

THE LAW OF LANDLORD AND
TENANT IN HAWAII;
A PROPOSED RESIDENTIAL LANDLORD-TENANT CODE

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Legislative Reference Bureau
University of Hawaii

FOREWORD

The Resolutions requesting this study and the preparation of a proposed Residential Landlord and Tenant Code constitute legislative recognition of increasing frustrations experienced by both landlords and tenants. The problems of residential landlords and tenants are exacerbated by the housing shortage in the State and by the fact that the governing law has not generally reflected changes in legal concepts to match the social changes that have occurred since the eighteenth century. The study here presented is an attempt to describe the existing law applicable to residential landlords and tenants and to propose a new law that would codify and reform the legal incidents of the relationship. The reform suggested is intended to be fair to landlords and to tenants and to be consistent with the latest decisions of the Hawaii Supreme Court.

Henry N. Kitamura
Director

March 1971

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HOUSE RESOLUTION

REQUESTING STUDY AND RESEARCH ON RESIDENTIAL LANDLORD-TENANT LAW
AND RECOMMENDATIONS THEREON.

1 WHEREAS, the American Bar Foundation in 1969 published the
2 Model Residential Landlord-Tenant Code, based on research con-
3 ducted by faculty and students of the University of Chicago Law
4 School and financed largely by the Office of Economic Opportunity;
5 and
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8 WHEREAS, the Code suggests codification, reform, and unifor-
9 mity in the matter of landlord-tenant law and is offered as a
10 basis for discussion, proposing topics, problems, and tentative
11 solutions that may be useful for further discussion and con-
12 sideration; and
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15 WHEREAS, the Code is now being considered for use as a first
16 tentative working draft by the Special Committee on Uniform Land-
17 lord and Tenant Relationship Act of the National Conference of
18 Commissioners on Uniform State Laws, in preparing a uniform act
19 to be recommended for enactment by state legislatures; and
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22 WHEREAS, reform of landlord-tenant law is a matter of special
23 interest in Hawaii where a critically tight residential renting
24 market accentuates the unequal bargaining position between many
25 tenants and their landlords; and
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28 WHEREAS, a workable and fair reform of residential landlord-
29 tenant law would benefit the legitimate economic interests of
30 landlords as well as protect tenants' concerns and advance the
31 general condition of public health, safety, and welfare; now,
32 therefore,
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35 BE IT RESOLVED by the House of Representatives of the Fifth
36 Legislature of the State of Hawaii, Regular Session of 1970, that
37 the Legislative Reference Bureau be requested to conduct a study
38 on revision of the landlord-tenant law and in its study and

1 research consult with the Hawaii Commission to Promote Uniform
2 Legislation, tenant organizations, landlord organizations, and
3 other organizations representing real property interests and
4 general concern with rental housing as a matter of public health,
5 safety, and welfare; and
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8 BE IT FURTHER RESOLVED that the Legislative Reference Bureau
9 report the findings and recommendations for legislative and
10 administrative action with respect to landlord-tenant law not
11 later than twenty days before the convening of the 1971 Regular
12 Legislative Session; and
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15 BE IT FURTHER RESOLVED that a copy of this Resolution be
16 sent to the Legislative Reference Bureau.
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SENATE RESOLUTION

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO STUDY AND ANALYZE
S. B. No. 1147-70 RELATING TO THE RESIDENTIAL LANDLORD-
TENANT CODE AND TO REPORT ITS RECOMMENDATIONS TO THE
SIXTH STATE LEGISLATURE.

WHEREAS, an acute low and medium income housing problem exists
in the State of Hawaii and such problem is evidenced in the legis-
lature by numerous bills, one of which is S. B. No. 1147-70,
relating to the Residential Landlord-Tenant Code; and

WHEREAS, S. B. No. 1147-70 provides comprehensive changes to
the present law of landlord and tenant relationship; and

WHEREAS, S. B. No. 1147-70 was drafted from a Landlord-Tenant
Code prepared as a research project of the American Bar Foundation
by students at the University of Chicago Law School in 1969, the
preface of which states:

"While this work has the form and title of a 'Model
Act', it is viewed by its draftsmen as a basis for
discussion and not as a proposal ready for adoption
as a model or uniform act. We feel that this com-
pendium of topics, problems and tentative solutions
may be useful for further discussion and consi-
deration".; and

WHEREAS, There are many ramifications to said bill, one of
which may be the result in the increase of rental, which is
contrary to the purpose of the bill; and

WHEREAS, there is doubt as to whether the Landlord-Tenant
Code should be made to apply to all residential landlord-tenant
relationships of every economic strata of our society; and

WHEREAS, the volume and diversity of the problems in the
area of residential landlord and tenant relationship are highly
complicated in nature; now, therefore,

1 BE IT RESOLVED by the Senate of the State of Hawaii, Regular
2 Session, 1970, that the Legislative Reference Bureau be requested
3 to make a comprehensive study and analysis of the Residential
4 Landlord-Tenant Code set forth in S. B. No. 1147-70 as it relates
5 to the present laws of landlord and tenant in this state, and
6 submit its findings and recommendations to the Senate no later
7 than twenty days prior to the convening of the Sixth Legislature
8 of the State of Hawaii, Regular Session of 1971; and
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11 BE IT FURTHER RESOLVED that the emphasis of the Legislative
12 Reference Bureau study be directed toward but not limited to the
13 development of a comprehensive landlord and tenant code specifically
14 adapted to the needs of this state; and
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17 BE IT FURTHER RESOLVED that duly certified copies of the
18 Resolution be transmitted to the Legislative Reference Bureau.
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INTRODUCTION

The Resolutions adopted by the Fifth Legislature of the State of Hawaii, Regular Session of 1970, requesting the preparation of a Residential Landlord-Tenant Code,¹ directed attention to the American Bar Foundation's Model Residential Landlord-Tenant Code (1969). That work, according to the Project Director, Professor Julian H. Levi of the University of Chicago Law School, constitutes essentially an orderly compilation of most recent laws, court decisions, and developments on the subject from the several states. The Model Code was not intended, as such, to serve as a model for enactment by any state;² however, it is serving as a take-off point for the preparation of a Uniform Landlord and Tenant Code by the National Conference of Commissioners on Uniform State Laws. A special committee of the National Conference, with Professor Levi as Reporter, is working on a Uniform Code, and this writer enjoys the extreme good fortune and honor to be serving on that committee.³ This Report and the suggested Hawaii Residential Landlord-Tenant Code is in large part a reflection of that committee's deliberations.

The growing demand for reforms in landlord and tenant laws is intensified in areas, such as Hawaii, where rental housing is in short supply.⁴ Under conditions of an almost vanishing vacancy rate that create a "sellers' market", most of the interest in law reform is in the direction of balancing the rights and responsibilities of residential landlords and tenants. In general, the balancing concentrates on attempts to equalize the bargaining positions of the two parties; however, the economic law of supply and demand probably plays a more effective role in removing inequities than new statutory law designed

to achieve a fair bargaining position for tenants. No revision of the law governing landlord and tenant relationships, however well done, can solve the housing problem, particularly as related to the low-income tenant. Furthermore, the landlord must and will operate within an economic framework. He needs a continuing stream of income in order to maintain his property, pay real property taxes, and service his debts and investment. If the consequences of law reform are so harsh as to discourage the honest, prudent investor, wholesale abandonment of rental property may be anticipated. It has become a truism to note that worse than "slumlords" are no landlords at all. A landlord and tenant code that overcorrects in the direction of equalizing the tenants' bargaining position and reflects only the demands of the tenant consumerism movement would result in a situation described by Professor Levi, "...then only knaves and fools will be prepared to maintain and operate...residential real estate."

Chapter I

LANDLORD AND TENANT LAW IN HAWAII

Landlord-tenant common law in Hawaii, as elsewhere in the nation, has remained relatively unchanged from its feudal origins, and the statutory law provisions are largely nineteenth century in origin. Long-term commercial and agricultural lease problems dominate the case law. Because of the amounts involved in short-term residential rental, disputes are generally too small to justify appeals from district court judgments and because of legal restraints on appeals from such judgments, appellate case law in the residential rental area is sparse. Most issues relating to residential rentals lack any useful precedent setting decisional rules of law. One of the beneficial aspects of a residential landlord-tenant code would be to occupy the current statutory vacuum with some specific detailed guidelines on issues that are seldom litigated on appeal.

The Statutes

The existing statutory law of landlord and tenant in Hawaii is found in chapter 666, Hawaii Revised Statutes. The law applies to all tenancies, whether residential, commercial, or agricultural. This chapter consists almost exclusively of legislative authorization of special summary proceedings to give landlords a prompt, inexpensive remedy to remove tenants. The proceedings for summary possession are brought in the district courts (section 666-6), where, it is noted, jury trials are not available. In such actions the landlord may ask for judgment for rent due and for accrued rent, profits, and damages up to the time of judgment in addition to summary possession (section 666-7). There are four grounds on which the landlord may ask

for summary possession: nonpayment of rent (sections 666-2, 666-15, 666-17, and 666-18); expiration of the tenancy (sections 666-1 and 666-2); commission of a common nuisance, as defined in section 727-1 (section 666-3); and noncompliance with conditions or covenants in a lease (section 666-1). If the tenant loses in the summary possession proceedings, a judgment is entered for the landlord for possession and his costs in bringing and maintaining the action (section 666-11), and a writ of possession is issued to the sheriff or police commanding him to remove all persons from the premises and to put the landlord into possession (sections 666-11 and 666-12). The law places legal limitations on the use of appeals by tenants in proceedings under this chapter. Section 666-16 provides that if an appeal by the tenant is "frivolous" or for purposes of delay only, the court may award against the tenant the whole cost of the appeal proceedings, including reasonable attorney's fees for the landlord. If the tenant appeals from a summary possession judgment in a case alleging the tenant's desertion of the premises (sections 666-17 and 666-18), section 666-19 requires the tenant to give a bond to pay the landlord all rents due and all costs of the appeal which may be adjudged against the tenant. This section also provides that appeals by tenants in such alleged desertion cases are to be taken to the circuit judge at chambers or to the supreme court, thereby precluding a jury trial at the circuit court level. In other appeals by the tenant, except for proceedings for nonpayment of rent only, section 666-15 requires the tenant, in order to win a stay of the writ of possession pending appeal, to give a bond, within five days after the adverse judgment, to pay the landlord all damages he may sustain by reason of the appeal in case the judgment of the district court is affirmed. The issuance of a writ

of possession may be stayed when the ground for summary possession is nonpayment of rent if the tenant pays the rent due plus eight per cent interest and all costs and charges of the proceeding and all expenses of the landlord, including reasonable attorney's fees, or gives security for such payment, within five days, satisfactory to the district magistrate or to the landlord (section 666-14). The notice to quit that the landlord is required to give the tenant is as follows:

Termination of the term of a tenancy, forfeiture of a tenancy for breach of the conditions or covenants in a lease, or termination of a tenancy at will (section 666-1)	10 days
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Termination of a periodic or month- to-month tenancy when the tenant is not in arrears in paying rent (section 666-2)	25 days
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Termination of a periodic or month-to- month tenancy for nonpayment of rent (section 666-2)	5 days
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Forfeiture of a periodic or month-to- month tenancy for the commission of a common nuisance by the tenant or by his invitee or employee after a notice setting a 24-hour deadline for abatement of the nuisance	5 days
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Any tenancy if the tenant is in arrears in paying rent and deserts the premises, by a notice affixed to the premises (section 666-17)	10 to 30 days
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Other sections of chapter 666 deal with: (1) the Statute of Frauds, providing that oral leases of real property for a period not exceeding one year are valid and enforceable to the same effect as if in writing (section 666-4); (2) the acceptance

of rent by the landlord during litigation of summary possession or like actions, providing that such acceptance shall not be construed as a recognition of the tenancy and shall be without prejudice to the landlord's legal rights at the inception of the proceedings and providing that any rent so paid shall be construed as damages for withholding the occupancy of the premises from the landlord if the eviction proceedings are successful (section 666-5); and (3) the effect of county rent control ordinances, providing that the chapter does not authorize the eviction of a tenant contrary to any county rent control ordinance declaring an emergency arising out of a housing shortage and prohibiting termination of tenancies or restricting the grounds for termination of tenancies as long as such emergency continues (section 666-20).

The remaining provisions of the present landlord and tenant law are confined to matters of procedure in connection with summary possession proceedings: complaint and summons content, and venue (section 666-6); service of summons (section 666-8); return day for summons (section 666-9); and adjournment of hearings (section 666-10).

Recent Developments

As is frequently the case when a major area of the law is considered for modernization and codification, an examination of the existing law of landlord and tenant reveals a lengthy but relatively uneventful history. Chapter 666, Hawaii Revised Statutes, dates back to the 1859 Civil Code of the Kingdom of Hawaii, and further back in antiquity to the Common Law roots of real property law. For the purposes of this study, two recent developments which have radically changed Hawaii's law of landlord and tenant are of vital importance.

On November 26, 1969, the Hawaii Supreme Court handed down the landmark decision, Lemle v. Breeden (51 H 426). This case of first impression involved a dispute over rented premises located in the Diamond Head area of Honolulu. The plaintiff entered into a rental agreement, after a daylight half-hour inspection, with rent stipulated at \$800 per month, fully furnished. On the first night of occupancy by the plaintiff, his wife, and four children, it became unpleasantly evident that the premises were rat infested. The Court describes the situation, "For three sleepless nights the plaintiff and his family literally camped in the living room. They were unable to sleep in the proper quarters or make use of the other facilities in the house due to natural apprehension of the rats which made noise scurrying about on the roof and invaded the house through the unscreened openings." The Court held that a lease is, in essence, a contractual relationship from which the warranty of habitability and fitness for the purposes intended is a just and necessary implication. The decision affirmed judgment for the plaintiff on the ground that there was a material breach of the implied warranty of habitability and fitness for the use intended which justified the plaintiff in rescinding the rental agreement and vacating the premises.

The following quotations from Lemle v. Breeden indicate the significance of the decision:

At common law when land was leased to a tenant, the law of property regarded the lease as equivalent to a sale of the premises for a term. The lessee acquired an estate in land and became both owner and occupier for that term subject to the ancient doctrine of caveat emptor. Since rules of property law solidified before the development of mutually dependent covenants in contract law, theoretically once an estate was leased, there were no further unexecuted acts to

be performed by the landlord and there could be no failure of consideration....

Given the finality of a lease transaction and the legal effect of caveat emptor which places the burden of inspection on the tenant, the actual moment of the conveyance was subject to an untoward amount of legal focus. Only if there were fraud or mistake in the initial transaction would the lessee have a remedy.... In the absence of statute it was generally held that there was no implied warranty of habitability and fitness....

The rule of caveat emptor in lease transactions at one time may have had some basis in social practice as well as in historical doctrine. At common law leases were customarily lengthy documents embodying the full expectations of the parties. There was generally equal knowledge of the condition of the land by both landlord and tenant. The land itself would often yield the rents and the buildings were constructed simply, without modern conveniences like wiring or plumbing. Yet in an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes, often signing standardized leases...common law conceptions of a lease and the tenant's liability for rent are no longer viable....

The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication. It is a doctrine which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities.

Shortly after the Lemle decision, the Hawaii Supreme Court extended the Lemle rule, holding in Lund v. MacArthur (51 H 473)

that the implied warranty of habitability applies to unfurnished as well as furnished dwellings.

The court, in moving forward to provide some degree of competitive parity between residential landlords and tenants, indicates the direction of change. If total reliance is placed upon judicial development of reformed landlord-tenant law, it can be assumed that the process will be excessively time-consuming on a case-by-case progression of litigation.

A key concept incorporated in the proposed Hawaii Residential Landlord-Tenant Code, set forth in Chapter II of this report, would probably be considered most controversial were it not for the Lemle decision. That concept is implicit throughout the Code and is stated as an underlying policy of the Code in section 2(b)(3)--to revise the law of residential landlord and tenant by changing the relationship from one based on the law of conveyance to a relationship that is contractual in nature. Lemle, of course, states its rule broadly and does not expressly limit it to residential leases although the case, and the Lund case following, involves residential premises. It is not necessary for the purposes of this report to speculate about the applicability of the Lemle doctrine to commercial or agricultural leases, but it is emphasized that the proposed Code deals only with residential tenancies. The Code, in fact, may be looked at as a fleshing out of the bare framework of the Court's latest decisions as they relate to residential tenancies. An important incident of this contract characterization is that it makes the covenants of the landlord, on the one hand, and of the tenant, on the other, mutually dependent and not independent as has generally been the case under prior law.

The second recent development which has radically changed Hawaii's law of landlord and tenant was the enactment of Act

41, Session Laws of Hawaii 1970 (sections 666-41 to 666-45, Hawaii Revised Statutes), entitled, "A Bill for an Act Relating to Repair of Substandard Rental Units". Act 41 authorizes tenants of residential units to correct, at landlords' expense through rent withholding, conditions on the premises that constitute violations of health laws or regulations. Notice must be given to the landlord by the tenant, or, if the cost of repair exceeds \$100, by the department of health. The tenant is required to give the landlord copies of receipts amounting to the sum withheld from rent which may not exceed one month's rent for a single repair and is subject to a further limitation of three months' rent withholding during a six-month period. The tenant is prohibited from repairing a dwelling at the landlord's expense when the condition complained of was caused by the tenant, a member of his family, or other person on the premises with his consent. Retaliatory evictions and rent increases by the landlord are prohibited within six months after the tenant complained to the department of health or requested repairs under the Act, except the landlord may evict the tenant under eight conditions, including commission of waste or a nuisance by the tenant or intention of the landlord to move into the premises or demolish them or sell them. Rent increases are permitted under five conditions, including increased maintenance and operating costs and completion of capital improvements. Waiver of liability imposed by the Act is prohibited.

This Act, in effect, has been a kind of mini-preview of two important features of the proposed Residential Landlord-Tenant Code, the limited right of the tenant to resort to self-help in remedying the landlord's default in his obligations to maintain the dwelling unit in conformity with law and limitations on retaliatory evictions and rent increases. These

provisions are incorporated in the proposed Code at sections 64 and 75 without substantial change, except for a somewhat broadened effectiveness since they are correlated with other landlord obligations and tenant remedies.

Key Elements of the Proposed Residential
Landlord-Tenant Code; Effect on Existing
Law and Practices

The description of the existing statutes dealing with landlord and tenant law, described in the first part of this chapter, demonstrates that the Hawaii Revised Statutes leave much to be said about the rights, obligations, and remedies of landlords and of tenants. Those twenty sections of the law, and the considerable body of case law related to commercial and agricultural tenancies, would continue to apply with full effect to commercial and agricultural tenancies and would in no way be affected by enactment of the proposed Residential Landlord-Tenant Code. Furthermore, the procedural statutes that provide for summary possession proceedings would be called into play as to residential tenancies whenever the Code authorizes the landlord to bring a summary proceeding for possession of the dwelling unit, as in sections 68(a), 69(a)(1) and (b), 70(c), 71(c), 72(b) and 75(b).

The Code rule in section 3(b) pertaining to conflicts between the Code and chapter 666, Hawaii Revised Statutes, states that in cases of such conflict, the Code provision controls. As an example of this conflict rule, the Code in section 35 provides that a rental agreement may include a provision for payment by the tenant of reasonable attorney's fees not in excess of fifteen per cent of the unpaid rent after default and referral to an attorney not a salaried employee of the

landlord or his assignee and further provides that a provision in violation of the section is unenforceable. Chapter 666, on the other hand, provides merely for reasonable attorney's fees to be paid by the tenant to stay issuance of a writ of possession and in appeals proceedings (sections 666-14 and 666-16). Many standard lease forms contain a provision imposing on the tenant the obligation of paying reasonable attorney's fees if it becomes necessary for the landlord to sue for possession. The Code, on this matter, would prevail as to residential tenancies over the existing law and would necessitate the use of new lease forms by the landlord.

Another area in which the Code provision would prevail over existing law and necessitate new language in lease forms is that of grounds for eviction. Although in the vast majority of cases the ground alleged is default in rent, other grounds are available, including commission of a common nuisance (section 666-3), involving, for instance, serious disturbance to other tenants, or noncompliance with conditions or covenants in the lease (section 666-1), or, under the common law doctrine of waste, wilful damage to the premises. The law is sufficiently vague that the landlord frequently relies on a written lease that incorporates a list of detailed rules of tenancy and gives the landlord the option to terminate the tenancy for continuous violation of such rules. Reliance on such ground is infrequent, usually in connection with long-term leases, since the landlord can evict a short-term periodic tenant simply by terminating the tenancy at the end of a period after giving twenty-five days' notice (section 666-2). One reason for not resorting to noncompliance with lease conditions or covenants as a ground for eviction is the difficulty of obtaining evidence, which in many

instances is available only from other tenants who are frequently reluctant to give evidence against a next-door neighbor.

The Code would establish a set of principles that would help to define this vague area of the law. Section 52 is intended to protect tenants from vague, arbitrary, and unequally enforced rules. The section provides that every rule must have a legitimate purpose in protecting the landlord or the tenants in general that is reasonably related to that purpose, is explicit, and applies to all tenants in a fair manner. The rules would have to be brought to the attention of the tenant at the time of entry into the rental agreement, or if at a later time, would have to be consented to in writing if they work a substantial modification of his bargain. The landlord would be required to give the tenant written notice and a five-day grace period to cease violation before resorting to his remedies (section 69). If the violation continued or was renewed thereafter, the landlord would be deemed to have waived his rights by accepting rent or failing to bring a summary possession action (section 73).

Section 21 of the Code would eliminate a certain ambiguity in the common law as to when rent is due. At common law, rent was due at the end of the period for which it was payable unless there was a lease provision or usage or custom to the contrary.¹ This rule is changed in most written leases, and it is now standard practice to treat the rent of periodic tenancies as due in advance of each period of occupancy. The Code rule is that in the absence of agreement to the contrary, rent is payable at the beginning of any term for one month or less and for longer terms, in equal monthly installments payable at the beginning of each month.

Another rent issue is its apportionability. The common law rule is that rent is not apportionable.² One possible consequence of the common law rule is that if a deposit paid by a tenant in advance is characterized as advance rent, any breach by the tenant would entitle the landlord to keep the whole deposit even though he might immediately rent to another tenant and thus not be damaged in the full amount of the deposit. Another consequence might be that a landlord could not be awarded any rent by a court for a rent period that was incomplete at the time of judgment. Section 21 of the Code would reverse to the common law rule in making rent apportionable from day to day.

The common law rule on late rent payment is that the landlord can treat the failure to pay rent on the due date as a breach of the conditions of tenancy and have the tenant evicted on that ground.³ That rule is modified by statute (sections 666-5 and 666-14). Some lease forms contain a provision that acceptance of late rent does not constitute a waiver by the landlord of the right to insist on future rent being paid on time. The Code provision, section 68, would provide a grace period of fourteen days after written notice informing the tenant of his right to make a late payment and stating that if default continues beyond the grace period, the rental agreement will be terminated. In addition, section 73, relating to waiver of the landlord's right to terminate would apply to acceptance of late rent payments; however, there would not be a waiver of his right to bring an action for rent alone under section 68(b).

The landlord's obligations to supply and maintain fit premises under the Code would be consonant with the Lemle decision, which imposes a duty on the landlord to supply habitable premises

fit for the use intended. Section 42 is, however, more explicit than the terms "habitability" and "fit for the use intended". The landlord would be under an express obligation to comply with all laws, noncompliance with which would endanger health or safety; to keep common areas clean and safe; make repairs to put and keep the premises in a habitable condition; maintain electrical, plumbing, and other facilities and appliances supplied by him in good working order and condition, subject to reasonable wear and tear; provide and maintain garbage receptacles and arrange for removal of garbage in cases of apartment buildings; and provide for the supplying of running water in cases of apartment buildings. If the landlord fails to perform these duties with respect to compliance with law at the beginning of the tenancy, the tenant would be authorized to terminate the rental agreement before entering possession or to vacate during the first week of occupancy (section 62).

Under section 63 of the Code, the tenant would have two remedies available for the landlord's failure to repair conditions arising after the beginning of the tenancy. If the conditions are serious enough, the tenant could terminate the rental agreement without liability for future rent and vacate the premises, under the theory of a liberalized doctrine of constructive eviction. If the condition was caused wilfully or negligently by the landlord, the tenant could also recover damages, including reasonable expenditures necessary to obtain adequate substitute housing.

Except for the doctrine of constructive eviction, these tenant remedies did not exist at common law.

On the problems of periodic tenancies, Code section 71 would provide different rules than the existing statutory

provision (section 666-2), which authorizes either the landlord or tenant to terminate on giving twenty-five days' notice prior to the end of any period, but in the case of nonpayment of rent authorizes summary possession proceedings on giving five days' notice. The Code would authorize termination of a month-to-month tenancy by either the landlord or tenant on giving one month's notice and when the period is less than monthly, on ten days' notice. The situation of nonpayment of rent would fall under the general section on that matter, section 68.

Most residential tenancies are for relatively short terms, usually month-to-month. The landlord can protect himself by requiring a security deposit (section 44) of the last month's rent. The tenant's protection is only that he is entitled to at least one month's notice. In this connection, it is of interest to note a recent United States Supreme Court decision, Thorpe v. Housing Authority (393 U.S. 268 (1969)). That case ruled that a tenant cannot be evicted without cause, on the basis of a termination of a periodic tenancy, from government-operated housing. The Court held that termination of a public housing tenancy (the tenure of almost all public housing tenants) required a prior informal hearing at which the tenant must be informed of the reasons for termination with an opportunity to dispute the reasons both on the facts and as to their legal sufficiency.

Section 71 would create new law with respect to hold-over tenants. The landlord would be given the remedy of collecting a double rent penalty, to be apportioned to the number of days the tenant overstays. If the tenant remains in possession longer than one month, the rental rate reverts to that of the previous tenancy. This provision is intended to prevent a

landlord from building up excessive rent against a hold-over tenant, but protects the landlord by giving him a month to complete summary possession proceedings before the penalty rate ceases.

Certain lease form provisions in common use operate effectively to deny due process to tenants in summary possession proceedings. The tenant who is subject to these provisions is denied his "day in court". One of these techniques, prohibited and made void in section 34 of the Code, is the use of confession of judgment provisions in leases. Pursuant to a confession of judgment, the tenant appoints the landlord as his attorney to confess judgment against the tenant for possession and rent due in the event of a dispute. Similarly, section 33 of the Code prohibits and makes void any exculpatory provision in a rental agreement exempting or limiting the landlord's liability for damages caused by the acts or omissions of the landlord, or requiring the tenant to indemnify the landlord for such damages, notwithstanding the newly imposed obligation of the landlord to repair under section 42.

One of the more novel provisions of the proposed Code is section 76 which would authorize the Office of Consumer Protection to provide counsel for any tenant in proceedings brought by or for a landlord against the tenant when the tenant is unable to afford his own counsel and is unable otherwise to obtain counsel. The Office of Consumer Protection currently is handling complaints by tenants and so has developed appropriate expertise in the field.

Of all such tenants' complaints to the Office of Consumer Protection, by far the great majority are reported by the Director of the Office of Consumer Protection as involving security deposit. Section 44 of the Code first defines "security

deposit" and then limits it as to amount and purpose. A security deposit would be limited in amount to the amount of one month's rent and would be limited as to purpose, for application in payment of the last month's rent, except in the three instances of nonpayment of rent, material noncompliance with the tenant's obligations in maintaining the dwelling unit (section 51), or wrongful quitting. Whereas the current practice generally places a burden on the tenant to convince the landlord that a security payment should be refunded to the tenant, the Code would shift that burden to the landlord. If the tenant does not consent in writing to the landlord's application of the security deposit for correction of the tenant's default instead of applying it for payment of the last month's rent, the landlord must prove to the court and obtain a court order authorizing the retention of the security deposit, or part of it, for purposes other than the last month's rent. This section further provides that a successor-landlord is not responsible for the wrongful retention of the security deposit by the original landlord, under the theory that the tenant has best knowledge of whether a security deposit had been paid to the original landlord and that transferring the responsibility to the successor-landlord would inhibit transferability of real property. Section 66 would require return of the security deposit not later than ten days after the tenant terminated the rental agreement before the end of the term under section 62, 63, or 65. The treatment of security deposits under the Code would encourage landlords to settle any problems about damage and retention of the security deposit during the last month of the tenancy. The provision would go a long way toward balancing the complaints of tenants against landlords who unfairly or improperly retain security deposits; under existing law the

only recourse of the tenant is to sue for the return of the security deposit, whereas under the Code it would be up to the landlord to prove his right to retain the security deposit to correct tenant default in cases where the landlord and tenant disagree. Section 44 would also prohibit requirements for prepayment of rent by post-dated checks to preclude that device for circumventing the security deposit limitations.

Another aspect of the security deposit provisions that should be taken into account is that they would promote good maintenance of the property. In this respect, it is necessary to consider other sections of the Code. Section 53 would spell out the right of the landlord to access, including entry into the dwelling unit to inspect the premises, make necessary repairs, and the like. This right of access is necessary to enable the landlord properly to fulfill his obligations of repair and maintenance (section 42). The right of access is circumscribed in the important interest of protecting the tenant's right to privacy, and the rights of both landlord and tenant as to access are protected by specific remedies for abuse of access by either party (section 74). In order more effectively to protect the landlord's position and at the same time to encourage him to discharge his obligations of repair and maintenance, section 69 would authorize the landlord when he learns, through inspection or otherwise, of damage to the dwelling unit caused by the tenant, to remedy the damage and bill the tenant for the costs of the remedy, the amount billed to be treated as rent. If the tenant fails to pay the bill; then the landlord could exercise his remedies for failure by the tenant to pay rent (section 68) and bring either summary proceeding for possession or an action for rent alone.

Another area of residential landlord-tenant law that gives rise to difficult controversies is the matter of subleasing and assignments. Lease forms commonly provide for the tenant to obtain the landlord's consent prior to subletting or assignment; however, they do not provide that the landlord is to be reasonable in withholding his consent. To the extent that section 37 would prohibit the landlord from arbitrarily withholding consent to assignments or subleases, the Code would change present practice. This section would also prohibit the landlord from exacting payment for such consent except for reasonable charges incurred.

The Code does not provide for criminal penalties but instead provides for the use of a variety of civil procedures for enforcement. This attitude adopts a recommendation in favor of emphasizing correction of conditions in the premises rather than punishing the landlord.⁴

Overall, the reform measures contained in the proposed Code would very clearly strengthen the rights of tenants. To a somewhat lesser degree, it would benefit landlords. It has been suggested with respect to the Model Residential Landlord-Tenant Code that:

For the landlord, the price of the Code's adoption should be calculated with an eye more to the future than to the present.... There are at least some prospects that the adoption of the Code would forestall a later movement toward more drastic legislative changes. In addition, the legislative adoption of specific rules would act as a deterrent to liberal judicial interpretation of vague present rules, and in general would slow the rate of judicial erosion of the landlord's rights....

Lest landlords and their advisors view this argument as scare propaganda...a recently enacted statute

of the State of Maryland...provides in effect that a landlord shall not be permitted to evict a tenant, despite default in rent, where the premises contain important housing code violations. Such a rule would cause serious problems for a large proportion of landlords, and it is all the more disturbing to landlords to realize that the bill was signed into law by no less a radical than former Governor, now Vice-President Spiro Agnew.⁵

Chapter II

PROPOSED RESIDENTIAL LANDLORD-TENANT CODE

The proposed Residential Landlord-Tenant Code, which is included at the end of this chapter, has been prepared with a studied attempt to make its provisions as easily understandable as possible by the broad audience to which it is addressed, the landlords and tenants of the State of Hawaii.¹ These are the individuals who will be directly affected by enactment of such a law, the landlord as to his livelihood and the tenant as to his home.

This commentary will be confined to pointing out unusual or important features of the Code. If a particular provision appears self-explanatory, no commentary will be directed to it; however, it is emphasized that the law proposed is a code and, as such, is intended to be effected as a whole.

Part I General Provisions and Definitions

Section 3 recognizes that many residential tenancies are subject both to the Code and to other bodies of law and legal principles. In the event of conflict between the Code and such other laws, for example, the law of principal and agent, the Code controls. In other cases, the Code is supplemented by specific statutory law, for example, the procedures for eviction and summary possession under chapter 666, Hawaii Revised Statutes, would apply in cases where such legal actions are authorized under the Code, but if there is a conflict between the Code and chapter 666, the Code controls.

Section 6 makes the Code applicable to any person who engages in the rental of residential property in this State. No special provision is needed to exercise jurisdiction over nonresidents because the "long-arm statute" (section 634-71, Hawaii Revised Statutes) will apply.

Section 7 excludes certain residential arrangements from the Code. It should be noted that public housing is not excluded nor is university or other housing provided at educational institutions, whether for faculty or students.

Section 8 provides definitions that should be referred to when the defined terms are used in subsequent sections of the Code. Note that the definition of "landlord" includes most agents of a landlord but not a person who merely collects rents and then turns the entire collection over to another. Note also that "rental agreement" includes oral as well as written agreements.

Section 9 includes specific rules for determining when notice or knowledge is given to a person and is particularly important because notice or knowledge throughout the Code triggers certain rights and is a condition to resort to certain remedies.

Section 11 authorizes the parties to an agreement to fix the time within which action must be taken under the Code when the Code requires action to be taken within a reasonable time.

Part II Rent

Section 21 leaves the amount of rent generally to the bargain of the parties. Subsection (c) reverses the common law rule that rents are non-apportionable. The Code provides that rents accrue on a day-by-day basis. See sections 36, 61, 65, 66, 70, and 71 in connection with subsection (c).

Section 22 relates to the problem of the Statute of Frauds which in Hawaii (section 666-4, Hawaii Revised Statutes) provides that an oral lease of real property for a term of more than one year results only in a tenancy at will. This section of the Code is in general agreement with the Hawaii rule but

provides that where there is a written rental agreement signed by one party but not the other, the non-signing party's partial performance, as by accepting rent, or by occupying the premises and paying rent, gives the agreement the effect of having been signed. Such rental agreements are limited to a maximum term of one year.

Section 23, as in the case of the amount of rent under section 21, leaves the term of the rental agreement to the bargain of the parties.

Part III Limitations on Rental Agreements and Practices

Section 31 provides that in general a tenant may not waive or agree to forego rights under the Code, but the Code provides for waiver by the tenant in some instances as in section 44 when the tenant, in effect, waives his right to any refund of his security deposit by wrongfully quitting the dwelling unit. In the absence of such a provision, waiver or agreement to forego must be part of a settlement, and settlements are subject to court review.

Section 32 promotes repair of dwelling units by providing for an allocation of responsibility to the persons who are most likely to be aware of conditions on the premises. This section requires affirmative compliance with legal requirements and is consistent with the entire Code scheme that provides for disclosure to the tenant of all owners and landlords (section 43), right of access for the landlord (section 53), landlord obligations (part IV), and the limited right of tenants to exercise self-help (section 64). Explicit in this section is the idea that rent must be spent on the property to the extent necessary to carry out the landlord's obligations under the Code.

Sections 33 and 34 invalidate two provisions that are commonly found in rental agreements and that are patently unfair to the tenant, the landlord's waiver of liability for damages attributable to the landlord and the tenant's confession of judgment.

Section 35 expresses a policy decision to treat attorney's fees not as part of the landlord's general overhead to be borne indirectly by all his tenants but as a charge to be imposed on the defaulting tenant who gives rise to the expense. The charge is limited to fifteen per cent of the unpaid rent after default.

Section 37 gives the tenant the right to assign and sublet subject to the landlord's consent which cannot be unreasonably withheld. This provision is patterned after the 1968-69 amendments to the Ontario Landlord and Tenant Act.

Part IV Landlord Obligations

Section 41 imposes a duty on the landlord to deliver possession to the tenant at the beginning of the agreed term; this is so even when the tenant is prevented from taking possession due to the holdover of a prior tenant.

Section 42 lists the obligations of the landlord with respect to supplying and maintaining fit premises. In view of the tight residential rental market, the duty of compliance with law was relaxed from an absolute standard to a more realistic standard of compliance with all laws noncompliance with which would endanger health or safety. Subsections (b) and (c) allow for some bargaining between the landlord and tenant whereby certain maintenance burdens can be shifted to the tenant if the work is for the benefit of the tenant and subject to the other conditions specified. In no case can a failure by the tenant with respect to the shifted burdens be used by the landlord as grounds for termination of the rental agreement.

Section 43 states obviously necessary disclosure requirements applicable to rental agreements, whether written or oral agreements. In connection with this section, note section 32 and, in particular, the definitions of "owner" and "landlord".

Section 44 deals with security deposits and is patterned, in part, after the 1968-69 amendments to the Ontario Landlord and Tenant Act. Although there are other more far-reaching provisions in the Code, the problems and complaints about security deposits have had more public attention. Landlords maintain that security deposits are necessary for purposes of compensation for damage done by tenants and as a deterrent to tenant caused damages. Tenants complain that security deposits are not necessary because damage to premises by tenants is not a widespread problem, that they have great difficulty or no success in obtaining repayment of security deposits whether or not there has been damage, and that security deposits are really accepted by landlords as windfall. This section attempts to balance the conflicting interests of landlords and tenants by limiting the amount of a security deposit to the amount of one month's rent, to be applied as a general rule to the last month's rent. The security deposit may be retained for purposes other than the last month's rent to remedy tenant defaults for nonpayment of rent, material noncompliance in maintaining the dwelling unit (section 51), or wrongful quitting. If the tenant does not consent to such retention of the security deposit, the landlord must obtain a court order. If the rental agreement is terminated prior to the last month by the landlord or the tenant, the landlord should repay it; if he does not, the tenant will have to sue for repayment. Note that if the landlord terminates the rental agreement for nonpayment of rent he cannot legally apply the

security deposit of the last month's rent to the rent for any earlier month unless the tenant consents or the court so orders. This section does not provide for interest payments on the security deposit; it would appear that the relatively small sums involved do not warrant the problems of record-keeping, administration, and enforcement.

Part V Tenant Obligations

Section 51 parallels for the tenant the obligations imposed by section 42 on the landlord. Paragraph (6) constitutes the Code's definition of waste.

Section 52 imposes additional duties on the tenant with respect to obeying reasonable and fair rules of the landlord.

Section 53 gives the landlord access for the enumerated purposes, subject to notice in the interest of protecting the tenant's right to privacy.

Part VI Remedies and Penalties

Section 61 gives the tenant remedies for failure by the landlord to put the tenant into possession at the beginning of the term (section 41). The tenant may recover damages, terminate the rental agreement, assert the breach in defense to an action to recover rent, or maintain a summary proceeding for possession.

Section 62 gives the tenant remedies for failure by the landlord to supply and maintain fit premises in nonconformance to the rental agreement or in material noncompliance with laws, noncompliance with which endanger health or safety (section 42(a)(1)). The tenant may terminate the rental agreement during the first week of occupancy or beyond that time so long as the tenant remains in possession in reliance on the landlord's promise to correct the condition.

Section 63 gives the tenant the right to terminate the rental agreement for any condition which deprives him of a substantial part of the benefit and enjoyment of his bargain. If the condition is caused wilfully or negligently by the landlord, the tenant may recover damages.

Section 64 is a restatement of existing law, section 666-42, Hawaii Revised Statutes. The major change in this provision from existing law is that the tenant is given the remedy of repair not only for the landlord's failure to comply with the rental agreement and with the health law, but in addition for the landlord's material noncompliance with any law, noncompliance with which endangers health or safety.

Section 65 allows the tenant to vacate all or part of the premises rendered unusable by fire or casualty.

Section 67 makes the landlord liable to the tenant in the amount of \$100 plus reasonable attorney's fees if the landlord fails to comply with the disclosure requirements specified for rental agreements. This extraordinary remedy is justified on the grounds that any other tenant remedy is illusory if as to the tenant the landlord has no identity or is an undisclosed absentee landlord.

Section 69 allows the landlord to correct the tenant's default in maintaining the dwelling unit (section 51) and bill the cost to the tenant as rent; then the landlord has all the remedies for nonpayment of rent if the tenant refuses to pay the bill (section 68). The landlord has other remedies under this section, including termination of the rental agreement and bringing summary proceedings for possession if the tenant is in material noncompliance with a law, noncompliance with which endangers health or safety, and actions for waste or for breach

of contract for damage if the tenant's failure to comply with section 51 was wilful or negligent.

Section 71 gives the landlord the right to double rent in the case of holdover tenants, or an election to treat the holdover tenant as a continuing tenant.

Section 74 provides remedies and liabilities for abuse of access (section 53). The tenant is required to indemnify the landlord for damages resulting from an unreasonable denial of access. If the landlord resorts to self-help, he will be absolutely liable for any damage suffered by the tenant.

Section 75 is a restatement of existing law, section 666-43, Hawaii Revised Statutes. The major changes are that retaliatory evictions and rent increases are prohibited for six months after a complaint by the department of health as well as for six months after the tenant's complaint or the tenant's request, and that such retaliation is prohibited in other instances where the tenant requests the landlord to remedy conditions of the dwelling unit (section 63).

Section 76 provides for counsel to a tenant who is otherwise unable to afford or obtain counsel on the grounds that such a person should have professional representation when his home is at stake.

Section 77 extends the unconscionability concept to residential rental agreements and enables the courts to police rental agreements or provisions which are found to be unconscionable. The basic test is whether, in the light of the background and setting of the residential rental market, the commercial needs of the case, and the condition of the particular parties to the rental agreement, the agreement or any provision of the agreement involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making

of the rental agreement. The particular facts involved in each case are important since certain rental agreements or provisions in agreements may be unconscionable in some situations but not in others.

Following is the proposed Residential Landlord-Tenant Code:

A BILL FOR AN ACT

RELATING TO A RESIDENTIAL LANDLORD-TENANT CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by adding
2 a new chapter to be appropriately designated and to read as
3 follows:

4 "CHAPTER

5 RESIDENTIAL LANDLORD-TENANT CODE

6 PART I. GENERAL PROVISIONS AND DEFINITIONS

7 Sec. -1 Short title. This chapter shall be known and
8 may be cited as the Residential Landlord-Tenant Code.

9 Sec. -2 Purposes; rules of construction. (a) This
10 chapter shall be liberally construed and applied to promote its
11 underlying purposes and policies.

12 (b) The underlying purposes and policies of this chapter
13 are:

- 14 (1) To simplify, clarify, modernize, and revise the law
15 governing the rental of dwelling units and the obli-
16 gations and duties of landlords and tenants of dwelling
17 units;
- 18 (2) To encourage landlords and tenants to maintain and
19 improve the quality of housing in this State; and
- 20 (3) To revise the law of residential landlord and tenant
21 by changing the relationship from one based on the
22 law of conveyance to a relationship that is contractual
23 in nature.

1 Sec. -3 Supplementary general principles of law, other
2 laws, applicable. (a) Unless displaced by the particular pro-
3 visions of this chapter, the principles of law and equity, in-
4 cluding the law relative to capacity to contract, principal and
5 agent, estoppel, fraud, misrepresentation, duress, coercion,
6 mistake, bankruptcy, or other validating or invalidating cause
7 supplement its provisions.
8

9 (b) Every legal right, remedy, and obligation arising out
10 of a rental agreement not provided for in this chapter shall be
11 regulated and determined under chapter 666, and in the case of
12 conflict between any provision of this chapter and a provision
13 of chapter 666, this chapter shall control.
14

15 Sec. -4 Construction against implicit repeal. This
16 chapter being a general law intended as a unified coverage of its
17 subject matter, no part of it shall be deemed to be impliedly
18 repealed by subsequent legislation if such construction can
19 reasonably be avoided.
20

21 Sec. -5 Severability. If any provision of this chapter
22 or the application thereof to any person or circumstances is held
23 invalid, the invalidity does not affect other provisions or appli-
24 cations of the chapter which can be given effect without the
25 invalid provision or application, and to this end the provisions
26 of this chapter are severable.

27 Sec. -6 Territorial application. This chapter applies
28 to rights, remedies, and obligations of the parties to any rental
29 agreement wherever made of a dwelling unit within this State.
30

31 Sec. -7 Exclusions from application of chapter. Unless
32 created solely to avoid the application of this chapter, this
33 chapter shall not apply to:
34

- (1) Residence at an institution, whether public or private, where residence is merely incidental to detention or the provision of medical, religious, or similar services, including prisons, hospitals, monasteries, and nunneries.
- (2) Occupancy under a bona fide contract of sale of the dwelling unit or the property of which it is a part where the tenant is, or stands in the place of, the purchaser.
- (3) Residence by a member of a fraternal organization in a structure operated without profit for the benefit of the organization.
- (4) Transient occupancy in a hotel, motel, cubicle hotel, or other transient lodgings.

Sec. -8 Definitions. As used in this chapter, unless the context clearly requires otherwise:

- (1) "Action" with reference to a judicial proceeding includes recoupment, counterclaim, setoff, and any other proceedings in which rights are determined.
- (2) "Apartment building" means a structure containing one or more dwelling units, except:
 - (A) A single-family residence, or
 - (B) A structure in which all tenants are roomers or boarders.
- (3) "Dwelling unit" means a structure, or part of a structure, which is used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, to the exclusion of all others.

- 1 (4) "Landlord" means the owner, lessor, or sub-lessor of
2 the dwelling unit or the property of which it is a
3 part and in addition means any person authorized to
4 exercise any aspect of the management of the premises,
5 including any person who, directly or indirectly,
6 receives rents or any part thereof, other than as a
7 bona fide purchaser, and who has no obligation to
8 deliver the whole of such receipts to another person.
9
10 (5) "Owner" means one or more persons, jointly or severally,
11 in whom is vested:
12 (A) All or any part of the legal title to property; or
13 (B) Part or all of the beneficial ownership and a right
14 to present use and enjoyment of the property.
15
16 (6) "Person" includes an individual, corporation, govern-
17 ment or governmental agency, business trust, estate,
18 trust, partnership or association, two or more persons
19 having a joint or common interest, or any other legal
20 or commercial entity.
21
22 (7) "Premises" means a dwelling unit, appurtenances there-
23 to, grounds, and facilities held out for the use of
24 tenants generally and any other area or facility whose
25 use is promised to the tenant.
26
27 (8) "Rental agreement" means all agreements, written or
28 oral, which establish or modify the terms, conditions,
29 rules, regulations, or any other provisions concern-
30 ing the use and occupancy of a dwelling unit.
31
32 (9) "Roomer" or "boarder" means a tenant occupying a
33 dwelling unit:
34

H.B. NO.

(A) Which lacks at least one major bathroom or kitchen facility, such as a toilet, refrigerator, or stove,

(B) In a building where one or more such major facilities are supplied to be used in common by the occupants of the tenant's dwelling unit and by the occupants of one or more other dwelling units, and

(C) In a building in which the landlord resides.

(10) "Single family residence" means a structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it shall be deemed a single family residence if it does not share hot water equipment or any other essential facility or service with any other dwelling unit.

(11) "Tenant" means any person who occupies a dwelling unit for living or dwelling purposes with the landlord's consent.

Sec. -9 Notice, notification, knowledge, etc. (a) A person has notice of a fact when:

(1) He has actual knowledge of it; or

(2) He has received a notice or notification of it; or

(3) From all the facts and circumstances known to him at the time in question he has reason to know of it.

(b) A person knows or has knowledge of a fact when he has actual knowledge of it. The terms "discover" or "learn" or terms of similar import refer to knowledge rather than reason to know.

1 The time and circumstances under which a notice or notification
2 ceases to be effective are not determined by this chapter.

3 (c) A person notifies or gives a notice or notification to
4 another by taking such steps as may be reasonably required to
5 inform the other in ordinary course whether or not the other
6 actually comes to know of it. A person receives a notice or
7 notification when:
8

9 (1) It comes to his attention; or

10 (2) It is delivered at the place of business through which
11 contract was made or at any place held out as the
12 place for receipt of such communications.
13

14 (d) Notice, knowledge, or a notice or notification received
15 by a person other than an individual is effective for a particular
16 transaction from the time it is brought to the attention of the
17 individual conducting that transaction or from the time it should
18 have been brought to his attention, whichever time is earlier.

19 Sec. -10 Duties; obligation of good faith. Every duty
20 within this chapter imposes an obligation of good faith in its
21 performance or enforcement.
22

23 Sec. -11 Time; reasonable time. (a) Whenever this chapter
24 requires any action to be taken within a reasonable time, any
25 time which is not manifestly unreasonable may be fixed by agree-
26 ment.

27 (b) What is a reasonable time for taking any action depends
28 on the nature, purpose, and circumstances of the action.
29

30 PART II. RENT

31 Sec. -21 Rent. (a) The landlord and tenant may agree
32 to any consideration, not otherwise prohibited by law, as rent.
33 In the absence of such agreement, and subject to section -71(c)
34 in the case of holdover tenants, the tenant shall pay to the

1 landlord the fair rental value for the dwelling unit.

2 (b) Rents shall be payable at the time and place agreed to
3 by the parties. Unless otherwise agreed, the entire rent shall
4 be payable at the beginning of any term for one month or less,
5 and for longer terms in equal monthly installments payable at
6 the beginning of each month.
7

8 (c) Except as otherwise provided in subsection (b), rent
9 shall be uniformly apportionable from day to day.

10 Sec. -22 Effect of unsigned rental agreements. (a) If
11 the landlord does not sign a written rental agreement signed and
12 delivered to him by the tenant, acceptance of rent without reserva-
13 tion by the landlord shall give to the rental agreement the same
14 effect as if it had been signed by the landlord.
15

16 (b) If the tenant does not sign a written rental agreement
17 signed and delivered to him by the landlord, acceptance of pos-
18 session and payment of rent without reservation shall give to the
19 rental agreement the same effect as if it had been signed by the
20 tenant.
21

22 (c) Subject to section -71, the maximum term of a rental
23 agreement which is given effect by the operation of this section
24 shall be one year.

25 Sec. -23 Term of rental agreement. The landlord and
26 tenant may agree in writing to any period as the term of the
27 rental agreement. In the absence of such agreement, the tenancy
28 shall be month to month or, in the case of boarders, week to week.
29

30 PART III. LIMITATIONS ON RENTAL AGREEMENTS
31 AND PRACTICES

32 Sec. -31 Waiver; agreement to forego rights; settlement
33 of claims. (a) Except as otherwise provided in this chapter, a
34

1 tenant may not waive or agree to forego rights or benefits
2 under this chapter.

3 (b) A claim by a tenant against a landlord for violation
4 of this chapter or a claim by a landlord against a tenant for
5 default or breach of duty imposed by this chapter, if disputed
6 in good faith, may be settled by agreement.

7 (c) A claim, whether or not disputed, against a tenant may
8 be settled for less value than the amount claimed.

9 (d) A settlement in which the tenant waives or agrees to
10 forego rights or benefits under this chapter is invalid if the
11 court, as a matter of law, finds the settlement to have been un-
12 conscionable at the time it was made. The competence of the
13 tenant, any deception or coercion practiced against him, the
14 nature and extent of the legal advice received by him, and the
15 nature and value of the consideration are relevant to the issue
16 of unconscionability.

17 Sec. -32 Separation of rents and obligations to property
18 forbidden. Any agreement, conveyance, or trust instrument which
19 authorizes a person other than the beneficial owner to act as
20 the landlord of a dwelling unit shall operate, regardless of its
21 terms, to authorize and require such person to use rents to
22 conform with this chapter and any other law, code, ordinance, or
23 regulation concerning the maintenance and operation of the
24 premises.

25 Sec. -33 Landlord's waiver of liability prohibited. A
26 provision in a rental agreement exempting or limiting the land-
27 lord, or requiring the tenant to indemnify the landlord, from
28 liability for damages to persons or property caused by or result-
29 ing from the acts or omissions of the landlord, his agents,
30 servants, or employees, in or about the dwelling unit covered
31 -

thereby or in or about the premises of which it is a part is void.

Sec. -34 Authorization to confess judgment prohibited.

A tenant may not authorize any person to confess judgment on a claim arising out of a rental agreement of any dwelling unit. An authorization in violation of this section is void.

Sec. -35 Attorney's fees. A rental agreement may provide for the payment by the tenant of reasonable attorney's fees not in excess of fifteen per cent of the unpaid rent after default and referral to an attorney not a salaried employee of the landlord or his assignee. A provision in violation of this section is unenforceable.

Sec. -36 Effect of termination. Except as otherwise provided in this chapter, whenever a landlord or tenant exercises a right to terminate a rental agreement, the obligations of each party to the rental agreement shall cease upon the final discharge of all obligations imposed by the rental agreement and by this chapter.

Sec. -37 Subleases and assignments. (a) Unless otherwise agreed to in a written rental agreement and except as otherwise provided in this section, the tenant may sublet his dwelling unit or assign the rental agreement to another without the landlord's consent.

(b) Subsection (a) does not apply to a tenant of a dwelling unit administered or owned by the United States, the State, a county, or any agency thereof.

(c) A written rental agreement may provide that the tenant's right to sublet his dwelling unit or assign the rental agreement is subject to the consent of the landlord.

1 (d) The landlord shall not withhold his consent to a sub-
2 lease or assignment unreasonably and he shall not make any
3 charge for giving his consent except for reasonable expenses
4 incurred thereby.

5 PART IV. LANDLORD OBLIGATIONS

6
7 Sec. -41 Landlord to supply possession of dwelling
8 unit. The landlord shall, at the beginning of the agreed term,
9 supply the dwelling unit and put the tenant into possession.

10 Sec. -42 Landlord to supply and maintain fit premises.
11 (a) The landlord shall at all times during the tenancy:

12 (1) Comply with all applicable provisions of any state
13 or county law, code, ordinance, or regulation, non-
14 compliance with which would have the effect of
15 endangering health or safety, governing maintenance,
16 construction, use, or appearance of the dwelling
17 unit and the premises of which it is a part;

18
19 (2) Keep common areas of the premises in a clean and safe
20 condition;

21
22 (3) Make all repairs and arrangements necessary to put
23 and keep the premises in a habitable condition;

24 (4) Maintain all electrical, plumbing, and other facili-
25 ties and appliances supplied by him in good working
26 order and condition, subject to reasonable wear and
27 tear;

28
29 (5) Except in the case of a single family residence,
30 provide and maintain appropriate receptacles and
31 conveniences for the removal of ashes, rubbish, and
32 garbage, and arrange for the frequent removal of
33 such waste materials; and
34

1 (6) Except in the case of a single family residence, or
2 where the building is not required by law to be equipped
3 for the purpose, provide for the supplying of running
4 water as reasonably required by the tenant.

5 (b) A rental agreement for a single family residence may
6 provide that under a separate agreement the tenant is to per-
7 form specified repairs, maintenance tasks, alterations, or re-
8 modeling, if:
9

10 (1) Provision for such tenant performance is in a separate
11 written agreement signed by the tenant; and

12 (2) The particular work to be performed by the tenant is
13 for the primary benefit of his dwelling unit and will
14 be substantially consumed during the remaining tenancy;
15 or
16

17 (3) The agreement is supported by adequate consideration,
18 apart from the rental agreement.

19 In no event under this subsection may the landlord treat per-
20 formance of this agreement as a condition to any provision of
21 the rental agreement.
22

23 (c) A rental agreement for a dwelling unit in an apartment
24 building may provide that under a separate agreement the tenant
25 is to perform specified repairs, maintenance tasks, alterations,
26 or remodeling, if:

27 (1) Provision for such tenant performance is in a separate
28 written agreement signed by the tenant;

29 (2) The work is not necessary to bring a noncomplying
30 dwelling unit into compliance with a state or county
31 law, code, ordinance, or regulation, noncompliance
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1 with which would have the effect of endangering health
2 or safety; and

3 (3) The agreement is supported by adequate consideration
4 apart from the rental agreement.
5

6 In no event under this subsection may the landlord treat perform-
7 ance of this agreement as a condition to any provision of the
8 rental agreement.

9 (d) Where a single family residence which is the owner's
10 usual residence is rented during a temporary absence of the owner,
11 the landlord and tenant may agree in writing that the tenant is
12 to perform specified repairs, maintenance tasks, alterations, or
13 remodeling.
14

15 Sec. -43 Rental agreement, disclosure. (a) On each
16 written rental agreement, the landlord shall disclose:

17 (1) The names and usual addresses of all persons who
18 are owners of the dwelling unit or the premises of
19 which the dwelling unit is a part; and
20

21 (2) The names and usual addresses of all persons who are
22 landlords of the dwelling unit;

23 provided that if there are more than ten such owners or more than
24 ten such landlords, the requirements of this section may be
25 complied with by disclosing on the written rental agreement the
26 names and usual addresses of ten such owners for the purposes
27 of paragraph (1) and of ten such landlords for the purposes of
28 paragraph (2) plus a statement on the written rental agreement
29 that there are additional owners or landlords, or both, as the
30 case may be, the names and usual addresses of whom are available
31 on demand at an address in the State.
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1 (b) In the case of an oral agreement, the landlord shall,
2 on demand, furnish the tenant with a written statement contain-
3 ing the information required by subsection (a).

4 (c) Any owner or landlord not dealing directly with the
5 tenant shall be responsible for compliance with this section by
6 an owner or landlord dealing directly with the tenant and shall
7 be estopped from any objection to a failure to serve process
8 upon an owner or landlord in any proceeding arising under this
9 chapter when such failure is due to failure to comply with this
10 section.
11

12 Sec. -44 Security deposits. (a) For the purposes of
13 this section "security deposit" means money or any property
14 or right paid or given by the tenant to the landlord or to any
15 one on behalf of the landlord to be held by or for the account
16 of landlord as security for the performance of an obligation or
17 the payment of a liability of the tenant and to be returned to
18 the tenant upon the happening of a condition.
19

20 (b) The landlord shall not require or receive a security deposit
21 from or on behalf of a tenant other than in an amount equal to
22 or less than the amount of the rent for the dwelling unit for
23 the rent term of one month, which payment shall be applied in
24 payment of the rent for the last month of the rental agreement,
25 except that the landlord may retain the security deposit or the
26 portion of the security deposit reasonably necessary therefor,
27 and not apply it to such last month rent payment, to remedy any
28 of the following tenant defaults:
29
30

31 (1) Nonpayment of rent;

32 (2) Material noncompliance with section -51; or
33
34

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1 (3) Wrongfully quitting the dwelling unit and clearly
2 indicating by words or conduct his intention not
3 to resume the tenancy.

4 (c) Where the landlord proposes to retain any amount of
5 the security deposit, he shall so notify the tenant, in writing,
6 unless, in connection with subsection (b) (3) the tenant cannot
7 be located, together with the particulars of and grounds for the
8 retention and he shall not retain such amount unless:
9

10 (1) The tenant consents thereto in writing after receipt
11 of the notice; or

12 (2) He obtains a court order pursuant to subsection (f).

13 (d) A security deposit shall be held and administered for
14 the benefit of the tenant and the tenant's claim to the security
15 deposit shall be prior to that of any creditor of the landlord,
16 including a trustee in bankruptcy, even if the security deposit
17 funds are commingled.
18

19 (e) The landlord shall not require the delivery of any
20 postdated check or other negotiable instrument to be used for
21 payment of rent.
22

23 (f) The landlord may apply to any district court in the
24 judicial circuit in which the dwelling unit is located for
25 an order authorizing the retention of all or part of a security
26 deposit pursuant to subsections (b) and (c). The court may
27 dismiss the application or order that all or part of the security
28 deposit be retained by the landlord to be applied on account of
29 any obligation or liability of the tenant arising from tenant
30 default as specified in subsection (b).
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1 (g) Upon cessation of his interest in the dwelling unit,
2 whether by sale, assignment, death, appointment of a receiver, or
3 otherwise, the person in possession of the security deposit,
4 whether the landlord, his agent, or his executor, shall within
5 a reasonable time:
6

7 (1) Transfer the security deposit to the landlord's
8 successor in interest and notify the tenant by regis-
9 tered or certified mail of the transfer and of the
10 transferee's name and address; or
11

12 (2) Return the security deposit to the tenant.

13 In either case, the landlord shall be relieved of further liability
14 with respect to the security deposit.

15 Upon receipt of a transferred security deposit, the trans-
16 feree, in relation to the security deposit, shall be deemed to
17 have all of the rights and obligations of a landlord holding the
18 security deposit.

19 PART V. TENANT OBLIGATIONS

20 Sec. -51 Tenant to maintain dwelling unit. Each tenant
21 shall at all times during the tenancy:
22

23 (1) Comply with all provisions primarily applicable to
24 tenants of any state or county law, code, ordinance,
25 or regulation, noncompliance with which would have
26 the effect of endangering health or safety, governing
27 maintenance, use, or appearance of the dwelling
28 unit and that part of the premises which he occupies
29 and uses;
30

31 (2) Keep that part of the premises which he occupies and
32 uses as clean and safe as the conditions of the premises
33 permit;
34

- (3) Dispose from his dwelling unit all rubbish, garbage, and other organic or flammable waste in a clean and safe manner;
- (4) Keep all plumbing fixtures as clean as their condition permits;
- (5) Properly use and operate all electrical and plumbing fixtures and appliances;
- (6) Not permit any person on the premises with his permission to wilfully or wantonly destroy, deface, damage, impair, or remove any part of the structure of dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing; and
- (7) Comply with all obligations, restrictions, rules, and the like which are in accordance with section -52 and which the landlord can demonstrate are reasonably necessary for the preservation of the property and protection of the persons of the landlord, other tenants, or any other person.

Sec. -52 Tenant to use properly. (a) The tenant shall obey all obligations or restrictions, whether denominated by the landlord as rules, or otherwise, concerning his use, occupancy, and maintenance of his dwelling unit, appurtenances thereto, and the premises of which the dwelling unit is a part, if:

- (1) Such obligations or restrictions are brought to the attention of the tenant at the time of his entry into the rental agreement; or

1 (2) Such obligations or restrictions, if not so known
2 by the tenant at the time of his entry into the
3 rental agreement, are brought to the attention of
4 the tenant and, if they work a substantial modifi-
5 cation of his bargain under the rental agreement, are
6 consented to in writing by him.

8 (b) No such obligation or restriction shall be enforceable
9 against the tenant unless:

10 (1) It is for the purpose of promoting the convenience,
11 safety, or welfare of the tenants of the property,
12 or for the preservation of the landlord's property
13 from abusive use, or for the fair distribution of
14 services and facilities held out for the tenants
15 generally;

17 (2) It is reasonably related to the purpose for which
18 it is established;

19 (3) It applies to all tenants of the property in a fair
20 manner; and

21 (4) It is sufficiently explicit in its prohibition,
22 direction, or limitation of the tenant's conduct to
23 fairly inform him of what he must or must not do to
24 comply.

26 Sec. -53 Access. (a) The tenant shall not unreasonably
27 withhold his consent to the landlord to enter into the dwelling
28 unit in order to inspect the premises; make necessary repairs,
29 decorations, alterations, or improvements; supply services as
30 agreed; or exhibit the dwelling unit to prospective purchasers,
31 mortgagees, or tenants.

(b) The landlord shall not abuse this right of access nor use it to harass the tenant. Insofar as it is practicable to do so, the landlord shall give the tenant at least two days notice of his intent to enter and shall enter only during reasonable hours.

Sec. -54 Tenant to use and occupy. Unless otherwise agreed in the rental agreement, the tenant shall occupy the dwelling unit as his abode and shall continue to occupy it until the end of the term. The landlord may also require, in the rental agreement, that the tenant must notify the landlord of any anticipated extended absence from the dwelling unit no later than the first day of such absence. This section shall have no effect except as between the parties.

Sec. -55 Tenant's responsibility to inform landlord. Any defective condition of the premises which comes to the tenant's attention, which he has reason to believe is unknown to the landlord, and which he has reason to believe is the duty of the landlord or of another tenant to repair, shall be reported by the tenant to the landlord as soon as practicable.

PART VI. REMEDIES AND PENALTIES

Sec. -61 Tenant's remedies for failure by landlord to supply possession. (a) If the landlord fails to put the tenant into possession of the dwelling unit at the beginning of the agreed term:

- (1) The tenant shall not be liable for the rent during any period he is unable to enter into possession;
- (2) At any time during the period the tenant is so unable to enter into possession he may notify the landlord that he has terminated the rental agreement; and

1 (3) The tenant shall have the right to recover damages
2 in the amount of reasonable expenditures necessary
3 to secure adequate substitute housing, the recovery
4 to be made either by action brought in the district
5 court or by deduction from the rent upon submission
6 to the landlord of receipts totaling at least

7 (A) The amount of abated rent; plus

8 (B) The amount claimed against the rent; or

9 (4) If the inability to enter results from the wrongful
10 holdover of a prior occupant, the tenant may main-
11 tain a summary proceeding in the district court for
12 possession.
13

14 (b) In any district court proceeding brought by the tenant
15 under this section the court may award the tenant substitute
16 housing expenditures, reasonable court costs, and attorney's
17 fees.
18

19 Sec. -62 Tenant's remedy of termination at beginning
20 of term. If the landlord fails to conform to the rental agree-
21 ment, or is in material noncompliance with section -42(a)(1),
22 the tenant may, on notice to the landlord, terminate the rental
23 agreement and vacate the dwelling unit at any time during the
24 first week of occupancy. The tenant shall retain such right to
25 terminate beyond the first week of occupancy so long as he
26 remains in possession in reliance on a promise, whether written
27 or oral, by the landlord to correct all or any part of the con-
28 dition which would justify termination by the tenant under this
29 section.
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1 Sec. -63 Tenant's remedy of termination at any time.

2 (a) If any condition deprives the tenant of a substantial part
3 of the benefit and enjoyment of his bargain under the rental
4 agreement, the tenant may notify the landlord in writing of the
5 situation and, if the landlord does not remedy the situation
6 within one week, terminate the rental agreement. The notice need
7 not be given when the condition renders the dwelling unit un-
8 inhabitable or poses an imminent threat to the health or safety
9 of any occupant. The tenant may not terminate for a condition
10 caused by the want of due care by the tenant, a member of his
11 family, or other person on the premises with his consent.
12

13 (b) If the condition referred to in subsection (a) was
14 caused wilfully or negligently by the landlord, the tenant may
15 recover any damages sustained as a result of the condition,
16 including, but not limited to, reasonable expenditures necessary
17 to obtain adequate substitute housing.
18

19 Sec. -64 Tenant's remedy of repair and deduction for
20 minor defects. (a) If the landlord fails to repair, maintain, keep
21 in sanitary condition, or perform in any other manner required
22 by sections 321-9 to 321-11 and 322-1 to 322-7, or by regula-
23 tions thereunder, or as agreed to in a rental agreement, or if
24 the landlord is in material noncompliance with section -42(a)(1),
25 and does not remedy the failure or noncompliance within thirty
26 days after being notified in writing by the tenant to do so, or
27 if the cost to the landlord of remedying the failure or non-
28 compliance would exceed \$100, within thirty days after being
29 notified in writing by the department of health that there is
30 a health violation, the tenant may further notify the landlord
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1 in writing of his intention to correct the objectionable con-
2 dition at the landlord's expense and:

3 (1) Immediately do or have done the necessary work in a
4 workmanlike manner; or

5 (2) The tenant may submit to the landlord, at least
6 thirty days before having the work done, a written
7 signed estimate from each of two qualified workmen
8 and proceed to have done the necessary work by the
9 workman who provides the lower estimate; provided
10 the landlord may require by a writing a reasonable
11 substitute workman or substitute materials; and
12 provided further that if the lower estimate exceeds
13 \$100, the tenant shall not proceed to have done the
14 necessary work until he obtains from the department
15 of health a written statement that the objectionable
16 condition in fact constitutes a violation of a health
17 law or regulation, a copy of which statement shall be
18 mailed by certified or registered mail by the depart-
19 ment of health to the landlord.

20 (b) A tenant may deduct from his rent not more than \$100
21 for his actual expenditures for work done to correct an objec-
22 tionable condition pursuant to subsection (a) (1) and may deduct
23 not more than one month's rent for his actual expenditures for
24 work done to correct an objectionable condition pursuant to sub-
25 section (a) (2), if he submits to the landlord copies of receipts
26 amounting to at least the sum deducted.

27 (c) At the time the tenant initially notifies the landlord
28 under subsection (a), the tenant shall list every condition that
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1 he knows or should know of noncompliance under subsection (a), in
2 addition to the objectionable condition that the tenant then
3 intends to correct or have corrected at the landlord's expense.
4 Failure by a tenant to list such a condition that he knew of or
5 should have known of shall estop the tenant from requiring the
6 landlord to correct it and from having it corrected at the land-
7 lord's expense under this section for a period of six months after
8 the initial notification to the landlord. Total correction and
9 repair work costs under this section chargeable to the landlord's
10 expense during each six-month period shall not exceed an amount
11 equal to three month's rent.
12

13
14 (d) In no event may a tenant repair a dwelling unit at the
15 landlord's expense when the condition complained of was caused
16 by the want of due care by the tenant, a member of his family, or
17 other person on the premises with his consent.

18 (e) Before correcting a condition affecting facilities shared
19 by more than one dwelling unit, the tenant shall notify all other
20 tenants sharing such facilities of his plans, and shall so arrange
21 the work as to create the least practicable inconvenience to the
22 other tenants.
23

24 Sec. -65 Tenant's remedies for fire or casualty damage.
25 When the dwelling unit or any part of the premises or appurtenances
26 reasonably necessary to the benefit and enjoyment thereof is
27 rendered partially or wholly unusable by fire or other casualty
28 which occurs without wilful fault on the part of the tenant or a
29 member of his family, the tenant may:
30

31 (1) Immediately quit the premises and notify the land-
32 lord of his election to quit within one week after
33 quitting, in which case the rental agreement shall
34

1 terminate as of the date of quitting, but if the
2 tenant fails to notify the landlord of his election
3 to quit, the tenant shall be liable for rent accruing
4 to the date of the landlord's actual knowledge of the
5 tenant's quitting or impossibility of further occupancy;
6 or
7

8 (2) If continued occupancy is otherwise lawful, vacate
9 any part of the premises rendered unusable by the
10 fire or other casualty, in which case the tenant's
11 liability for rent shall be no more than the fair
12 rental value of that part of the premises which he
13 continues to use and occupy.
14

15 Sec. -66 Tenant's right to refund of rent, etc., on
16 termination; return of security deposit. When a tenant exercises
17 a right to terminate the rental agreement pursuant to section
18 -62, -63, or -65 the landlord shall return to the
19 tenant, not later than ten days after the termination, the amount
20 of any advance rent paid apportionable to the remaining days of
21 the term and the amount of any security deposit not necessary to
22 remedy tenant defaults.
23

24 Sec. -67 Tenant's remedy for failure by landlord to
25 disclose. If the landlord fails to comply with any disclosure
26 requirement specified in section -43 within ten days after
27 proper demand therefor by the tenant, the landlord shall be
28 liable to the tenant for \$100 plus reasonable attorney's fees.
29

30 Sec. -68 Landlord's remedies for failure by tenant to
31 pay rent. (a) A landlord or his agent may, any time after rent
32 is due, demand payment thereof and notify the tenant in writing
33 that unless payment is made within a time mentioned in the
34

1 notice, not less than fourteen days after receipt thereof, the
2 rental agreement will be terminated. If the tenant remains in
3 default, the landlord may thereafter bring a summary proceeding
4 for possession of the dwelling unit or any other proper proceed-
5 ing, action, or suit for possession.
6

7 (b) A landlord or his agent may bring an action for rent
8 alone at any time after he has demanded payment of past due rent
9 and notified the tenant of his intention to bring such an action.

10 Sec. -69 Landlord's remedies for tenant's waste, failure
11 to maintain, or unlawful use. (a) If the tenant is in material
12 noncompliance with section -51, the landlord, upon learning
13 of any such noncompliance and after notifying the tenant in writing
14 of the noncompliance and allowing a specified time, not less than
15 five days after receipt of the notice, for the tenant to remedy
16 the noncompliance:
17

18 (1) May terminate the rental agreement and bring a summary
19 proceeding for possession of the dwelling unit or any
20 other proper proceeding, action, or suit for possession
21 if the tenant is in material noncompliance with section
22 -51(1); or
23

24 (2) May remedy the tenant's failure to comply and bill
25 the tenant for the actual and reasonable cost of such
26 remedy if the noncompliance can be remedied by the
27 landlord by cleaning, repairing, replacing a damaged
28 item, or the like, which bill shall be treated by
29 all parties as rent due and payable on the next
30 regular rent collection date or, if the tenancy has
31 terminated, immediately upon receipt by the tenant.
32
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1 No allowance of time to remedy noncompliance shall be required
2 when noncompliance by the tenant causes or threatens to cause
3 irremediable damage to any person or property.

4 (b) The landlord may terminate the rental agreement and
5 bring a summary proceeding for possession of the dwelling unit
6 or any other proper proceeding, action, or suit for possession
7 for any material noncompliance with section -51 by a roomer
8 or boarder if the roomer or boarder fails to comply within the
9 time specified in the notice.
10

11 (c) The landlord may bring an action or proceeding for
12 waste or for breach of contract for damage suffered by the
13 tenant's wilful or negligent failure to comply with his obliga-
14 tions under section -51.
15

16 Sec. -70 Landlord's remedies for absence, misuse, and
17 abandonment. (a) If the rental agreement provides for notifica-
18 tion of the landlord by the tenant of an anticipated extended
19 absence and the tenant fails to make reasonable efforts to comply
20 with such requirement, the tenant shall indemnify the landlord
21 for any damage resulting from such absence.
22

23 (b) The landlord may, during any extended absence of the
24 tenant, enter the dwelling unit as reasonably necessary for
25 purposes of inspection, maintenance, and safe-keeping.

26 (c) Unless otherwise provided in the rental agreement, use
27 of the dwelling unit by the tenant for any other purpose than
28 as his abode, or non-use of the dwelling unit, constitutes a
29 breach of the tenant's obligations under section -52 and
30 entitles the landlord to proceed as provided in section -72.
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1 (d) If the tenant wrongfully quits the dwelling unit and
2 unequivocally indicates by words or deeds his intention not to
3 resume the tenancy, he shall be liable to the landlord for the
4 lesser of the following amounts for such abandonment:

5 (1) The entire rent due for the remainder of the term;
6 or
7

8 (2) All rent accrued during the period reasonably neces-
9 sary to re-rent the dwelling unit at a fair rental,
10 plus the difference between such fair rent and the
11 rent agreed to in the prior rental agreement and a
12 reasonable commission for the renting of the dwelling
13 unit. This paragraph applies if the amount calculated
14 hereunder is less than the amount calculated under
15 paragraph (1) whether or not the landlord re-rents
16 the dwelling unit.
17

18 Sec. -71 Termination of tenancy; landlord's remedies
19 for holdover tenants. (a) When the tenancy is month to month,
20 the landlord or the tenant may terminate the rental agreement
21 upon his notifying the other at least one month in advance of
22 the anticipated termination.
23

24 (b) When the tenancy is less than month to month, the
25 landlord or the tenant may terminate the rental agreement upon
26 his notifying the other at least ten days before the anticipated
27 termination.
28

29 (c) Whenever the term of the rental agreement expires,
30 whether by passage of time, by mutual agreement, by the giving
31 of notice as provided in subsection (a) or (b), or by the
32 exercise by the landlord of a right to terminate given under
33
34

1 this chapter, if the tenant continues in possession after the
2 date of termination without the landlord's consent, the tenant
3 shall be liable for and shall pay to the landlord a sum not to
4 exceed twice the monthly rent under the previous rental agreement,
5 computed and prorated on a daily basis, for each day he remains
6 in possession for any period up to one month. If the tenant
7 remains in possession for a period longer than one month, he
8 shall be liable for and shall pay to the landlord a sum equal
9 to the monthly rent under the previous rental agreement for each
10 additional month or fraction thereof. The landlord may bring
11 a summary proceeding for recovery of the possession of the
12 dwelling unit at any time during the first sixty days of hold-
13 over, except that the landlord's acceptance of rent in advance
14 after the first month of holdover shall create a month-to-month
15 tenancy in the absence of an agreement between the parties to
16 the contrary at the time of such acceptance.

17
18
19 Sec. -72 Landlord's remedies for improper use. (a) If
20 the tenant breaches any rule authorized under section -52,
21 the landlord may notify the tenant in writing of his breach.
22 The notice shall specify the time, not less than five days,
23 within which the tenant is required to remedy the breach and
24 shall be in substantially the following form:

25
26 "(Name and address of tenant) (date)

27 You are hereby notified that you have failed
28 to perform according to the following rule:

29 (specify rule allegedly breached)

30 Be informed that if you (continue violating)
31 (again violate) this rule after (a date not less
32 than five days after this notice), the landlord
33 may terminate the rental agreement and sue for
34 possession of your dwelling unit."

(b) If the breach complained of continues or recurs after the date specified in the notice, the landlord may bring a summary proceeding for possession within thirty days after such continued or recurring breach.

Sec. -73 Waiver of landlord's right to terminate. Whenever the landlord accepts rent after learning of a breach of the rental agreement or a breach of an authorized rule under section -52 by the tenant, or whenever the landlord accepts performance by the tenant which does not comply with the terms of the rental agreement or with an authorized rule under section -52, the landlord waives his right to terminate the rental agreement on account of such breach or noncompliance.

Sec. -74 Landlord's and tenant's remedies for abuse of access. (a) The tenant shall be liable to the landlord for any damage proximately caused by the tenant's unreasonable refusal to allow access as provided in section -53(a).

(b) Except for an entry under an emergency such as fire, the landlord shall be liable to the tenant for any theft, casualty, or other damage proximately caused by an entry into the dwelling unit by the landlord or by another person with the permission or license of the landlord:

- (1) When the tenant is absent and has not specifically consented to the entry;
- (2) Without the tenant's actual consent when he is present and able to consent; or
- (3) In any other case, when the damage suffered by the tenant is proximately caused by the landlord's negligence.

1 (c) Repeated demands by the landlord for unreasonable
2 entry, or any entry by the landlord or by another with the
3 landlord's permission or license which is unreasonable and not
4 consented to by the tenant, may be treated by the tenant as
5 grounds for termination of the rental agreement. Any circuit
6 judge on behalf of one or more tenants may issue an injunction
7 against a landlord to enjoin violation of this subsection.
8

9 (d) Every agreement or understanding between a landlord and
10 a tenant which purports to exempt the landlord from any liability
11 imposed by this section, except consent by a tenant to a particular
12 entry, shall be void.
13

14 Sec. -75 Retaliatory evictions and rent increases pro-
15 hibited. (a) Notwithstanding that the tenant has no written
16 rental agreement or that it has expired, so long as the tenant
17 continues to tender the usual rent to the landlord or proceeds
18 to tender receipts for rent lawfully withheld, no action or pro-
19 ceeding to recover possession of the dwelling unit may be main-
20 tained against the tenant, nor shall the landlord otherwise cause
21 the tenant to quit the dwelling unit involuntarily, nor demand
22 an increase in rent from the tenant; nor decrease the services
23 to which the tenant has been entitled, within six months after:
24

- 25 (1) The tenant has complained in good faith to the
26 department of health of conditions in or affecting
27 his dwelling unit which constitute a violation of
28 a health law or regulation; or
29
30 (2) The department of health has filed a notice or
31 complaint of a violation of a health law or
32 regulation; or
33
34

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1 (3) The tenant has in good faith requested repairs
2 under section -63 or -64.

3 (b) Notwithstanding subsection (a), the landlord may re-
4 cover possession of the dwelling unit if:

5 (1) The tenant is committing waste, or a nuisance, or
6 is using the dwelling unit for an illegal purpose
7 or for other than living or dwelling purposes in
8 violation of his rental agreement;

9
10 (2) The landlord seeks in good faith to recover posses-
11 sion of the dwelling unit for immediate use as his
12 own abode;

13
14 (3) The landlord seeks in good faith to recover possession
15 of the dwelling unit for the purpose of substantially
16 altering, remodeling, or demolishing the premises;

17 (4) The landlord seeks in good faith to recover possession
18 of the dwelling unit for the purpose of immediately
19 terminating for at least six months use of the
20 dwelling unit as a dwelling unit;

21
22 (5) The complaint or request of subsection (a) relates
23 only to a condition or conditions caused by the lack
24 of ordinary care by the tenant or another person in
25 his household or on the premises with his consent;

26 (6) The landlord has received from the department of
27 health certification that the dwelling unit and other
28 property and facilities used by or affecting the use
29 and enjoyment of the tenant were on the date of filing
30 of the complaint or request in compliance with health
31 laws and regulations;
32
33
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1 (7) The landlord has in good faith contracted to sell
2 the property, and the contract of sale contains a
3 representation by the purchaser corresponding to
4 paragraph (2), (3), or (4); or

5 (8) The landlord is seeking to recover possession on
6 the basis of a notice to terminate a periodic
7 tenancy, which notice was given to the tenant
8 previous to the complaint or request of subsection
9 (a).
10

11 (c) Any tenant from whom possession has been recovered or
12 who has been otherwise involuntarily dispossessed, in violation
13 of this section, is entitled to recover three months' rent or
14 three-fold the damages sustained by him, whichever is greater,
15 and the cost of suit, including a reasonable attorney's fee.

16 (d) Notwithstanding subsection (a), the landlord may increase
17 the rent if:
18

19 (1) The landlord has received from the department of health
20 certification that the dwelling unit and other property
21 and facilities used by and affecting the use and enjoy-
22 ment of the tenant were on the date of filing of the
23 complaint or request of subsection (a) in compliance
24 with health laws and regulations;
25

26 (2) The landlord has become liable for a substantial in-
27 crease in property taxes, or a substantial increase in
28 other maintenance or operating costs not associated
29 with his complying with the complaint or request, not
30 less than four months prior to the demand for an
31 increase in rent; and the increase in rent does not
32
33
34

1 exceed the prorated portion of the net increase in
2 taxes or costs;

3 (3) The landlord has completed a capital improvement of
4 the dwelling unit or the property of which it is a
5 part and the increase in rent does not exceed the
6 amount which may be claimed for federal income tax
7 purposes as a straight-line depreciation of the
8 improvement, prorated among the dwelling units
9 benefited by the improvement;

10 (4) The complaint or request of subsection (a) relates
11 only to a condition or conditions caused by the want
12 of due care by the tenant or another person of his
13 household or on the premises with his consent; or

14 (5) The landlord can establish, by competent evidence,
15 that the rent now demanded of the tenant does not
16 exceed the rent charged other tenants of similar
17 dwelling units in his building or, in the case of a
18 single-family residence or where there is no similar
19 dwelling unit in the building, does not exceed the
20 market rental value of the dwelling unit.

21 Sec. -77 Unconscionability. (a) In any court action or
22 proceeding with respect to a rental agreement, if the court as
23 a matter of law finds the agreement or any provision of the
24 agreement to have been unconscionable at the time it was made
25 the court may refuse to enforce the agreement, or it may enforce
26 the remainder of the agreement without the unconscionable pro-
27 vision, or it may so limit the application of any unconscionable
28 provision as to avoid any unconscionable result.

1 (b) If it is claimed or appears to the court that the
2 rental agreement or any provision thereof may be unconscionable
3 the parties shall be afforded a reasonable opportunity to
4 present evidence as to its setting, purpose, and effect to aid
5 the court in making the determination.
6

7 (c) For the purposes of this section, an act or practice
8 expressly permitted by this chapter is not in itself uncon-
9 scionable.

10 Sec. -76 Office of consumer protection to provide
11 counsel for certain tenants. In any proceeding brought by or
12 for a landlord against a tenant under this chapter, the court
13 shall inform the tenant of his right to counsel, and if the court
14 determines that the tenant is unable to afford his own counsel
15 and is unable to obtain counsel through a nonprofit organization
16 authorized to provide administrative support to lawyers who pro-
17 vide legal services to indigents, the court shall notify the
18 office of consumer protection which shall provide counsel for
19 the tenant in the proceedings."
20
21

22 SECTION 2. Chapter 666, Hawaii Revised Statutes, is amended
23 by repealing part II.

24 SECTION 3. This Act does not affect rights and duties that
25 matured, penalties that were incurred, and proceedings that were
26 begun, before its effective date.

27 SECTION 4. This Act, upon its approval, shall take effect
28 on January 1, 1972.
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Chapter III

ECONOMIC AND OTHER REPERCUSSIONS

It is debatable whether economics or the common law of landlord and tenant has determined the condition and status of the modern residential tenant.¹ It is certain that outmoded common law concepts contributed to the modern legal status of the tenant in Hawaii prior to the landmark Lemle decision.² Notwithstanding that decision, which imposes on the landlord in leasing a dwelling the implied warranty of habitability and fitness, the tenant achieves true bargaining equality only from economic power. True bargaining power for the tenant in the residential rental market requires available alternatives-- either additional income for access to other available housing, or substitute housing, which is not available.³

Theoretically, the law of supply and demand should result in the market determining the condition and value of residential rental housing. If the tenant were dissatisfied with the condition, he could move. Since the vacated housing would be worth less than the rent charged, the landlord theoretically would be unable to obtain the same rent unless he made necessary repairs, and the former tenant could spend the same amount of rent on housing that presumably would be better than the housing he left. Since turnover is costly to the landlord, he would then be encouraged to make the necessary repairs to avoid the turnover costs. However, under a seller's market,⁴ the hypothetical landlord is able to re-rent at the same rental level without making the repairs, and the hypothetical former tenant will probably find that the same amount of rent will not buy better housing than that which he left.

Laws can be enacted to prevent landlords from taking undue advantage of the present economic state of housing, but the law of supply and demand cannot be repealed. The obvious true need is to increase the supply and quality of rental units at prices the tenants can afford.⁵ This kind of housing production requires investment in the construction of new units, with a sizeable commitment from private capital. However, increasing the rights of tenants may tend to discourage private investments in new rental housing; thus, reform legislation that is of immediate benefit to tenants may result in an even tighter rental housing market in the future. The problem has been described with reference to New York City:

The current dilemma is illustrated by the situation in New York City where there is more housing legislation of all types than anywhere else; indeed there is so much that only experts can make sense of the jumble. New York has had rent control over a substantial portion of apartments since World War II, and organizations there are active in lobbying on behalf of tenants. Despite all this, rental housing conditions there are probably worse than at anytime since the Depression. Despite a variety of subsidies available, construction of all new rental residential buildings is approaching a standstill, and rent controlled apartment buildings are being torn down and replaced by office buildings, which are a better investment. The major effect of all this government activity paradoxically has been to increase tenant frustration and demands for yet more regulation.⁶

During a period of consumerism when legislatures demonstrate a responsive concern about protection of consumers, it is puzzling to observe a lack of concern about residential tenants. No state has by statute revised the archaic landlord and tenant concepts to meet the needs of contemporary society or to protect the tenant's status and interest in the dwelling which he

rents. Yet, the Kerner Commission reports that in a ranking of the grievances of the urban poor, inadequate housing is listed number three at the first level of intensity.⁷

It is ironic that the Lemle decision giving a tenant remedies for breach of the implied warranty of habitability and fitness concerned a house rented at the rate of \$800 per month. The facts recited in the decision demonstrate that substandard or unsuitable housing occurs where high rentals are charged as well as in cases where rentals are geared to low-income tenants. Under both federal and state constitutional guarantees of equal protection of the law, there may be a question as to whether classification based on either tenant-income or dwelling unit rent levels is legally proper since it would establish differing landlord-tenant obligations and remedies.⁸ Although the legislature has extensive powers to impose classifications as long as the classes are not arbitrarily or unreasonably discriminatory, any classification must bear a fair and just relation to the legitimate objective of the legislation, both in privileges or rights conferred and in liabilities imposed. In fact, a classification verging into the area of rent control, based on tenant-income or dwelling unit rent levels, could be expected to operate so as to discourage construction of low-rent housing where the need is most acute for low-income tenants. Landlords would have additional incentive to concentrate on high-rent housing to avoid obligations under the law applicable to low-rent housing, and tenants who might otherwise seek to up-grade their housing would instead increase the demand for the short supply of low-rent housing in the interest of improving their bargaining position. Such results would be contrary to the objective of improving the quality of housing in the State as set forth as an underlying policy of the proposed Residential Landlord-Tenant Code.

A study published by the Urban Studies Center of Rutgers University concludes, on the relationship of rehabilitation of substandard rental housing and rent increases:

There is a well-founded fear on the part of the tenantry that rehabilitation leads to rent increases. This must be accepted as a fact of the market. Although tax policy can somewhat relieve this factor, particularly when coupled with adequate financing, this fact should be faced. The potential of rent subsidies for the under-incomed with which to pay better rents is quite clear here. There is no substitute for this approach. This is not to underestimate the value of code enforcement--but rather to add a carrot to the stick. There is more positive achievement by making rehabilitation profitable than in attempting to secure it through punitive measures. (author's italics)⁹

A different approach to the cost issue with respect to housing code enforcement has been made by Frank P. Grad, a leading authority in the field:

It is one of the basic assumptions...that code enforcement may be justified by its social purposes alone, even if it is not economically feasible to recover the cost of the effort, including the cost of necessary repairs, through preservation or enhancement of property values. Obviously code enforcement efforts have often found their justification in the preservation of property values as well as of social values. In the present crisis...the preservation of property values may have to yield to other dominant purposes in providing a rationale for housing enforcement.¹⁰

It is obvious that the most unfortunate consequences that might flow from comprehensive residential landlord-tenant law reform would be (1) significant rent increases and (2) a decrease in rental units available due to abandonment of substandard housing. The lack of quantitative data and the presence of a multitude of imponderable factors inhibit economic forecasting. Among the unknown quantities are: (1) the cost of improvements

to substandard rental housing to bring them up to the standards imposed by law; (2) a measure of the relative elasticity or inelasticity of existing rental housing to determine the extent to which that housing would stay on the rental market, or conversely would be converted to other economic use or abandoned; (3) the relationship to rent increases of added property values, including tax increases, resulting from improving substandard housing; (4) the extent of tenant resort to new remedies under a reformed law, particularly with respect to inadequate maintenance and repairs; (5) the leveling effect on costs attributable to tenants' rights from the correlative benefits for landlords; and (6) the value of giving long overdue attention to the needs of tenants, and the general value that will flow to society as a whole if the tenants receive some satisfaction from their improved bargaining position in the landlord-tenant relationship.

Whatever the merits of the long-term economic issues involved, there is pressure from tenants for immediate reform. It is pointed out that the proposed Residential Landlord-Tenant Code is a compromise and is severely limited in coverage. The limitations are express in some cases, for instance, the "public utility" approach to the ownership of residential property is rejected; so there are no rent control provisions, except for two special circumstances. The prohibitions against retaliatory rent increases¹¹ for the specified six-month period, in a sharply qualified way, could be considered a kind of transitory rent control. Second, the proposed Code's provision on rent, section 21, provides that the landlord and tenant may agree to any consideration, not otherwise prohibited by law, as rent. If the amount of rent in a rental agreement is found by the court as a matter of law to have been unconscionable at the time that

agreement was made, under section 77 the court could refuse to enforce the agreement, or enforce the remainder of the agreement without the unconscionable rent provision, or limit the application of the rent provision to avoid any unconscionable result. Other limitations in the coverage of the proposed Code reflect a conclusion that certain approaches to landlord and tenant law appear inapposite to the structure of the residential rental market in the State, for instance, tenants' unionism¹² and tenants' receivership laws.¹³ Other proposals were beyond the scope of this report, such as vigorous, comprehensive housing code administration¹⁴ that properly should be left to housing code laws and officials.

It is hoped that the content of the proposed Residential Landlord-Tenant Code will serve as an appropriate starting place for legislative reform of the existing law.

FOOTNOTES

Introduction

1. Senate Resolution No. 279; House Resolution No. 355.
2. In view of the general concern about housing in Hawaii, the Code was introduced at the 1970 legislative session. There were seven introductions: S.B. 1147 and 1291 and H.B. 1299, 1306, 1324, 1336, and 1474.
3. The Chairman of the Committee is Edward L. Schwartz, Boston, Massachusetts; other members are James H. Clarke, Portland, Oregon; William C. Gardner, Washington, D.C.; William C. Hillman, Providence, Rhode Island; Benny L. Kass, Washington, D.C.; George A. Ranney, Springfield, Illinois; and R. Bruce Townsend, Indianapolis, Indiana.
4. The Federal Housing Administration, Field Market Analysis Service reported that as of July 1, 1969:
 - Honolulu - renter vacancy rate of 2.2 per cent, down from 2.9 per cent in 1969 and 4.4 per cent in 1965.
 - Hawaii - no vacancy rate is given, but it is noted that in the Hilo area, few rentals are available and the Kailua-Kona market is characterized as tight.
 - Maui - no vacancy rate is given, but the rental market is characterized as tight and the Lahaina market as very tight.
 - Kauai - renter vacancy rate of 1.6 per cent.

Chapter I

1. 52 Corpus Juris Secundum 359 (Landlord and Tenant, sections 472(2) and 480(4)).
2. American Law of Property, sec. 9.44 at 465 (A. J. Casner ed. 1952).
3. Ibid.

4. Frank P. Grad, Legal Remedies for Housing Code Violations, National Commission on Urban Problems, Research Report No. 14 (1968), p. 150.
5. Gerald R. Gibbons, "Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code," 21 Hastings L.J. 369, 415 (January 1970).

Chapter II

1. April 1, 1969 data show that of a total of 199,394 private housing units in the State, 115,645 or 58 per cent are rental units. When the 5,191 public housing units operated by the Hawaii Housing Authority are included, the proportion of rental units is 59 per cent (State of Hawaii Data Book 1970, Department of Planning and Economic Development, Table 122, p. 118).

Chapter III

1. Paul G. Garrity, "Redesigning Landlord-Tenant Concepts for an Urban Society," 46 J. Urban Law 695, 698 (1969).
2. Lemle v. Breeden, 51 H 426 (1969). See generally H. Lesar, Landlord and Tenant (1957) and Holdsworth, History of English Law (3d ed. 1923). See also, Lesar, "Landlord and Tenant Reform," 35 N.Y.U.L. Rev. 1279 (1960) where Professor Lesar states that most of the rules which have proved troublesome in the law of landlord and tenant arose out of the concept of the lease as a grant of an estate in land. He also comments that the common law basis of the landlord-tenant relationship rests on tenant remedies, such as ejectment, which focused on land rather than dwellings, "The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years," 9 Kan. L. Rev. 369 (1961).
3. Supra, chapter 1, fn. 1.
4. The literature describes the landlord's attitude, also, as "take it or leave it" or "if you don't like it, move", e.g., Garrity, at 698 to 701; Sternlieb, at 9.

5. Section 359-121, Hawaii Revised Statutes, establishes a rent supplement program for low-income tenants whose annual rent exceeds 20 per cent of their annual income. The rent-income ratio on Oahu increased from 16.9 per cent in 1958 to 23.8 per cent in 1969, with the median monthly rate increasing from \$70 to \$147 (State of Hawaii Data Book 1970, Department of Planning and Economic Development, Table 124, p. 119).
6. Gerald R. Gibbons, "Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code," 21 Hastings L.J. 369, 382 (January 1970).
7. See Gershon M. Ratner, "Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services," IV Harvard Civil Rights-Civil Liberties Law Review 1, 15, 31 (Fall 1968).
8. Report of the National Advisory Commission on Civil Disorders (Bantam, 1968), p. 7; specific problems included substandard, old, and overcrowded structures; high rents for poor housing; inadequate housing code enforcement; housing conditions and disorder; deteriorated housing; racial discrimination; lack of government response (pp. 467 to 482).
9. George Sternlieb, The Tenement Landlord, Rutgers University Press (1966), p. 234.
10. Legal Remedies for Housing Code Violations, National Commission on Urban Problems, Research Report No. 14 (1968), p. 1.
11. In effect now pursuant to Act 41, Session Laws of Hawaii 1970.
12. Myron Moskowitz and Peter J. Honigsberg, "The Tenant Union-Landlord Relations Act: A Proposal," 58 Georgetown L.J. 1013 (June 1970).
13. Model Residential Landlord-Tenant Code, pp. 87 to 93.
14. Joseph S. Slavet and Melvin R. Levin, New Approaches to Housing Code Administration, National Commission on Urban Problems, Research Report No. 17 (1969).