

University of Michigan Journal of Law Reform

Volume 2

1968

Draftsman: Formulation of Policy

Carl Schier

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Housing Law Commons](#), [Law and Society Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Carl Schier, *Draftsman: Formulation of Policy*, 2 U. MICH. J. L. REFORM 227 (1968).

Available at: <https://repository.law.umich.edu/mjlr/vol2/iss1/9>

This Project is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

DRAFTSMAN: FORMULATION OF POLICY

*Carl Schier**

I. Introduction

Most low income families rent their living accommodations; for them the lease arrangement is a precarious one at best. It is generally a periodic tenancy from week to week or month to month with the agreement rarely reduced to writing. If the allocation of rights and duties between the parties is spelled out by them at all, it is quite one-sided and normally delineates only what the *tenant* may and may not do. When there is no written agreement or when the writing is silent as to the obligations of the parties, the common law of landlord and tenant controls, leaving the landlord in a position of near absolute control over his tenant. The premises conveyed under a lease are of uniformly low quality. Buildings are old and facilities supplying heat, light, and water are badly in need of repair or replacement. Rents, however, are uniformly high, a circumstance which results from heavy demand in a market of extremely short supply. Given that the low income family must lease its housing accommodations in the private market where the quality is poor and the supply is limited, the question is whether law reform can be expected to work a substantial change.

The law reform accomplished in Michigan in 1968 was begun by limiting the legal frame of reference in the hope that the impact of reform could be maximized. The framework for Michigan reform was limited to two areas: first, the law of landlord and tenant since that law governed nearly all relationships between buyers and sellers of housing accommodations; second, the law of environmental control, such as housing codes and other health and safety laws, which was to be clarified and in some measure integrated with landlord-tenant law. Realistic goals were stated within this limited legal framework. First, the tenant must have sufficient space for the comfort and convenience of himself and his family. Second, the term of occupancy should be long enough that the tenant is assured some degree of permanency. Third, the premises must be maintained in a safe and sanitary condition. Fourth, basic services, such as heat, light, and water, must be provided in sufficient quantity and quality to meet normal needs. And fifth, the price to be paid by the tenant for the premises and the attendant services should reflect his ability to pay in some measure. A more encompassing goal was to alter the balance of power in the lease relationship so that the tenant might assume some responsibility

*Member of the Michigan Bar.

and control in matters fundamental to his well-being. If the tenant had the leverage to force his landlord to bargain, he could compel the commitment of more money to improve the quality of existing housing. There would be no limit on the nature and variety of beneficial considerations which he could extract with his bargaining leverage.

Prior to 1968 no support for efforts to achieve these goals could be found in the law. No coherent, unified body of substantive law governed the various relationships arising out of the occupation of multiple dwellings. The law was rather a patchwork enforced through actions brought by the parties to the lease. Even the code law governing environmental control was unclear in its relationship to the tenant and was enforced by a local governmental officer. The substantive law did not recognize rights which tenants claimed to be theirs in the natural order of things, as for example the right of a person with a large family to have space sufficient to his needs made available to him at a reasonable cost. More importantly, perhaps, acknowledged rights could not be secured through existing remedies. A tenant, convinced that he had been evicted as a result of his lawful complaints to local building officials about code violations on the premises, was not permitted to present evidence of the wrongful nature of the eviction by way of defense. Relief often depended solely on the control exercised by a local official charged with the enforcement of a housing code or other health ordinance. As a matter in the official's discretion, enforcement was often based on considerations other than the needs of those the law was intended to benefit.

II. Summary of Proposed Bills

In the 1968 Regular Session the Michigan Legislature enacted six bills, popularly known as the Tenants' Rights package.¹ The bills were drafted to interlock, and they complement one another in establishing remedies.

One bill amended the State Housing Law, which had been adopted in 1917, by substituting a new enforcement section.² Although the objectives of this ancient law were inappropriate for urban renewal and its standards hopelessly antiquated, the amendment was directed at the woefully inadequate enforcement provisions because wholesale revision of the code had failed to pass the Legislature in previous years. The general maintenance sections of the code, if properly enforced, were thought to offer adequate relief to low income tenants in most instances. A second bill altered the general rule that the tenant accepts leased premises as he finds them, imposing on the landlord an obligation to put the premises in a

¹ H. 3188, providing for new code enforcement procedures; H. 3395, establishing covenants of fitness and repair; H. 3397, requiring just cause for eviction from public housing; H. 3396, creating a Board of Tenants Affairs; H. 3384, amending the summary possession law; S. 804, the open occupancy and fair housing law.

² P. A. 1968, No. 286.

condition fit for habitation prior to the tenant's taking possession and an obligation to maintain the leased premises throughout the term of occupation.³ Covenants to this effect were to be read into every lease or license of residential premises as a matter of statutory law.

To prohibit the termination of tenancy in public housing without reason, the third bill provided that no tenancy could be terminated except for just cause.⁴ Illustrative reasons that would satisfy the requirement of just cause were provided in the bill. A fourth bill provided for the creation of tenants' councils in any community that operated public housing projects or facilities, although the bill as enacted was limited in its application to the city of Detroit.⁵ These councils were given the power to control relations between tenants and project management. The fifth bill amended the state's summary possession law, creating a variety of defenses to an action for possession and liberalizing the provisions requiring an excessive bond on appeal.⁶ The final bill, perhaps symbolically most important, was the fair housing or open occupancy bill.⁷

III. Housing Code Enforcement

The most striking aspect of the amendments to the enforcement article of the state housing law is that the proposed changes were intended more to clarify and to elaborate on existing procedures than to establish an entirely new mode of enforcement. Significant innovations were adopted, but the greatest single accomplishment was to indicate in detail the variety of enforcement remedies long ignored by local officials.

A. Prior Law

The pre-1968 enforcement sections contained a skeleton procedure consisting of two parts. Various administrative functions performed by officials at the local level, such as the health inspector or a building inspection engineer, make up the first part. The formal and informal procedures used by inspectors are sufficient in most cases to secure compliance. The second part consists of formal procedures leading to compliance orders issued by hearing boards or courts and backed by the threat of contempt citations or criminal prosecution.

The old procedures included registration and indexing of the names of owners of buildings and their agents, periodic inspections, entry upon premises, issuance of certificates of compliance, and issuance of notices of violation and orders to comply. If, following inspection, a notice of violation and an order to correct did not result in compliance, the en-

³ P. A. 1968, No. 295.

⁴ P. A. 1968, No. 267.

⁵ P. A. 1968, No. 344.

⁶ P. A. 1968, No. 292.

⁷ P. A. 1968, No. 112.

forcing official was given four alternatives: to seek a misdemeanor conviction under the statute; to bring an action for recovery of a "civil penalty"; to bring an action for an injunction or other equitable relief; or to have the violations corrected and obtain a lien against the real property for the costs. Where fines or penalties were left unpaid, liens could be obtained by proper recording of the judgment in the civil or criminal action.

Enforcement was not solely the province of local officials. Some language in the act suggested that an occupant in a multiple dwelling might bring an action to enforce the act, while a self-help provision permitted the withholding of rent where certificates of compliance had not been obtained. Although the arsenal of remedial weapons in the hands of the local enforcing official thus seemed adequate in even the most difficult situations, the grants of power were either ineptly drawn or circumscribed by such limitations as to emasculate them effectively. This is unfortunately characteristic of enactments which purport to exercise or delegate powers which protect public health, safety, morals and the general welfare. Whether the limitations were the product of inadvertence or design is unclear, but their existence could not be disputed. The provisions for registering and indexing the names of owners and agents were not accompanied by any requirement that records be kept with regard to such matters as the number of inspections, the number of violations, the anticipated time for compliance, or estimated costs. The section providing for the right of entry by enforcement officials was limited only in that inspections were to be undertaken at reasonable hours. No provision was made for a warrant procedure as required by recent Supreme Court decisions.⁸ The procedure for noting violations and ordering corrections gave no direction to enforcing officials. The statute merely stated that "every notice or order in relation to a dwelling shall be served five days before the time for doing the thing in relation to which it shall have been issued." Doing one's "thing" on five days notice might be difficult at times, especially if the "thing" were the replacement of plumbing or heating facilities. In addition to allowing a reasonable time for compliance, the notice had to state the date of the inspection, the name of the inspector, and the sections of the law that were violated.

The certificate of compliance under the old law had an impact only upon new construction and buildings converted into dwellings. It issued only once prior to first occupancy as a condition precedent to lawful occupation of the building. Had it been given continuing legal effect and made subject to revocation or suspension where conditions warranted, it could have been a useful enforcement device. The single self-help provision which permitted rent withholding was dependent on the status of the

⁸ *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1966); See *v. City of Seattle*, 387 U.S. 541 (1967).

certificate of compliance, for rent could be withheld only when the certificate had not been issued. Yet since the certificate was issued only once, and that was done prior to first occupancy, subsequent decay making the buildings unsound would not be a circumstance that would authorize rent withholding if the buildings had been lawfully occupied in the beginning.

The other provision which might have been interpreted to permit tenant-initiated enforcement stated simply that "an action may also be brought and proceedings taken for the enforcement of this act by any taxpayer." The language "any taxpayer" left unclear whether suit had to be brought by a person who was adversely affected by the existence of the violation.

Of the four remedies for coercing compliance, the one most likely to be chosen by the enforcing official but the least likely to be effective was the criminal sanction. This choice was popular chiefly because it was convenient: no building official or city attorney ever had the time to draft the lengthy pleadings needed to institute court proceedings for equitable relief. There was, however, another reason for not using other available remedies: the constitutionality of the section providing for hearings by the local legislative body and the subsequent undertaking of repairs to be secured by lien was doubtful. Notice of hearings could be provided by personal service or by certified mail sent to the last known address of the owner. Failure to receive the certified mail, however, would not affect the validity of the proceedings nor was any minimum time for giving notice set, although notice was to be posted in a conspicuous place on the dwelling seven days before the hearing. The failure to distinguish between residential and non-residential owners, to require personal service on residential owners, and to provide a minimum time for giving notice would constitute lack of procedural due process today.

B. The 1968 Amendments

Remedying the inadequacy of the existing law meant specification of the procedures to be used by enforcing officials and the courts in securing compliance: delegation of enforcement authority, methods of inspection, a warrant procedure for gaining entrance to premises, requirements for issuance and suspension of certificates of compliance, and procedures to be followed where violations were noted. A step-by-step, chronological order was set out for law enforcement officials so that they would not mistake what was required of them.⁹

The innovations were devised in the area of coercive remedies. Under the prior law criminal prosecution of the violators as misdemeanants had been favored and had proved overwhelmingly unsuccessful. Cases were adjourned interminably, and when fines were imposed they were rarely

⁹ MICH. COMP. LAWS §125.525-533 (1968).

large enough to do more than touch the offender's purse. All criminal sanctions were omitted from the new law, as reliance was placed on the ability of the court of general trial jurisdiction to compel compliance through the exercise of its equity powers. After hearing the matter the court, in appropriate circumstances, may issue a mandatory injunction,¹⁰ appoint a receiver,¹¹ or authorize the local unit of government to make the repairs.¹² If repairs are undertaken by a receiver or by the local unit of government, the court is given the power to grant a lien against the "real property" for costs and expenses of the receivership and for the expenses of repair and renovation.¹³ In the order granting the lien the court may also establish the priority of the lien, except that it may not be senior to tax and assessment liens, nor to any mortgage lien which "has a recording date prior to all of their liens of record . . . if, at the time of recording such mortgage or at anytime subsequent thereto, a certificate of compliance . . . is in effect on the subject property."¹⁴

Presumably the relief described in the preceding paragraph could have been obtained under the prior law, which provided for bills of complaint, petitions, and applications to the circuit court and chancery for injunctions or for an "order granting the relief for which said action or proceeding is brought." What is innovative in the new law is the right which is given to an occupant of premises upon which a violation exists to bring an action in his own name for enforcement. If a local enforcing agency applies to the court, or the occupant-plaintiff gives a notice of request, the enforcing agency may be joined with or substituted for the occupant as a plaintiff.¹⁵ The occupant having filed his complaint is also given the right to apply to the court for authorization to make repairs and deduct the expense thereof from his rent payments.¹⁶

The common law cause of action which the lessee might bring against his lessor for damages and injunctive relief for breach of the covenant of quiet enjoyment has been expanded. The lessee now has a statutory right of action against the owner where a violation of the housing law which the owner is obligated to correct interferes with the use and occupation of the premises.¹⁷

At least one innovation proved too strong for a citizens committee¹⁸ which reviewed the bill prior to its introduction in the Legislature. As initially drafted, the bill provided for an affidavit by the owner which

¹⁰ *Id.*

¹¹ *Id.*, §125.535 (1968).

¹² *Id.*, §125.534 (1968).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*, §125.536 (1968).

¹⁸ The New Detroit Committee, formed after the 1967 Detroit riots to inquire into the causes of the disturbances and suggest cures.

would be attached to the documents of transfer and would state known code violations; if the premises were believed to be free of violations, the affidavit would have to state that there were no violations. No deed would have been entitled to record unless such affidavit were attached. If a transfer were completed without compliance with the affidavit requirement, it would have been voidable at the option of the transferee within twelve months from the date of exchange.

IV. Leasehold Covenants Obliging the Landlord to Maintain the Premises

It is arguable that, prior to the enactment of the 1968 legislation in Michigan, a duty was imposed on the landlord both by case law¹⁹ and statute²⁰ to put the premises in habitable condition before the tenant takes possession and to keep them in good repair throughout the term of the tenancy. But one old case and a statute honored more often in the breach than in the observance did not establish precedents in which the tenant could place his confidence. Furthermore, another statute prohibited the implication of covenants in conveyances of real property²¹ such as leases; as a consequence, only with great hesitation would one expect to persuade a trial judge that Michigan courts recognized an implied covenant of fitness in leases of residential property.

Under the new statute²² the occupant of rented housing, whether a lessee or a licensee, has the benefit of two covenants which will be found in every rental agreement. The first covenant is in effect a warranty that the premises are fit for the uses intended by the parties at the time of taking possession. The second is in effect a promise of future performance and states that the lessor or licensor covenants to keep the premises in reasonable repair during the term of occupancy and to comply with all applicable health and safety laws. An exception to the landlord's obligation under the second covenant is created where the "disrepair . . . is caused by the tenant's willful or irresponsible conduct or lack of conduct."²³ Even though the State Housing Law imposes on the owners of all dwellings a general duty to repair,²⁴ that obligation ordinarily does not give rise to implied or constructive contractual obligations on which the tenant may rely. Therefore it was felt necessary to establish as a matter of law the landlord's promissory duty to make the premises fit for habitation at the time of taking possession and throughout the term or period of the tenancy.

The rule of *caveat emptor* is clearly rejected, for the statute provides

¹⁹ *Leonard v. Armstrong*, 73 Mich. 577, 41 N.W. 695 (1889).

²⁰ MICH. COMP. LAWS, §125.471 (1968).

²¹ *Id.*, §565.5 (1968).

²² *Id.*, §554.139 (1968).

²³ *Id.*, §554.139(1)(b) (1968). This provision was drafted by the New Detroit Committee.

²⁴ *Id.*, §125.471 (1968).

that the right of a prospective occupant to inspect the premises before concluding the agreement, if exercised, does not imply a waiver of the covenants.

V. *Rights of Tenants in Public Housing*

Legal relations between tenants and the project management of public housing are governed by the law of landlord and tenant and by rules imposed by the Housing Commission. Tenants are given a lease which creates a tenancy from month to month, the tenancy for a term of years being eschewed because of the difficulty in evicting occupants. Obtaining an eviction is a relatively painless matter for the project administration when the tenancy is periodic. Rules and regulations are made by the project management and the Housing Commission; they tend to weigh rather heavily on the tenants. Public housing is an assistance program, and characteristically such programs leave recipients with little control over the way in which benefits are administered.

The stimulation of fundamental changes in the administration of welfare housing is the objective of the two statutes enacted by the Legislature in this area. The first statute²⁵ looks to the narrow problem of evictions, a problem which can best be illustrated by a shocking example. Mrs. X and Mrs. Y were tenants in a Detroit housing project, and Mrs. Y, the daughter of Mrs. X, found herself the recipient of an eviction notice. The project management contended that Mrs. Y had been letting unauthorized persons use her apartment, and that during these illegal occupations Mrs. Y stayed with her mother, Mrs. X, in her mother's unit. When it became apparent that Mrs. Y was going to fight the eviction, notice was also given to Mrs. X that her tenancy would be terminated. Mrs. X was an elderly lady who had been a model tenant for sixteen uneventful years, and the clear intimation from the management was that the notice to Mrs. X would be rescinded if Mrs. Y would leave the project voluntarily.

There may be no eviction under the new act except for "just cause." Illustrations of cause set out in the statute include failure to comply with the obligations of the lease or the lawful rules and regulations of the Housing Commission; the use of a unit for an unlawful purpose; the maintenance of unsafe or unhealthful conditions on the premises; and ineligibility for continued occupancy by reason of overcome.

The language of the act as passed should be contrasted with that of the proposed bill which indicated that just cause would include "a *repeated* failure to comply with the obligations of the lease . . . such as a failure to pay *successive* installments of rent; the *continued* use of a unit for any unlawful purpose." (emphasis added) As drafted the statute was intended not to permit eviction for a minor transgression, and therefore it was

²⁵ *Id.*, §125.694(a) (1968).

clearly indicated that repeated wrongdoing was the gravamen of cause for eviction. Certainly one could expect breaches of such magnitude that one occurrence would suffice to justify eviction: but such an eviction was not forbidden by the proposed language. The draft, however, also ensured that project management was not given a weapon against the tenant in the form of termination for the slightest breach.

The second statute²⁶ created Boards of Tenants Affairs, although the initially intended application to all communities was ultimately limited to communities of one million or more inhabitants, effectively excluding all cities except Detroit. The act seeks to achieve three objectives. First, it requires the local Housing Commission to adopt rules governing eligibility requirements, obligations of tenants, conditions for continued occupancy, the elements of cause for eviction, and such other rules and regulations as are necessary to administer the local projects effectively.²⁷ Second, the act provides for the organization of the Board. There are to be not less than eight nor more than twenty members, one-half being elected by their fellows from tenants and local projects, and one-half appointed by the mayor of the local unit of government.²⁸ Third, the act sets forth the powers of the Board: to advise the Housing Commission on matters concerning the welfare of the tenants, to review and possibly veto rules of the local Housing Commission, and to hear and determine complaints by tenants or applicants for public housing arising from decisions of the project management or Housing Commission.²⁹

In effect, the Board becomes a governing body sitting in judgment on matters which directly affect the tenants, guiding decisions of the project administrators, and proposing rules and regulations to the Housing Commission. The act and the Board which it creates are perhaps accurately characterized as hopeful experiments. There will remain in practice the very serious question whether these tenants can become active participants in the management of their daily affairs.

VI. The Summary Possession Law

A. Prior Law

The right of the landlord to regain possession of premises to which he holds legal title without having to engage in extended litigation is unquestionably the source of his greatest strength in contests with tenants. Under prior law the landlord had the right to oust the tenant when the tenant held over at the end of the term, or after notice to quit in the case of periodic tenancies and estates at will or by suffrance; when the tenant

²⁶ *Id.*, §125.694(b), .699 *et. seq.* (1968).

²⁷ *Id.*, §125.694(b) (1968).

²⁸ *Id.*, §125.700-.701 (1968).

²⁹ *Id.*, §125.702-.704 (1968).

held over contrary to the terms or conditions of his lease; when rent had come due and the landlord's obligation to demand payment was waived in writing; and when rent came due and the tenant refused to pay or relinquish possession of the premises for seven days after notice to quit.

Actions were brought before a court of limited jurisdiction and were tried there so long as title to the premises was not in issue. The complaint was abbreviated, merely setting forth the statutory grounds showing the plaintiff was entitled to relief. By way of defense the defendant pleaded orally in open court: "guilty" or "not guilty." As framed by the denial the issues were whether the plaintiff was the proper party to seek possession; whether proper notice had been given to terminate the periodic tenancy, or whether the term was at an end; whether the defendant had paid the rent; and whether the defendant was in possession. Affirmative defenses, other than the defense of partial eviction, were not permitted. For centuries the rule was that covenants in a lease were independent and that a breach of the landlord's covenant to repair, for example, did not give the tenant a right to withhold his rent. He had to pay the rent when due and then sue for damages; of course, any tenant who sued his landlord for damages could expect to receive a notice to quit by the end of the next period. If the defendant had a valid claim for damages against the landlord, that claim could not be heard by the same tribunal hearing the claim for possession and no counter claims were permitted. If the tenant should lose and the court should order a writ of restitution to issue, the tenant could appeal as a matter of right to a court of general trial jurisdiction for a *de novo* hearing. However, this right was limited in the most absolute and conclusive way by a provision that required an appeal bond in an amount equal to *nine times* the monthly rental. For a tenant who had difficulty in scraping together one month's rent from period to period, the making of a cash deposit of nine months' rent was impossible. The cash bond was the only alternative: no surety would post the bond for any premium and the court never permitted a personal bond.

B. 1968 Amendments

The changes enacted in the Summary Possession Law were directed at the single objective of extending duration of the tenancy by making it possible to delay the execution of a writ of restitution for long periods. Appeals alone add nearly a year to the normal ten days grace period, while the landlord is not harmed since the changes in the law permit the court to require monthly rental payments as a condition for continuing the appeal without a cash bond.³⁰ The duration problem has been met and settled in the case of public housing. No action may be brought under the statute unless the landlord alleges the reasons why the action is

³⁰ *Id.*, §600.5670 (1968).

brought and further refers to law or to rules of the Housing Commission which support his claim that just cause for the eviction existed.³¹

Aside from the tactics of delay, however, the amended Summary Possession Law permits defenses not previously available to the tenant. If the landlord can be shown to have terminated the tenancy for any of a number of prohibited reasons, this will constitute an absolute defense and judgment will be entered for the defendant.³² The defense has the added effect of increasing duration in some small measure as the instances in which the landlord may lawfully terminate the tenancy are curtailed. The amending act also permits the assertion of the affirmative defense of failure of a constructive condition precedent, a defense long recognized in contract doctrine. The prior legal doctrine of independence of covenants in the lease was thus substantially modified. The tenant need only persuade the court that the failure of the landlord to repair, if that is the case, is a substantial breach of contract, giving rise to a failure of a constructive condition precedent to the duty to pay rent. Since a statutory covenant to repair is implied, the task of persuasion should not be difficult. The new section of the Summary Possession Law implicitly recognizes these statutory covenants as it permits that "the defendant may state such defenses as he may have upon the lease or *contract*, or against the opposing party."³³ Extended pleadings are now permitted, as the law states that "the defendant may file any responsive pleading permitted by the court rules."³⁴

Other affirmative defenses are set out in the amending act which may be pleaded in defense to a suit for possession whether brought to collect rent or to evict a holdover tenant after notice to terminate. The tenant will prevail if he can establish by a preponderance of the evidence that the termination was intended as a penalty for attempting to secure rights under the lease or agreement, or under the laws of the state or of the United States; or as a penalty for making a complaint of unsafe or unsanitary housing conditions to an appropriate governmental agency; or as retribution for any other lawful act arising out of the tenancy (such as organizing a tenants' council).³⁵

The difficult bond requirements for the right of appeal have been liberalized. The penalty of the bond is now to be fixed at a reasonable amount. If the appellant cannot obtain sureties or make a cash deposit, he may have the bond without sureties of cash deposit and upon reasonable conditions determined by the court,³⁶ including the possibility of monthly rental payments to the landlord.

³¹ *Id.*, §600.5637 (1968).

³² *Id.*, §600.5646 (1968).

³³ *Id.*, §600.5646(3) (1968).

³⁴ *Id.*, §600.5646(2) (1968).

³⁵ *Id.*, §600.5646(4) (a)-(c) (1968).

³⁶ *Id.*, §600.5670 (1968).

A provision was added by the Legislature which should be carefully noted, as it could become oppressive for tenants who are living in deteriorated housing. The amending act provides that if a tenant causes a serious and continuing health hazard or physical injury to the premises and refuses to restore the premises or deliver up possession within seven days, he will be subject to eviction.³⁷

³⁷ *Id.*