program developed independently of Kennedy's theory of selective code enforcement, the program's vision and goals are strikingly similar. The official goals of ROCCI are as follows:

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100. *Id.*

101. *Compilation of Condemnation/Tax Classification Scoresheets*, City of Minneapolis, ID-3801 (rev. Aug., 1990) [hereinafter *Scoresheets*].

102. *Id.* For example, a missing storm door scores one while a missing smoke detector scores ten.

103. *Id.* For example, the substandard threshold for a duplex is 30 while the substandard threshold for a building with six apartments is 60.

104. Interview with Craig Eliason, Licensing Inspector, City of Minneapolis, in Minneapolis, Minn. (Jan. 12, 1993).

105. ROCCI was primarily the project of Assistant City Attorney Bill Korn who was then assigned to the Inspections Department to prosecute code violations for two years. Korn created ROCCI after being frustrated by the ease with which some landlords evaded the housing code, as previously described. See *supra* section III.A.



1. Bring targeted properties into compliance with the housing and maintenance code so that they may be licensed under the new rental licensing ordinance.
2. Obtain actual abatement of all housing code violations observed in target properties during the initial round of inspections.
3. Reduce tenant and neighborhood complaints regarding housing code violations in target properties.<sup>106</sup>

The city attorney employed the following criteria to identify the landlords who had the worst records of noncompliance and who were presumably milking their properties as of 1990:

1. Ownership of at least twelve properties in Minneapolis, half of which have had ten or more violations since 1985; and
2. At least one violation in 1990.<sup>107</sup>

The first criterion was designed to identify those landlords with the worst records of noncompliance; the second criterion insured that the landlord's previous pattern of behavior was continuing. From the initial pool of eleven landlords identified by these factors, the city attorney ranked the landlords by the percentage of properties owned with ten or more violations since 1985.<sup>108</sup> The five landlords with the highest percentages were slated for induction into ROCCI.<sup>109</sup> All five shared two common characteristics:

1. At least seventy-five percent of the properties they owned had ten or more violations between 1985 and 1990; and
2. Each received a minimum of 225 orders to correct structural violations between 1985 and 1990.<sup>110</sup>

These objective statistics seemingly indicate that the five landlords were engaging in precisely the destructive milking behavior against which Kennedy advocates using selective enforcement. This conclusion is buttressed by the fact that the initial group of five were no strangers to Minneapolis city officials, tenant advocates, or neighborhood activists. To the contrary, these five landlords had been consistently identified by advocates and journalists as the worst landlords in the city.<sup>111</sup>

106. Memorandum from Bill Korn, Assistant City Attorney, Criminal Division, City of Minneapolis, describing the Repeat Offender Code Compliance Initiative (ROCCI) (1990) (on file with author) [hereinafter ROCCI Procedure Memo].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See, e.g., Kevin Duchscher, *Group's Crusade Aims at Absentee Landlords*, MINNEAPOLIS STAR-TRIB., Oct. 22, 1991, at 1B; Maura Lerner & Norman Draper,

## 2. ROCCI Procedure

The central idea of ROCCI was to increase the strength of the inspection and prosecutorial systems to counter effectively the persistent efforts of landlords to avoid making repairs.<sup>112</sup> The result is an independent program with special procedures for landlords who owned multiple properties and had egregious records of code violations and noncompliance. Under ROCCI, landlords work with only one inspector throughout a streamlined process.<sup>113</sup> If a landlord refuses to comply, the prosecutor will seek jail sentences instead of civil fines, which landlords historically treated as a small cost of doing business.<sup>114</sup>

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*Some Landlords Closing Their Eyes to Drug Deals*, MINNEAPOLIS STAR-TRIB., Feb. 25, 1990, at 1A; *Visiting Carolers Deliberately Hit Sour Notes for Landlord*, MINNEAPOLIS STAR-TRIB., Dec. 15, 1991, at 4B [hereinafter *Visiting Carolers*].

112. See *supra* section III.A.

113. The city attorney who is assigned to the Inspections Department ("special prosecutor") and a single inspector ("inspector") administer the program jointly. By shuffling some duties and districts between different inspectors, the Inspections Department was able to assign one inspector to ROCCI full-time.

The special prosecutor initially contacts each landlord by certified letter before the inspector begins inspecting such landlord's properties. In the letter, the special prosecutor explains to the landlord that he has been identified as a ROCCI landlord, explains the procedure, and emphasizes that the special prosecutor will not give extensions, and that if the landlord fails to comply with orders, he risks prosecution for an executed jail sentence. The special prosecutor and the inspector then set a schedule for the inspection of all properties owned by the landlord in Minneapolis. The special prosecutor notifies the landlord of the schedule, requesting him to arrange for entry into the buildings for the inspector and informing him that the special prosecutor will obtain search warrants for the properties if he fails to admit the inspector.

The inspector then "scores" all units in all buildings according to a point system. See *supra* notes 101-04 and accompanying text. All orders for each property are due on a single date. The orders are accompanied by a written notice informing the landlord that no extension will be granted and that once initiated, prosecution will continue even if the landlord transfers ownership of the properties. Preexisting orders are reissued, subject to ROCCI procedures and deadlines.

The inspector re-inspects each property as the deadline expires. If the landlord has complied with orders and there are not any newly observed violations, the inspector will classify the property as passing and recommend licensing. The City Council will license the property on the inspector's recommendation, unless denial of a license is otherwise justified. Any newly observed violations result in new orders subject to ROCCI procedures and deadlines. If the landlord has not corrected the previous violations, the special prosecutor may immediately file a criminal complaint and summons. See ROCCI Procedure Memo, *supra* note 106.

114. If the defendant-landlord does not plead guilty at arraignment, the special prosecutor will set the case for trial. The special prosecutor will not hold pretrial conferences, nor will he certify public safety or health violations as petty misdemeanors—actions that are otherwise common practices. The special prosecutor may certify cosmetic violations, such as exterior painting, as petty misdemeanors.

If the defendant-landlord pleads guilty at arraignment, the special prosecutor will recommend the maximum fine and a stayed jail sentence, conditioned on prompt

#### D. Program Successes

In general, responses of advocates and public officials to ROCCI have been positive.<sup>115</sup> Both Bill Korn, founder of ROCCI and the first special prosecutor, and Craig Eliason, the inspector, found the biggest surprise in administering ROCCI to have been the remarkable degree of cooperation they received from landlords.<sup>116</sup> They did not have to obtain search warrants for inspection entry,<sup>117</sup> and landlords kept appointments and met reinspection deadlines.<sup>118</sup> The improvement in the landlords' responses to selective code enforcement indicates that ROCCI's "stick," the threat of jail sentences, is a sufficient threat to motivate cooperation.

Objective statistics also indicate that ROCCI has succeeded in achieving its stated goals: to bring targeted properties up to code for licensing purposes and to reduce tenant complaints.<sup>119</sup>

##### 1. Licensing

As of April 1, 1993, the City Council licensed approximately 67% of the ROCCI properties.<sup>120</sup> Of the twenty-four unlicensed

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code compliance. If the defendant-landlord pleads not guilty at arraignment and the judge or jury convicts the defendant-landlord, the special prosecutor will seek an executed jail sentence. *Id.*

115. See Interview with Craig Eliason, *supra* note 104; Interview with Charlotte Vick, Attorney, Northside Office, Legal Aid Society of Minneapolis, in Minneapolis, Minn. (Jan. 8, 1993); Interview with Bill Korn, *supra* note 87; Interview with Jo Ann Rockwell, Division Manager of Family Assistance Division, Hennepin County Department of Economic Assistance, in Minneapolis, Minn. (Jan. 19, 1993).

116. Interview with Craig Eliason, *supra* note 104; Interview with Bill Korn, Assistant City Attorney, Criminal Division, City of Minneapolis, in Minneapolis, Minn. (Aug. 26, 1992).

117. Craig Eliason, Licensing Inspector, City of Minneapolis, Draft Report on Repeat Offender Code Compliance Initiative 2 (1992) (unpublished report on file with author).

118. A review of the inspection score sheets prepared by Craig Eliason reveals some continuing violations. The vast majority of these problems are either currently unrepairable, such as exterior painting in the winter months, or minor mistakes that a delegated worker overlooked, such as window sashes forgotten in two apartments but installed in the rest of a large apartment building.

On such matters, the special prosecutor has not strictly followed the original ROCCI guideline that *no* extensions be granted. Instead, the prosecutor has granted minimal extensions on the theory that to file a complaint would be counterproductive. Interview with Bill Korn, *supra* note 116.

119. See *supra* text accompanying note 106.

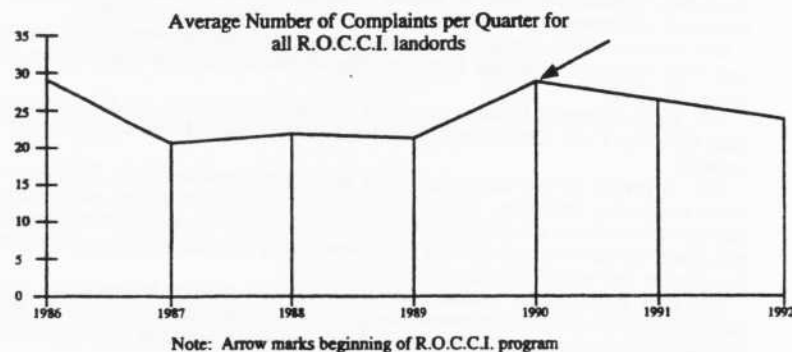
120. Under the rental licensing ordinance, a building initially classified as substandard or condemnable will not receive a full license until the landlord has made sufficient repairs to elevate the building into the passing category. See *supra* section III.B.2. Consequently, a building may receive a full license while some orders to repair remain unfulfilled. The Inspections Department is contemplating lobbying the City Council for a change in the ordinance that would require that the owner bring

properties, the inspector anticipated that at least seventeen would have been licensed within six months after the buildings' new non-profit owner received sale proceeds to finance remaining repairs.<sup>121</sup> At that rate of licensing, it was expected that 90% of the ROCCI properties would have been licensed by the end of Summer, 1993. However, this dramatic licensing rate has not yet been realized, due mainly to problems between a nonprofit receiver and its property management agent.

The licensing of these properties is a success in three respects: 1) licensing means that over 60% of the properties that the inspector originally classified as substandard or condemned have been improved to passing levels; 2) licensing represents a reversal of previous milking patterns and a maintenance of housing stock levels through properties that would probably have been abandoned; and 3) licensing provides a deterrent to future milking because the City Council can move quickly to revoke a landlord's license and thereby cut off his cash flow if he resumes his previous patterns.

## 2. Decreasing Complaints

Since implementing ROCCI, the Inspections Department has reported decreased numbers of complaints about the ROCCI landlords. The following graph illustrates this change:<sup>122</sup>



the building completely up to code to obtain a permanent license. Telephone Interview with Craig Eliason, Licensing Inspector, Minneapolis Department of Inspections (Jan. 22, 1993).

121. Telephone Interview with Craig Eliason, *supra* note 120.

122. Statistical notes and spreadsheets from Craig Eliason, Licensing Inspector, Minneapolis Department of Inspections (Jan. 22, 1993) (documenting complaint data by month, landlord, and building) (on file with author).

Although reported complaints may come from anyone, the Inspections Department commonly assumes that the vast majority come from tenants or neighbors.<sup>123</sup> The significance of the decrease in complaints is twofold: 1) decreased tenant complaints indicate that building conditions are improving, and 2) decreased complaints from neighbors indicate that outward appearances and perceptions of the properties are improving.

#### **E. Interpreting the Individual Cases**

Although ROCCI has achieved its stated goals, the statistics do not directly address the concern of the mainstream<sup>124</sup> theorists that selective code enforcement will ultimately precipitate rent increases and abandonment.<sup>125</sup> To answer this concern requires analysis of the individual reactions of the landlords to ROCCI. Have they abandoned their properties, as the mainstream theorists predicted? Have they quickly snapped into full compliance, a reaction that would lend unquestionable support to code enforcement advocates? Or have their reactions been mixed, thus requiring further analysis?

In fact, each of the ROCCI landlords has reacted somewhat differently to selective code enforcement. How then should the results be interpreted? While an exhaustive discussion of each case might prove useful, the idiosyncrasies of each case might become overwhelming. Instead, a presentation of the individual cases within a framework of generic types of landlords enables comparison of the utility of selective code enforcement in various factual situations. This, together with an analytical framework of the utility of selective code enforcement under certain market conditions (Section III.F.), will allow the reader to assess the utility or futility of selective code enforcement in a local market by analyzing landlord types and local economic conditions.

##### *1. Types of Milking Landlords*

For the purposes of discussion, the three types of milking landlords are 1) the sociopathic, 2) the debt-ridden, and 3) the incompetent.<sup>126</sup>

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123. Interview with Craig Eliason, *supra* note 104.

124. *See supra* note 7.

125. *See supra* note 7 and accompanying text.

126. The discussion of the ROCCI landlords within three generic types was designed as an organizational aid to ease comparison with other cities. The ideas for

a. *The Sociopathic*

The sociopathic milker represents the classic folk myth of the malignant landlord. He is visualized as greedy, uncaring, unfeeling, and dangerous. He milks his properties to reap maximum profits in the short term, without concern for the effects of his management on the health and safety of his tenants, the longevity of his properties, or the well-being of the surrounding neighborhood.

Selective code enforcement is used appropriately against the sociopathic milker. Because he is both competent and financially able to make necessary repairs, the sociopathic milker will reverse his milking behavior if there is a sufficiently serious threat of prosecution.

b. *The Debt-Ridden*

Those who believe that code enforcement will precipitate abandonment often employ a paradigm based on the debt-ridden milker. This landlord milks his properties because he has little choice. Due to deteriorating market conditions, poor financial planning, or a combination of both, the debt-ridden milker is unable to make repairs out of current rents and also continue paying his debt service, taxes, and insurance.<sup>127</sup>

The debt-ridden milker is viewed sympathetically by many who see the interdiction of government orders against him as overreaching and unjustified. Sympathy, however, does not mitigate the ill effects of the debt-ridden milker upon his tenants, his properties, and the surrounding neighborhoods. In fact, the negative effects caused by the debt-ridden milker are indistinguishable from those of the sociopathic milker, although individual cases may vary in degree of harm done.

Although the debt-ridden milker is unable to finance repairs out of current rents, his properties may not be inherently unprofitable. Rather, in the hands of a better financed landlord with a less onerous debt load, the properties might be quite profitable at current rent levels. Selective code enforcement against the debt-ridden milker may be useful in that it could precipitate a change of ownership to a better financed landlord who will be able to afford repairs and protect the long-term viability of the property.

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the different categories developed through conversations with Duncan Kennedy, Charlotte Vick, Bradley Scott, and Craig Eliason.

127. A debt-ridden landlord is analogous to a debt-ridden business. While the business itself may not be inherently unprofitable, its debt to equity ratio hinders its ability to pay expenses and reinvest at current income levels.

c. *The Incompetent*

The incompetent milker fails to make repairs because he is too physically and mentally infirm to make the repairs himself or to hire someone else to make the repairs for him. Like the debt-ridden milker, the incompetent milker may evoke the sympathy of some, particularly when governmental officials threaten to fine or incarcerate him for failure to make repairs. Nevertheless, the incompetent milker poses the same dangers to his tenants and the surrounding neighborhoods as those posed by the sociopathic milker and the debt-ridden milker. Selective code enforcement against the incompetent milker may help force him to seek competent management assistance, or it might precipitate a transfer of ownership to a competent landlord who is mentally and physically able to make needed repairs.

2. *The ROCCI Landlords: Classified and Analyzed by Type*

a. *The Sociopathic*

Two landlords who have gone through the ROCCI program fit the description of the sociopathic landlord. They will be referred to in this Article as Landlords A and B.

i) *Landlord A*

Landlord A is a truly notorious Minneapolis slumlord.<sup>128</sup> A United States Postal carrier who reportedly withholds mail from tenants who dare complain about their living conditions,<sup>129</sup> Landlord A consistently evades orders to repair by delaying the extension process and eventually paying only small fines that do not reflect the true cost of repair.<sup>130</sup> On the rare occasion that he actually repairs something, he usually makes the repair in such a hasty and unprofessional manner that it quickly breaks again.<sup>131</sup> He rarely, if ever, hires licensed contractors to make repairs.<sup>132</sup>

In 1989, only days after a local news exposé on Landlord A's unscrupulous behavior, a tenant was pleasantly relieved when Landlord A responded to her complaint about damaged electrical wiring. Instead of hiring a licensed electrician, Landlord A did the work himself. Less than twenty-four hours later, the building

128. *Channel Five Eyewitness News: No Place Like Home* (KSTP-TV, Minneapolis, Minn., Nov. 27-30, 1989).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

burned down and a tenant died. The fire inspector determined that the cause of the fire was faulty wiring.<sup>133</sup>

From 1988 to 1990, Landlord A owned two properties that were among the ten most frequently raided by the Minneapolis Police Department on narcotics warrants. In 1989, neighbors of Landlord A's properties picketed the post office where he worked, carrying signs that read, "We want crack out of neighborhoods." In a single eleven month period, just one of the buildings that Landlord A owned in the protesters' neighborhood generated 204 police calls, 6 narcotics raids (the third highest in the city), and 140 housing code violations.<sup>134</sup>

During the preliminary inspection of Landlord A's eighteen properties in May 1991, the inspector classified one building as condemnable and five more buildings as substandard. The inspector issued orders to repair for all eighteen properties.<sup>135</sup>

To the surprise of many observers, Landlord A complied with all ROCCI orders on time.<sup>136</sup> Although Landlord A has met all the technical requirements of ROCCI, he has not changed his problematic behavior, which necessitated his initial inclusion in the program. He continues to disregard regular maintenance and tenant complaints until the inspector orders him to make repairs.<sup>137</sup> Essentially, Landlord A is using ROCCI as his property manager. Whereas the threat of jail time has produced a dramatic shift in Landlord A's behavior, the shift has not been substantial enough to sustain itself without consistent code enforcement intervention.

ii) *Landlord B*

Landlord B has been the greatest ROCCI success story.<sup>138</sup> During the preliminary inspection of Landlord B's twelve properties in August and September 1991, the inspector classified two buildings, having twenty-one units each, as condemnable and five buildings,

133. *Channel Five Eyewitness News: No Place Like Home, Follow-up Report* (KSTP-TV, Minneapolis, Minn., Dec. 2, 1989).

134. Lerner & Draper, *supra* note 111.

135. Scoresheets, *supra* note 101.

136. Interview with Craig Eliason, *supra* note 104.

137. *Id.*

138. On March 13, 1992, in response to a request for information regarding Landlord B's status in ROCCI, Eliason wrote City Council member Jackie Cherryholmes that Landlord B has been "quite cooperative and timely in completing all items," that he has performed acceptable work, and that tenant and neighborhood complaints have dramatically decreased. Letter from Craig Eliason, Licensing Inspector, City of Minneapolis, to Jackie Cherryholmes, Minneapolis City Council Member (Mar. 13, 1992) (on file with author).



having twenty units each, as substandard.<sup>139</sup> The inspector issued orders to repair for all twelve properties.<sup>140</sup>

One month later, Landlord B had brought all seven unlicensed properties into compliance; the City Council consequently approved all of his properties for licensing.<sup>141</sup> As a result of his dramatic turnabout, Landlord B will probably be the first landlord released from the program.<sup>142</sup> In this case, the dual threat of jail time and coordinated enforcement was sufficient to persuade a sociopathic milker to change his behavior.<sup>143</sup>

*b. The Debt-Ridden*

Two ROCCI landlords, Landlords C and D, fit the description of the debt-ridden landlord.<sup>144</sup>

*i) Landlord C*

Landlord C was the first and most notorious landlord to enter the ROCCI program.<sup>145</sup> Between August 1985 and December 1990, the Inspections Department wrote Landlord C 1196 orders to repair housing code violations, issued him 77 citations for failure to comply with orders, and condemned 11 of his properties.<sup>146</sup>

In addition to failing to repair his properties, Landlord C engaged in illegal rental practices, including renting condemned

139. Scoresheets, *supra* note 101.

140. *Id.*

141. Telephone Interview with Craig Eliason, *supra* note 120.

142. *Id.*

143. The ROCCI program, although essential in forcing Landlord B's turnaround, did not operate in a vacuum. Prior to and during ROCCI, community groups were working to focus attention on the problem of absentee landlords. One such group was the Joint Ministry Project that organized a "Hot Spots" campaign, which collected information and organized volunteers to banner Landlord B's house and demonstrate in his neighborhood. Duchschere, *supra* note 111; Kevin Duchschere, *Landlords Warned to Clean Up 'Hot Spots'*, MINNEAPOLIS STAR-TRIB., June 14, 1991, at 3B; Peter Leyden, *Urban Spirit; Minneapolis Church Coalition Confronts City's Needs Head-on*, MINNEAPOLIS STAR-TRIB., May 5, 1992, at 1B; *Visiting Carolers*, *supra* note 111.

144. Both of these cases illustrate the difficulty of describing behavior within the constraints of a generic type. Both Landlord C and Landlord D demonstrated extreme disinterest in the well-being of their properties and their tenants. They were also both insolvent, as evidenced by their petitions for bankruptcy. I have chosen to describe them as debt-ridden milkers because their declarations of bankruptcy were critical in precipitating ownership change.

145. Allen Short, *Slumlord's Empire Comes Tumbling Down; Fed-up Tenants Help Put the Squeeze on Sundaes*, MINNEAPOLIS STAR-TRIB., July 31, 1992, at 1B.

146. *Id.*

properties.<sup>147</sup> In 1987 and 1988, Landlord C rented condemned properties to six tenants.<sup>148</sup> After local government authorities ordered the tenants to vacate the condemned properties, Landlord C refused to return their security deposits.<sup>149</sup> Consequently, the six tenants, represented by Charlotte Vick, a Minneapolis Legal Aid attorney, filed a consumer fraud suit that alleged deceptive trade practices, fraud, and false advertising.<sup>150</sup> In May, 1990, the Hennepin County District Court awarded the six tenants an \$18,000 judgment against Landlord C.<sup>151</sup>

Landlord C promptly filed a bankruptcy petition to avoid foreclosure on some of his properties and to escape his numerous creditors, including the six former tenants.<sup>152</sup> When Landlord C failed to file a plan of reorganization, Jim Baillie, a Minneapolis bankruptcy attorney who represented the tenants *pro bono*, helped them file a creditor's plan of reorganization.<sup>153</sup> The plan transferred ownership of Landlord C's properties to the Monday Corporation, a nonprofit corporation created to own, sell, and arrange management of the properties, and to facilitate payment of Landlord C's creditors, including the former tenants.<sup>154</sup> Additionally, the Monday Corporation sought preservation of the buildings as low- and middle-income housing.<sup>155</sup> This appears to be the first case in the nation, that utilizes a creditor plan to take away the assets of a slumlord and manage them for public benefit.<sup>156</sup>

Meanwhile, Landlord C entered ROCCI.<sup>157</sup> During preliminary inspection of Landlord C's seventeen properties in late March and early April 1991, the inspector classified five buildings with twenty-one units as condemnable and six buildings with twenty units as substandard.<sup>158</sup> The inspector issued orders to repair for all seventeen properties.<sup>159</sup>

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*; Tony Caridea, *Nervous Erik Nordstrom, "Tired of Talking about it," Must Endure One More Day*, MINNEAPOLIS STAR-TRIB., Aug. 6, 1992, at 2D.

153. Caridea, *supra* note 152.

154. *Id.*

155. Short, *supra* note 145.

156. *Id.*

157. Scoresheets, *supra* note 101.

158. *Id.*

159. *Id.*

Unfortunately, the Monday Corporation, through its property management agent, had to demolish one building, which was not salvageable.<sup>160</sup> Two buildings were condemned and could not be rented.<sup>161</sup> Mortgage holders repossessed three buildings.<sup>162</sup> Notwithstanding these difficulties, the Monday Corporation has gradually repaired the eleven remaining properties.<sup>163</sup> As of December 1992, the Monday Corporation spent over \$68,000 repairing the remaining properties.<sup>164</sup> The Monday Corporation's implementation of successful management appears to confirm Kennedy's thesis that, if caught early enough, a selective code enforcement program could compel the maintenance of housing that would otherwise have been abandoned and thereby increase the housing stock.

Meyers argues that code enforcement is a doomed liberal project because it will only lead to abandonment, and the reduction in housing stock will hurt low-income people.<sup>165</sup> The case of Landlord C, however, demonstrates that code enforcement does not necessarily hurt low-income tenants when it precipitates ownership change. Before ROCCI, Landlord C engaged in a consistent pattern of milking, equity skimming, and abandonment.<sup>166</sup> By threatening Landlord C with a jail sentence, ROCCI disabled his scheme. Unable to continue milking, Landlord C filed a bankruptcy petition, an action that led to the transfer of his properties to the Monday Corporation. The Monday Corporation has brought the properties back into compliance; they remain in the housing stock and continue to serve the needs of low-income people. These positive results rebut mainstream theorists' assertions by showing that code enforcement which precipitates ownership change can benefit low-income people.<sup>167</sup>

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160. Interview with Bradley Scott, Towncrest Management, in St. Louis Park, Minn. (Jan. 12, 1993).

161. *Id.*

162. *Id.*

163. *Id.*

164. The Monday Corporation has funded the repairs through three sources: 1) current rents and security deposits; 2) initial deferral of the management fee; and 3) an approximately \$12,000 tax refund that the Monday Corporation received as a result of the reorganization. *Id.*; Bradley Scott, Income Statement for Towncrest Trusteeship (May 1991-Nov. 1992) (on file with author and U.S. Bankruptcy Court Trustee).

165. See Meyers, *supra* note 7.

166. Interview with Charlotte Vick, *supra* note 115.

167. This narrow case can be expanded to other types of cases in which abandonment by the owner will not necessarily lead to abandonment of the property, such as mortgage foreclosure, cancellation of contract for deed, and purchase by nonprofit community groups. In each of these scenarios, the new owner may be able to success-

*ii) Landlord D*

Landlord D's pre-ROCCI actions were no better than Landlord C's. In 1988, a state court judge instituted contempt of court proceedings against Landlord D for filing groundless counterclaims against former tenants who had sued him to recoup their security deposits.<sup>168</sup> Landlord D settled with the judge by agreeing to pay a \$1,000 fine, to turn over management of his buildings to a professional, and to limit his access to the courts.<sup>169</sup> After a year long investigation, which was triggered by the contempt proceedings, the state attorney general filed a lawsuit against Landlord D, seeking \$25,000 in fines and restitution to tenants for Landlord D's alleged deceptive trade practices, consumer fraud, and violation of landlord-tenant laws.<sup>170</sup>

Furthermore, in 1992, the Minneapolis Police Department identified two of Landlord D's properties as "high-crime rental properties."<sup>171</sup> In the first six months of that year, those two properties alone generated 132 police calls involving weapons, narcotics, fights and other serious crime.<sup>172</sup> The crime problems at Landlord D's properties were so serious that the Fifth Precinct Community Action Team had contacted him directly.<sup>173</sup>

During the preliminary inspection of Landlord D's twelve properties in December 1991 and January 1992, three properties, totaling twenty-four units, were classified as condemnable and four more properties, totaling twenty-nine units, were deemed substandard. The inspector issued orders to repair for all twelve properties.<sup>174</sup>

Like Landlord C, Landlord D extensively milked his properties prior to his admission to ROCCI, and, once in ROCCI, he immediately filed a bankruptcy petition, presumably to avoid the ROCCI

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fully operate the properties where the milking landlord either would not or could not maintain them.

168. David Shaffer, *Landlord Faces Contempt Threat on Suits*, ST. PAUL PIONEER PRESS DISPATCH, Feb. 11, 1988, at 16C; David Shaffer, *Landlord is Target of Suit over Treatment of Tenants*, ST. PAUL PIONEER PRESS DISPATCH, Feb. 15, 1989, at 2B.

169. Shaffer, *supra* note 168; Dan Oberdorfer, *Humphrey Goes After Twin Cities Landlord*, MINNEAPOLIS STAR-TRIB., Feb. 15, 1989, at 4B.

170. Shaffer, *supra* note 168; Oberdorfer, *supra* note 169.

171. Letter from Kathryn E. Storey, Director, Anti-Crime Program, Whittier Alliance, to Judge Nancy C. Dreher, U.S. Bankruptcy Court (July 9, 1992) (on file with Minneapolis Department of Inspections and U.S. Bankruptcy Court, Minneapolis, Minn.)

172. *Id.*

173. *Id.*

174. Scoresheets, *supra* note 101.

requirements.<sup>175</sup> Unlike Landlord C, who filed under Chapter 11 of the Bankruptcy Code of 1978 as amended (reorganization), Landlord D quickly converted his initial Chapter 11 petition to a Chapter 7 petition (liquidation).<sup>176</sup> Therefore, a creditors' reorganization plan, such as the one which created the Monday Corporation, was not an option.

Nonetheless, the results of Landlord D's bankruptcy were positive from the perspective of low-income renters. Many of Landlord D's properties reverted to their previous owner, who canceled contracts for deed after Landlord D filed for bankruptcy.<sup>177</sup> The previous owner was devastated to learn that the properties were near complete ruin, and he is currently working to restore the properties so that he can re-sell them and resume his retirement.<sup>178</sup>

The case of Landlord D demonstrates again that code enforcement that precipitates ownership change from debt-ridden landlords may be a positive development. Here, the neglected properties reverted to their previous owner who is working to restore them as affordable and safe rental housing.

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175. Interview with Charlotte Vick, *supra* note 115.

176. Under Chapter 11 of the Bankruptcy Code of 1978 as amended [the "Bankruptcy Code"], a creditors' committee has the right, upon expiration of a time period, to, *inter alia*, formulate a reorganization plan and request the appointment of a trustee. 11 U.S.C. §§ 1103(c)(3), (c)(4) (1988). Under Chapter 7 of the Bankruptcy Code the focus is on liquidation rather than reorganization. Therefore, the appointed trustee's ultimate responsibility is to satisfy the debtor's creditors. 11 U.S.C. § 704 (1988). While a creditors' committee may be formed, 11 U.S.C. § 705(a) (1988), the committee's role is limited to "consult with the trustee[,] . . . make recommendations to the trustee . . . respecting the performance of the trustee's duties, and submit . . . any question affecting . . . administration . . ." 11 U.S.C. § 705(b) (1988). Creditors in a Chapter 7 proceeding, therefore, have a clearly *de minimis* role.

177. Doug Grow, *A Landlord Decries Loss of Building, Neighborhood, Trust*, MINNEAPOLIS STAR-TRIB., Dec. 13, 1992, at 3B.

178. *Id.* In addition, several neighbors wrote letters to Nancy C. Dreher, the bankruptcy judge assigned to Landlord D's case, describing how Landlord D destroyed the properties and requesting Judge Dreher to return the properties to their previous responsible owner. Letter from Kathryn E. Storey, *supra* note 171; Letter from Ned Worrell and Tod Skallerup, Block Club Co-Captains of 2700 Garfield Avenue South, Minneapolis, to Judge Nancy C. Dreher, U.S. Bankruptcy Court (July 9, 1992) (on file with Minneapolis Department of Inspections and U.S. Bankruptcy Court, Minneapolis, Minn.); Letter from Shawn M. Walsh, Resident, 2625 Pleasant Avenue South, Minneapolis, to Judge Nancy C. Dreher, U.S. Bankruptcy Court (July 9, 1992) (on file with Minneapolis Department of Inspections and U.S. Bankruptcy Court, Minneapolis, Minn.); Letter from Connie Gretch, Block Co-Captain, 2700 Blaisdell Avenue South, Minneapolis, to Judge Nancy C. Dreher, U.S. Bankruptcy Court (July 9, 1992) (on file with Minneapolis Department of Inspections and U.S. Bankruptcy Court, Minneapolis, Minn.).

c. *The Incompetent: Landlord E*

One landlord who has gone through the ROCCI program fits the description of the incompetent landlord. Landlord E is perhaps the most unusual of the five ROCCI landlords. A former state senator from the northern Minnesota iron range, Landlord E purchased a number of rental properties at mortgage foreclosure sales after he retired from politics and farming. Landlord E rents to tenants who are refused residence by other owners of low-income housing.<sup>179</sup> Unfortunately, Landlord E has lost control of his properties.<sup>180</sup> He has been repeatedly assaulted and threatened by some tenants, and any attempt to enter certain of his properties to make repairs or to evict problem tenants now seems futile.<sup>181</sup>

During preliminary inspection of Landlord E's fourteen properties in March 1992, eleven buildings were classified condemnable and one substandard.<sup>182</sup> The inspector issued orders to repair for all fourteen properties.<sup>183</sup>

Landlord E has been difficult to reform. Although he has talked about selling his properties to relatives or community groups, he has done nothing.<sup>184</sup> He recently pled guilty to ROCCI charges and received a suspended sentence on the condition that he repair his properties within ninety days.<sup>185</sup> He claimed subsequently that he had not intended to plead guilty and should not be held accountable.<sup>186</sup> If nothing else, this case demonstrates the need for patience and flexibility.

**F. The Potential for Rent Increases**

Despite the positive results under ROCCI, advocates of selective code enforcement must address the troubling question of whether landlords will pass the code costs to low-income tenants in the form of rent increases. In Minneapolis, the economic conditions of the housing market indicate that the ROCCI landlords will not be able to pass code costs in the form of unaffordable rent increases.

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179. Interview with Bill Korn, *supra* note 115.

180. *Id.*

181. *Id.*

182. Scoresheets, *supra* note 101.

183. *Id.*

184. Interview with Craig Eliason, *supra* note 104.

185. *Id.*

186. *Id.*

1. *Consideration of Local Economic Conditions Indicates That ROCCI Will Not Precipitate Rent Increases*

To evaluate the potential for rent increases as a result of ROCCI, consider the following local economic facts:

1. The apartment vacancy rate in Minneapolis is 9.8%;<sup>187</sup> vacancy rates in ROCCI neighborhoods are even higher.<sup>188</sup>
2. Advocates who work with low-income tenants believe Minneapolis has a surplus of housing in the \$350 per month range.<sup>189</sup> Such a surplus is plausible, given the high apartment vacancy rates in low-income neighborhoods and the 1992 average apartment rent of \$413.<sup>190</sup>
3. Nearly all the current ROCCI tenants receive some type of federal assistance.<sup>191</sup> The local welfare department estimates that more than 85% of these tenants are on welfare.<sup>192</sup> On the basis of these estimates, the average ROCCI tenant must spend approximately two-thirds of his or her monthly income to afford a rent of \$350.<sup>193</sup>

187. OFFICE OF THE CITY COORDINATOR, CITY OF MINNEAPOLIS, STATE OF THE CITY 1992: A STATISTICAL PORTRAIT OF MINNEAPOLIS 42 (1993) [hereinafter STATE OF THE CITY]. High vacancy rates are thought to be the result of decreasing demand (declining numbers of young people between ages 20-24 who constitute the majority of first time rentals) and increasing supply (the escalating development of multi-family rentals in the mid-to-late 1980's). METROPOLITAN COUNCIL, ST. PAUL, MINN., RENTAL HOUSING: REPORT OF A TECHNICAL WORK GROUP OF THE METROPOLITAN COUNCIL'S REGIONAL HOUSING TASK FORCE 4 (1990) [hereinafter TECHNICAL REPORT]; see JOANNE BARRON & AUDREY DOUGHERTY, METROPOLITAN COUNCIL, HOUSING MARKET IN 2000: PROTOTYPES OF THE REGION'S COMMUNITIES (1989) (discussing demographic changes that will affect future housing needs); AUDREY DOUGHERTY ET AL., METROPOLITAN COUNCIL, LOOKING AHEAD AT HOUSING . . . THE EFFECT OF CHANGING DEMOGRAPHICS ON THE TWIN CITIES HOUSING MARKET I (1988) (predicting that demographic effects will result in decreasing demand for new and rental housing and increasing need for rehabilitation of existing housing).

188. For example, the Near Northside apartment vacancy rate is 12.3%. STATE OF THE CITY, *supra* note 187, at 42. These high vacancy rates are significant. Whereas a 6% vacancy rate is considered "healthy," rates as high as 9% exert pressure on owners to engage in behavior that threatens the long-term viability of their properties, such as decreasing maintenance, defaulting on taxes or mortgage payments, and reducing tenant screening. TECHNICAL REPORT, *supra* note 187, at 4.

189. Interview with Charlotte Vick, *supra* note 115; Interview with Jo Ann Rockwell, *supra* note 115; Telephone Interview with Herb Frey, Alliance for the Streets (Jan. 22, 1993).

190. STATE OF THE CITY, *supra* note 187, at 44.

191. Interview with Jo Ann Rockwell, *supra* note 115.

192. *Id.*

193. This calculation is based on the monthly AFDC grant for a parent and two children in Hennepin County (Minneapolis) of \$532. MINN. DEPARTMENT OF HUMAN SERVICES, MDHS CERTIFICATION MANUAL 20.9 (Aug. 1, 1992) (containing AFDC monthly standards).

4. On any given night in Minneapolis, approximately 1,000 people are homeless.<sup>194</sup> The homeless in Minneapolis are primarily single men who can only afford to pay \$175 to \$200 per month for rent, if they receive government assistance.<sup>195</sup> Due to the destruction of more than 1500 units of single renter occupancy housing to allow for downtown development, there is very little housing available at the \$200 rent level.<sup>196</sup>

Duncan Kennedy argues that selective code enforcement against milking landlords will increase the supply of housing by preventing the loss of units that were slated for abandonment.<sup>197</sup> Under conventional supply and demand assumptions, this increase in supply will exert downward pressure on rents. This result is predicated upon the assumption that landlords will not be able to upgrade and raise the rents or they would have chosen to do so instead of milking.

Kennedy's assumption holds true in Minneapolis. There has been no noticeable gentrification<sup>198</sup> within the low-income neighborhoods where ROCCI properties are located.<sup>199</sup> The existence of gentrification pressures would indicate that landlords could upgrade their properties and raise the rents. Without the pressure of gentrification to displace the current low-income tenants, it would be difficult, if not impossible, for landlords to upset the pre-ROCCI pricing.

As the ROCCI program saves buildings that would have been lost from the housing stock, the aggregate housing supply in Minneapolis low-income neighborhoods will increase. The law of supply and demand dictates that if supply increases while demand stays constant, rents will decrease below their current level. In this case, the extent to which rents will decrease depends upon how quickly low-income people who are currently doubled-up or homeless will be able to access the lower priced housing. Prices will sta-

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194. Telephone Interview with Herb Frey, *supra* note 189. Excluding women and children in battered women's shelters, there was an average of 1,094 people per night in county-funded and charitable homeless shelters in Minneapolis during the month of December 1992. *Id.*

195. *Id.*

196. The destruction of single renter occupancy housing that served the needs of the single men and women who receive lower monthly income grants precipitated the homeless crisis in Minneapolis. Telephone Interview with Alexa Bradley, Minnesota Alliance for Progressive Action, formerly with the Minnesota Alliance for the Homeless (Feb. 1, 1990).

197. See Kennedy *supra*, note 4, at 500.

198. See *supra* note 62.

199. Telephone Interview with Herb Frey, *supra* note 189; Interview with Bradley Scott, *supra* note 160; Interview with Charlotte Vick, *supra* note 115.



bilize when enough of these tenants are able to rent and fill vacancies. While it cannot be shown precisely how far rents will fall, the critical point is that as supply increases, landlords must lower rents to prevent further vacancies.

2. *This Conclusion Is Consistent with Ackerman's Theory of the "Lukewarm" Tenant*

In his defense of housing code enforcement as a method of redistributing wealth to low-income tenants, Bruce Ackerman postulates that affected landlords will not be able to pass code costs in the form of rent increases if there are "lukewarm" tenants who are unwilling to pay increased rents for increased amenities.<sup>200</sup> Ackerman distinguishes lukewarm tenants from "homelover" tenants who will pay increased rents for increased amenities.<sup>201</sup> In this case, the lukewarm tenants are those tenants who pay their rents out of their federal assistance checks.<sup>202</sup> These tenants are lukewarm, not because they are unwilling to pay increased rents for increased maintenance, but because they are unable to pay increased rents.<sup>203</sup>

Ackerman's argument does not require that there be a large number of lukewarm tenants who can simply overwhelm landlords by boycotting rent increases. In fact, Ackerman asserts that there need not be significant numbers of lukewarm tenants at all.<sup>204</sup> It is only important that landlords understand clearly the strength of

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200. *Regulating Slum Housing Markets*, *supra* note 6, at 1104-10.

201. *Id.* at 1105.

202. The extremely high rate of federal assistance incomes (nearly 100%) within the low-income rental markets of Minneapolis creates large income clusters centered around the monthly grant levels of AFDC recipients with children and single men or women who receive social security disability insurance or general assistance. These income clusters create large bargaining units that upset the incremental distribution of rents along the demand curve. Instead of gradually increasing rents and gradually increasing amenity levels, the distorted market contains large groups of housing renting for the maximum rent that each income cluster can afford with little variation in rent for differences in amenity level.

203. The idea that the very low-income renter has any real choice in the decision of whether to pay increased rents is misleading. Without outside assistance (such as Section 8 Existing and Moderate Rehabilitation Program rental vouchers) to make up the difference between the very low-income tenant's ability to pay and current rent levels, the "lukewarm" tenant has no choice but to accept eviction for his inability to pay. To maintain consistency with Ackerman's argument, I will utilize his notion of choice. Perhaps if Ackerman had been writing in the 1980's, when the numbers of homeless families burst to unprecedented and previously unimaginable levels, he would have utilized the concept of inability to pay rather than choice.

204. *Regulating Slum Housing Markets*, *supra* note 6, at 1106.

the tenants' conviction to double up, holdover, or go without housing, rather than pay increased rents.<sup>205</sup>

Ackerman's theory applies in Minneapolis where there are exceedingly high numbers of lukewarm tenants in the relevant ROCCI neighborhoods. Since nearly all ROCCI tenants pay their rent out of fixed federal assistance incomes, there are clearly sufficient numbers of lukewarm tenants to overwhelm any new pricing structure involving higher rents.<sup>206</sup> The average welfare recipient living in the average low rent apartment in Minneapolis already pays approximately two-thirds of her income in rent.<sup>207</sup> Those single people receiving federal assistance cannot afford housing in the lowest rent buildings at all, unless they double-up. Therefore, landlords will not be able to significantly raise rents because the lukewarm tenants cannot afford to pay more.

Additionally, local housing market data indicate that ROCCI landlords will be unable to significantly raise rents. While a vacancy rate of 6% is generally considered healthy, the Minneapolis apartment vacancy rate is nearly 10%.<sup>208</sup> High vacancy rates create pressure on owners to attract tenants. It is therefore unlikely that landlords will raise rents and risk losing even more tenants.

Ackerman, however, opposed the idea of selective code enforcement. He reasoned that if authorities enforced the code in area X but not in area Y, then the homelover tenants in Y would move to X and displace the lukewarm tenants.<sup>209</sup> The result would be displacement of very low-income (lukewarm) tenants by (homelover) tenants with marginally higher incomes. Ackerman's discussion of areas X and Y clearly presumes that both areas contain housing of equal amenity levels. Therefore, if the code is enforced in area X but not in area Y, the amenity level of area X will rise above that of area Y. Consequently, he argues, those homelover tenants who can afford to move and who want increased amenity levels will have an incentive to leave their homes in area Y for the increased amenity homes in area X.

Ackerman's reservations about selective code enforcement are based upon resulting differential amenity levels between neighborhoods that were previously equal. This situation, however, does not describe the results obtained under the ROCCI program.

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205. *Id.*

206. Interview with Jo Ann Rockwell, *supra* note 115.

207. See *supra* note 193 and accompanying text.

208. See *supra* note 187.

209. *Regulating Slum Housing Markets*, *supra* note 6, at 1105.

Rather, ROCCI forces the equalization of previously disparate amenity levels by forcing historically noncompliant landlords to bring their buildings up to the same amenity level as other housing in the area. The result is precisely the opposite situation that Ackerman feared. Therefore, although the code enforcement is selective, it produces no incentive for homelover tenants to displace lukewarm tenants, because the homelover tenants will not obtain any more amenity than they already have in their current housing.

Based upon the foregoing explanations of Kennedy's and Ackerman's theories of selective code enforcement, ROCCI will not precipitate rent increases. As to economic forces, Kennedy's theory dictates that selective code enforcement will increase supply and thereby decrease rents. As to behavioral forces, Ackerman's theory dictates that the existence of lukewarm tenants who will not or cannot afford to pay increased rents will thwart landlords' attempts to increase rents. Both of these predictions are premised upon a non-gentrifying, low-income housing market—a prerequisite that selective code enforcement advocates cannot afford to overlook.

#### **IV. Is Selective Enforcement a Viable Option for Other Municipalities?**

##### **A. The Monday Corporation Demonstrates Profitability**

The success of the Monday Corporation strengthens the theoretical arguments that ROCCI landlords will not be able to raise rents. If a deteriorating building is caught early enough, good management may be able to turn the building around and make it profitable. Competent management's ability to maintain cost covering revenues through refinancing and other techniques allows the building's restoration without rent increases.

Since May 1991, the Monday Corporation has reinvested more than \$68,000 in its properties.<sup>210</sup> While in the beginning this reinvestment was financed by a large tax refund and deferral of the property management agent's fee, the Monday Corporation has since been able to pay the current and deferred property management fees while repairing the properties out of current rents and security deposits.<sup>211</sup> The property management agent projects that

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210. See Interview with Bradley Scott, *supra* note 160.

211. *Id.*

it will be able to complete the rehabilitation and pay off bankruptcy creditors by raising some rents by \$25 (5.5%) per month.<sup>212</sup>

The important lesson in this case is that the Monday Corporation is almost breaking even while substantially reinvesting in the properties and paying its management company a healthy fee.<sup>213</sup> In the hands of a private owner, the management fee would be considered profit. If the management fee (profit) has averaged 20%, and the needed rent increases are only 5.5%, then the Monday Corporation's profits exceed the required rent increase. Analogizing this to a landlord indicates that a landlord could sufficiently lower his profit and could continue to manage and repair the properties at current rent levels without losses. Therefore, the Monday Corporation experience demonstrates that, if caught early enough and placed under better management, previously milked properties can be restored and made profitable at existing rent levels. In other words, the problem may not be the properties, the tenants, or the market; the problem may be the management practices of the current landlord.<sup>214</sup>

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212. Bradley Scott, Operating Projection for Towncrest Trusteeship (July 1992 - Feb. 1993) (on file with author and U.S. Bankruptcy Court Trustee).

213. The management fee of \$1200 per month is computed as 10% of "gross potential rents," a term that presumes 100% occupancy. Currently, the properties are approximately 60% to 70% occupied. Telephone Interview with Bradley Scott, Towncrest Management (Jan. 22, 1993). Computed as a percentage of current rents, the management fee has averaged approximately 20% since May 1991.

214. The experience of the Monday Corporation is analogous to the arguably superior ability of a non-profit receiver to revitalize problem properties. Albert Rosen argues that a receiver may be in a better position to make repairs than a problem landlord in five ways:

1. As a neutral party, the receiver will likely be more responsive to tenants' needs.
2. As a neutral party, the receiver has no incentive to delay repairs or cut corners.
3. The receiver's qualifications may give him greater expertise than the landlord.
4. The receiver is more likely to gain the cooperation of tenants.
5. Depending on its size, the receiver may achieve economies of scale that a private landlord could not achieve.

Albert Rosen, *Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low-income People*, 3 HARV. C.R.-C.L. L. REV. 311, 328-29 (1968).

The management company that the Monday Corporation hired to administer the former landlord's properties is analogous to the receiver that Rosen describes. Although the management company receives a fee, that fee is based upon "gross potential rents" rather than actual profits. Therefore, the management company's only incentive is to insure its future employment by bringing the properties up to code in accordance with the Monday Corporation's wishes. Furthermore, the management company's professional experience in managing hundreds of properties has provided

### B. Incidental Increase in Supply for Section 8 Recipients

In addition, ROCCI may further aid low-income tenants by increasing incidentally the supply of housing in which they can use Section 8 rent vouchers.<sup>215</sup> The Department of Housing and Urban Development will not approve the use of a Section 8 rent voucher in a particular unit unless that unit meets the "housing quality standards" ("HQS").<sup>216</sup> The HQS do not necessarily mandate complete compliance with the local housing code. In fact, the HQS are often below the standards of the local housing code.<sup>217</sup> Therefore, since local housing code standards equal or exceed the HQS, forcing landlords to bring sub-code buildings into compliance with housing codes will increase the available supply of housing in which tenants can use Section 8 rent vouchers.

### C. Cost Effectiveness

The successful continuation and replication of any selective code enforcement program ultimately depends upon its cost effectiveness in generating reinvestment in low-income housing. In Minneapolis, ROCCI has forced landlords to reinvest substantially in their properties at essentially no public cost.

Between May 1991 and November 1992, the Monday Corporation reinvested more than \$68,000 in its properties.<sup>218</sup> To determine the cost effectiveness of ROCCI, compare the \$68,000 reinvestment to the cost of administering ROCCI. Because the Inspections Department did not need to hire any new inspectors to administer the program, the cost of administering ROCCI is zero.<sup>219</sup> A program that has a cost of zero and that leverages more than \$68,000 in benefits from just one participant in eighteen months is cost effective. ROCCI also conserves departmental resources. First, whereas under the previous system, milking landlords were easily able to maneuver through the inspections and

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it with invaluable expertise about local contractors, code requirements, and financing options.

215. For an explanation of Section 8 vouchers, see *supra* note 2 and accompanying text.

216. See *supra* note 4.

217. Interview with Charlotte Vick, *supra* note 115.

218. Because reliable data could not be obtained from other ROCCI landlords, I will examine only data submitted by Towncrest Management to the United States Bankruptcy Court Trustee. See Scott, *supra* note 212.

219. As previously discussed, Inspections Department administrators shuffled inspection zones and duties between all inspectors so that Eliason would be available to work on the ROCCI program full time. See *supra* note 113.

judicial systems for periods of years, consuming inspectors' time and judicial resources, ROCCI's shortened and streamlined procedure has eliminated most of these costs.<sup>220</sup> Second, due to the different inspection districts of various inspectors, six or more inspectors were often responsible for each milking landlord before ROCCI.<sup>221</sup> These landlords consumed an inordinate amount of each inspector's time.<sup>222</sup> Under ROCCI, inspectors are able to efficiently concentrate their efforts because one inspector handles all the milking landlords.

ROCCI has clearly been cost effective when compared with the reinvestment benefits it has generated. Furthermore, a successful selective prosecution program may generate additional benefits such as the reduction of threats to tenant health and safety, the reduction of threats to neighborhood health and safety, the assurance that tenants have been informed of their rights to habitable living, and the empowerment of neighborhood activists.

#### D. Lessons Learned

The first two years of ROCCI reveal many lessons that should be employed in the future administration of ROCCI and by anyone designing a similar program:

1. Balance cooperation with history. While gaining cooperation can be more cost-effective than prosecution, landlords in this program have historical records of noncompliance. These histories should be considered in evaluating both current progress and future actions. While any improvement in maintenance behavior might therefore be viewed as a victory, prosecutors should listen to excuses with a critical ear and utilize prosecutorial powers against landlords who continue to abuse the system.

2. Coordinate with the local welfare department to control the flow of income to ROCCI landlords. In Minneapolis, the Hennepin County Board assured such cooperation by passing a resolution that denied the availability of welfare vendor payments or emergency assistance payments to ROCCI landlords.<sup>223</sup> The Hennepin County Department of Economic Assistance informed all tenants living in ROCCI properties of the change and of their legal right to withhold rent if their home was not up to code.<sup>224</sup> As a result,

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220. Interview with Bill Korn, *supra* note 115.

221. *Id.*

222. *Id.*

223. HENNEPIN COUNTY, MINN., RESOLUTION 92-9-765 (Sept. 1, 1992).

224. Interview with Jo Ann Rockwell, *supra* note 115.

ROCCI landlords were hit with double-fisted enforcement: 1) potential prosecution for noncompliance and 2) rent withholding by tenants if properties were sub-code.

3. Do not overlook community resources such as nongovernmental advocates. In Minneapolis, the Legal Aid Society organized tenant-creditors to file the reorganization plan under which Landlord C's properties were transferred to the Monday Corporation.

4. Emphasize empowerment of neighborhood activists. ROCCI has helped empower neighborhood activists' campaigns against bad landlords. Such empowerment furthers the goals of ROCCI by focusing additional public attention on the problem of milking landlords and by providing a ready group of neighborhood residents to testify against landlords in court.

5. Insure that the administration of the selective prosecution program does not compromise the legal rights of tenants to withhold rent if their housing is sub-code. The right to withhold rent can provide powerful collateral enforcement of the housing code. To insure that this right is not compromised, the Inspections Department should establish a public service desk to provide free copies of housing orders and citations to tenants and their advocates.

#### **V. Conclusion**

ROCCI stands as a positive example of how one municipality attacked the problem of milking landlords. The success of ROCCI also buttresses the claims of Duncan Kennedy and Bruce Ackerman that, under certain market conditions, municipalities can utilize selective code enforcement to improve housing conditions of the poor without precipitating rent increases.

Before implementing a similar program, however, local officials must examine local economic factors to determine whether selective code enforcement will precipitate rent increases. If there are no gentrification pressures and there exists a sufficient supply of affordable housing for low-income tenants, a selective code enforcement program can be administered without detriment to low-income tenants or neighborhoods. If these factors are not present, local officials must consider other means, such as eviction free zones, rent supplements, or anti-gentrification laws, to prevent the displacement of low-income tenants.