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Rent Control in the 1970’s: The Case Of the New Jersey Tenants’ Movement

By KENNETH K. BAAR*

In New Jersey, an effective middle class tenants’ movement has emerged. Within the past five years more than 110 New Jersey municipalities have adopted rent control ordinances. Furthermore, in 1974, New Jersey became the first state to adopt a law requiring that evictions from all residential units (with the exception of owner dwellings with not more than two units) be based on good cause. The strength of the New Jersey tenants’ movement has no parallel in the

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* A.B., 1969, Wesleyan University; J.D., 1973, University of California, Hastings College of the Law; member, California Bar. Research for this article was supported by a grant from the DJB Foundation, New York.


1. Some of the materials in this article are based on the author’s personal observations.

2. N.Y. Times, Mar. 7, 1976, § 8, at 1, col. 1. Included are eleven of the thirteen cities in the state with over 50,000 residents. The cities with rent controls contain approximately 550,000 of the 868,000 rental units in the state. This figure is based on an examination of census data on tenant-occupied units in each city, contained in 1 U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, pt. 32, § 1.

3. The following causes constitute grounds for eviction: tenant’s failure to pay the rent, provided that any increase in the rent is not “unconscionable;” disorderly conduct; negligently permitting or wilfully causing damage to the premises; breach of reasonable rules or convenants agreed to in the lease; refusal to agree “at the termination of the lease, [to] reasonable changes of substance in the terms and conditions of the lease, including specifically any change in the term thereof . . . ;” and owner intention to end rental of the premises either after citation for code violations which would be economically unfeasible for the owner to correct, or as part of the “permanent” retirement of the unit from the housing market. N.J. STAT. ANN. § 2A:18-61.1 (Supp. 1976). For a discussion of the law see Note, New Rights for New Jersey Tenants—“Good Cause” Eviction and “Reasonable Rents,” 6 RUTGERS (CAMDEN) L.J. 565 (1975).

No other state has an eviction for cause law which covers rental units not subject to rent control. In the 1920’s, several states passed laws requiring just cause for eviction in an action for possession. See Willis, Fair Rent Systems, 16 GEO. WASH. L. REV. 104, 135-36 (1947); N.J. Laws of 1924, ch. 69, §§ 109-30a to -30k (repealed 1930).
history of the United States, with the possible exception of New York City.  

The New Jersey tenants' movement, which at first consisted mainly of strikes and demonstrations, was started in 1969 largely in middle income suburbs of New York City by residents of large apartment complexes. These tenants were outraged by substantial rent increases, often accompanied by cutbacks in maintenance. In many cases the tenants felt squeezed because of their inability to buy single family dwellings, which were quickly inflating in price. In response to the growing discontent, a core of dedicated tenant leaders formed the statewide New Jersey Tenants Organization in order to help tenants organize on a local level. Tenants led by the NJTO first looked to the state legislature for rent control and other landlord-tenant reforms. When it became apparent in 1971 that the state legislature would not enact a rent control statute, apartment dwellers, through intensive lobbying and attendance at city council meetings, pressured municipalities into adopting local rent control ordinances. The local ordinances were adopted despite a holding by the New Jersey Supreme Court in 1957 that localities could not enact rent controls which were not specifically authorized by state statute. In 1973, after eighteen cities had adopted local rent control ordinances, the court overruled its 1957 decision. Although by that time, the legislature probably would have passed a state rent control act, tenants abandoned their efforts to obtain a statewide measure, opting instead for legislation at the municipal level, where they felt that they had the most political clout.

Within two years, eighty more municipalities adopted local ordinances. These ordinances, which were administered by unpaid boards, usually provided for property tax pass-alongs and annual rent increases tied to the Consumer Price Index. When severe inflation in 1974 and 1975 led to substantial rent increases under the provisions of the ordinances, local boards amended the laws to restrict annual increases either to a fixed percentage of the rent (from 2½ to 7 percent) or to a percentage of the increase in the Consumer Price Index. Landlords, who had opposed any form of rent legislation in the past and


were now being squeezed by fuel price increases, started to advocate statewide legislation tying rent increases to the Consumer Price Index as an alternative to local legislation. They also launched a new series of legal attacks on the local ordinances, arguing that the ordinances were unconstitutional because they failed to guarantee landlords a fair return on their investments and restricted rental increases to an amount less than their increases in operating costs. In December 1975, the state supreme court rejected these attacks and set forth very general guidelines for local boards to follow in reviewing anticipated applications for hardship increases. The court also contributed to pressure for statewide legislation by indicating that it was disturbed by the inexpert approach of local governing bodies to rent control, and by suggesting a need for a statewide law which would include a formula for granting hardship rental increases to landlords.

The events which occurred in New Jersey are of particular significance since they are the result of a suburban middle class tenant movement. They suggest that organizations of middle class occupants of large apartment complexes may be far more effective than low income tenant movements in bringing about legislative change in landlord-tenant statutes.

The purpose of this article is to describe the history of the New Jersey rent control movement. This movement has nationwide relevance. Throughout the nation, construction costs are placing home ownership beyond the means of a substantial portion of the middle class and are making the construction of middle income multiple-dwelling rental properties economically unfeasible. Furthermore, zoning ordinances of suburban towns frequently exclude apartment construction. Under these circumstances, it is possible that middle income people all over the country may eventually face the predicament

7. See notes 241-61 & accompanying text infra.
8. Id.
10. In a June 1976 interview, a representative of the New Jersey Builders' Association stated that the high cost of land and construction makes it infeasible to build two bedroom apartment units which rent for less than three hundred dollars per month.
11. In 1969, the assistant secretary for research and technology of the Department of Housing and Urban Development reported that 99.2% of all undeveloped land in the country earmarked for future dwelling purposes is restricted to single family dwellings. N.Y. Times, Nov. 7, 1969, at 16, col. 4.
of New Jersey apartment dwellers who cannot afford to move and are faced with escalating rents and deteriorating services.

I. Historical Background—Rent Control in the United States

Prior to 1969, rent controls were limited to periods of war-created housing emergencies. Between the years 1920 and 1923, several cities and states adopted rent control or eviction control statutes in response to the housing crisis created by World War I. They were seen as temporary emergency measures which would have been unconstitutional under normal peacetime conditions. During World War II, Congress passed the Emergency Price Control Act, which authorized the Administrator of the Office of Price Administration to stabilize rents for any housing accommodations within a particular defense rental area. By October 1942, the entire nation had been designated as a potential defense rental area. In some areas, Congress maintained the designation until April 1954 and continually renewed the “temporary” controls by extending the authority of the Office of Price Administration to regulate rents.

New York City, in contrast to the rest of the nation, has had continuous controls since 1921, except for the period between 1929 and 1942. Rents were virtually frozen from 1943 to 1953, with increases allowed only in cases of hardship or vacancies. As a result of vacancy

12. For a discussion of rent controls during and after World War I, see Drellich & Emery, Rent Control in War and Peace (1939); Schaub, The Regulation of Rents During the War Period, 28 J. Pol. Econ. 1 (1920).

13. Shortly after World War I the Supreme Court held: “The [rent control] regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.” Block v. Hirsh, 256 U.S. 135, 157 (1921). For the background of the emergency requirement see Baar & Keating, The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control, 7 Urban Law 447 (1975).


18. Usually rent increases were confined to instances in which there was a change in tenancy. State Study Commission for New York, The Management of the Maximum Base Rent Program by the Housing and Development Administration of New York City—From June 1970 to October 1972, at 12 (1972).
decontrol, rents often varied enormously among units within the same building; tenants who lived in the same unit for many years were disproportionately favored by the law. In some cases, landlords profited when poor maintenance led to higher turnover and successive rent increases. In 1953, an across-the-board rent increase of 15 percent over 1943 rent levels was granted. Rents in units constructed after 1947 were not controlled. During the 1960's, increased operating costs in controlled apartments outpaced rent increases, which averaged 2 percent per year. Massive studies of New York City's housing crisis, which were conducted at the end of the 1960's, documented a gap between operating revenues and operating costs in rent controlled units. The studies recommended that the existing system of controls be replaced. Opponents of rent control have subsequently pointed to the New York experience to show that rent controls lead to abandonment and tax delinquency, despite the existence of persuasive evidence that neighborhood decay and the unavailability of financing for building in poor neighborhoods were actually the major causes of abandonment and tax delinquency.

19. Under vacancy decontrol, rents in units which became vacant could be raised 15%.
20. "Originally enacted under federal rent control in 1947, the 15 percent increase provision [referred to in note 19 supra] has created the least justifiable effects of rent control. Typically an apartment will have been re-rented fewer times than an identical apartment in the same building. Some apartments may not have changed hands at all since 1943. There may be a difference, therefore, of more than 100 per cent in the rents charged for identical apartments in the same building. Rent administrator Frederic S. Berman has stated that of all the complaints about rent control this is the most justifiable." Comment, Residential Rent Control in New York City, 3 COLUM. J.L. & SOC. PROB. 30 (1967).
25. "Rent control was far from the dominant cause indicated by owners as the reason for their structures getting in trouble.
"When analysis was made of rent control as an inhibitor of rent increase for the 710 respondents on this point, there was negligible variation in the response of tax delinquent and non-delinquent owners. In the former case, 79.3 percent said that they could get more for their apartments if there were no rent control, and in the latter case 82.1 percent made similar assertions. When questioned in depth as to whether they could secure these increases 'for all of them,' again there was no distinction between delinquents and non-delinquents."
In 1970, the New York City Council adopted a maximum base rent ordinance.\textsuperscript{26} The ordinance, which was designed to encourage maintenance, ties rents to an operating cost and fair return formula.\textsuperscript{27} Landlords are allowed to increase rents at a rate not to exceed 7.5 percent a year until the maximum base rent for each unit is reached. Between 1970 and 1975, rents rose an average of 57 percent, while average income for city residents went up only 17 percent.\textsuperscript{28}

Since 1969, particularly in the Northeast, tenants have organized to exert pressure for rent controls.\textsuperscript{29} The movement for rent control has been led primarily by middle class citizens who have been forced into tenant status without substantial bargaining power under condi-

"Given this factor, it is intriguing to match it against the fact that the bulk of the reasons given by owners for vacated buildings and buildings which have fallen into in rem proceedings do not include rent control. This statement should not be equated with the claim that rent control has been completely blameless. But many of the delinquent or vacant structures dealt with in this chapter are probably beyond the state which could command new private capital inputs even if controls were significantly alleviated." Sternlieb, \textit{supra} note 24, at 706-07. On the incidence of similar housing phenomena in cities without rent control, see Sternlieb, \textit{Bulldozer Renewal}, 25 \textit{JOURNAL OF HOUSING} 180 (1968).

The National Urban League has concluded: "From the evidence available, it is difficult to prove a linkage between abandonment and rent control." National Urban League, \textit{National Survey of Housing Abandonment} 33 (1971). Moreover, in a report prepared by Sternlieb, which was submitted to the House of Representatives, the view that rent control was a major cause of abandonment in New York City was rejected: "Rent control, though certainly a contributory factor, is far from basic to the scene. If there were no rent control I am afraid the process of abandonment would substantially continue." Sternlieb, Abandonment and Rehabilitation: What Is To Be Done, Appendix, at 2 (1970).


\textsuperscript{27.} "A 'fair' profit is represented by a Return on Capital Value . . . which amounts to a mean 42.4 percent of MBR." Hsia, \textit{The ABC's of MBR: How to Spell Trouble in Landlord/Tenant Relations (Up Against the Crumbling Wall)}, 10 COLUM. J.L. & SOC. PROB. 113, 132 (1974). Return on capital value is computed after taking into account operating expenses, but not debt service.

\textsuperscript{28.} N.Y. Times, Jan. 19, 1976, at 1, col. 5. The median rent in controlled apartments went from $97 to $133 during the five year period. \textit{Id.} at 20, col. 2.

\textsuperscript{29.} For a discussion of modern rent control concepts, laws, and their administration see M. Lett, \textit{Rent Control Concepts, Realities and Mechanisms} (1976). The author relies largely upon empirical studies which have concluded that rent control is harmful.
tions they consider outrageous. Some of the most successful rent strikes have resulted from disputes over such problems as the failure to maintain air-conditioning rather than from the presence of rats and roaches.

In 1969 the Massachusetts legislature gave Boston the power to adopt rent regulations. The Boston suburb of Brookline, without state enabling authority, enacted a local rent control ordinance, which was subsequently invalidated by the Massachusetts Supreme Judicial Court on the ground that Massachusetts cities do not have the power to adopt rent controls under local police powers. Four months after the high court decision, the state legislature passed a rent and eviction control statute which cities could adopt at their option.

The law gave local boards appointed by the mayor or town council authority to adopt regulations governing rent increases which would guarantee landlords a "fair net operating income." These boards were assisted by paid staffs whose salaries were financed by

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30. "Two or three years ago, there practically were no middle-class tenant unions," says an official of Urban Research Corp. . . . The activity of such unions this year is running about double last year's pace . . . . 'Unless rents level off or landlords begin improving services, well-to-do tenants will keep joining unions . . . .'

"..."

"At least one tenant with power on a national level is turning to unions for help with the landlord. Congressman Frank Annunzio was enraged last June when the monthly rent on his two-bedroom apartment was boosted to $295.50, an 11 percent increase. . . ."

"...


36. Id. § 1-7(a). There has been a great deal of variation among the different cities' provisions governing rental increases and defining the "fair net operating income"
rental registration fees. Units constructed after 1968 were exempted from controls. Cambridge, Brookline, Somerville, and Lynn passed rent control ordinances soon after the passage of the 1970 Massachusetts statute. The issue of whether these laws should be continued has been marked by intense political conflict on the state and local levels. After the state option law expired in April 1976, the legislature adopted in its place special enabling legislation for Cambridge and Somerville which substantially resembled the expired state option law.

In October 1969, Miami Beach, Florida passed a municipal rent control ordinance. In 1972, that law was struck down by the courts. In 1973, the city passed a new law after the state legislature expanded home rule powers to include the power to adopt rent control. The new law was struck down on the basis that it set confiscatory rent guidelines. In 1974, a third ordinance was adopted which is now being challenged in the courts.

provision. See HARBRIDGE HOUSE, supra note 34, at IV-1 to V-16.

In March 1971, the Cambridge rent board set a formula allowing for an 8 to 12% return on the value of property, which actually led to an 18.5% increase in rents. See Ackerman v. Corkery, Equity No. 17, at 6 (Middlesex County, Mass., Mar. 2, 1972). The court struck down the formula. That decision was upheld by the supreme court in Rent Control Bd. v. Gifford, 285 N.E.2d 449 (Mass. 1972). In 1972, with a view towards maintaining profits at their 1967 level, the Cambridge board established a formula which allowed landlords to raise rents 30% above their level in September 1967. Cambridge, Mass. Rent Control Board Regulation Series No. 70-01 (1972).

37. For a description of how the boards and staffs operated see HARBRIDGE HOUSE, supra note 34, at IV-1 to -146.

38. MASS. GEN. LAWS ANN. ch. 40 App., § 1-3(b)(2) (Supp. 1976).

39. See HARBRIDGE HOUSE, supra note 34, at ch. 4.

40. In several cases rent controls have been repealed by city councils and then reenacted under strong tenant pressure. For a city by city account of these events see id. ch. 4.

41. The special enabling acts for Boston and Brookline are still in effect. See notes 31, 34 supra.


43. Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972). The law was struck down on three grounds: (1) there was no emergency to justify its existence; (2) Florida municipalities do not have the power to adopt rent controls under home rule powers; and (3) the ordinance included an illegal delegation of legislative authority without appropriate guidelines to the rent control administrator.


47. Miami Beach, Fla., Ordinance 74-2018 (Dec. 31, 1974).

48. Interview with Joseph A. Wanick, Miami Beach City Attorney, June 12, 1976. The law was upheld by the trial court in Abenson v. Miami Beach, No. 75-7868 (Dade County, Fla. Cir. Ct. 11th Dist., Jan. 1976).
In June 1972, rent control was enacted by initiative in Berkeley, California.\textsuperscript{49} In 1973 a trial court struck down the ordinance.\textsuperscript{50} Three years later the California Supreme Court upheld the trial court ruling, but relied on totally different grounds.\textsuperscript{51}

At the federal level, on August 15, 1971, President Nixon ordered a ninety-day national freeze on wages and prices, including rents,\textsuperscript{52} pursuant to the powers granted to him under the Economic Stabilization Act of 1970.\textsuperscript{53} This temporary freeze was replaced by the Phase II economic stabilization program.\textsuperscript{54} Under Phase II controls landlords were permitted: (1) an annual increase equal to 2.5 percent of the

49. Berkeley, Cal., City Charter, art. 17, June 6, 1972.
51. Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 500 P.2d 1001, 130 Cal. Rptr. 465 (1976). The trial court struck down the law on the basis that there was no housing emergency in Berkeley. The presumption of validity which usually attaches to legislative findings of fact was held to be not applicable to the ordinance's declaration of emergency, since the finding of emergency was made by the voters through the initiative process without the benefit of formal legislative hearings on the existence of an emergency. Therefore, the trial court held a de novo hearing on the issue of whether there was a housing emergency in Berkeley, and decided that there was none. Such a restrictive view of the initiative process was subsequently rejected by the California Supreme Court in a separate case. San Diego Bldg. Contractors Ass'n v. City Council of San Diego, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

Two years after the trial court ruling, a two to one majority in the court of appeal decided that the ordinance was invalid because it did not have a termination date. "In that rent control derives its constitutionality from the existence of a rental housing emergency it is necessary that all municipal legislation enacting rent control provide for its termination." Birkenfeld v. City of Berkeley, 122 Cal. Rptr. 891, 904 (1975).

One year later, the California Supreme Court ruled that an emergency was not a prerequisite to a valid rent control ordinance. Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 153-57, 500 P.2d 1001, 1018-21, 130 Cal. Rptr. 465, 482-85 (1976). However, the court ruled that the charter amendment's mechanisms for granting rent increases were so unwieldy as to constitute a denial of due process. Under the ordinance, rent increases could not be granted on an across the board basis and individual increases could be granted only after a hearing before the whole rent control board.

base rent;\textsuperscript{55} (2) rent increases based on increases of state and local property taxes;\textsuperscript{56} (3) capital improvement increases;\textsuperscript{57} (4) base rent increases;\textsuperscript{58} and (5) hardship increases.\textsuperscript{59} Single family homes and units owned by landlords who owned not more than four rental units were exempted from controls.\textsuperscript{60} As a result, rents in a substantial percentage of rental units were not regulated.\textsuperscript{61} The Phase II regulations were extremely complex, making it difficult for tenants to question increase proposals of landlords.\textsuperscript{62} Furthermore, enforcement of the rules was lax.\textsuperscript{63} During the first nine months of the controls, rents rose an average of 3.5 percent in twenty-three major cities; in the New York-New Jersey area, however, increases averaged 7.7 percent.\textsuperscript{64}

The termination of Phase II controls on January 12, 1973,\textsuperscript{65} resulted in the passage of more state and local rent controls. After Maryland tenants vigorously protested rent increases, which immediately followed the termination of federal controls,\textsuperscript{66} the state legislature limited rent increases to 5 percent plus increases in real property taxes and utility increases incurred by landlords.\textsuperscript{67} The Maryland law, however,
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expired on July 1, 1974. In June 1973, Maine adopted a local option law modeled after the Massachusetts law. In November, Congress passed a law authorizing the District of Columbia to adopt rent control; pursuant to the federal act, the District of Columbia Council promulgated rent control regulations in 1974. In the same year, the Alaska legislature gave the governor and the state department of commerce the power to declare local housing emergencies and establish rent and eviction controls.

II. The New Jersey Rent Control Movement

While in most states the future of rent controls has been uncertain, the central issue in New Jersey has not been whether rent controls would continue, but rather what form they would take. The strength of the movement has forced the real estate lobby to abandon its opposition to rent control. Landlords are now beginning to advocate a statewide law, which they hope will be less stringent than the local measures now in effect.

A. The Setting

New Jersey experienced an 18.2 percent increase in population between 1960 and 1970. During the mid-1960's, there was a surge in the construction of multi-family rental housing in the state. Gar-

68. In 1973 the state law was supplemented by more stringent measures in Montgomery County and Prince George County. MD. ANN. CODE art. 6, ch. 29 (Supp. 1973); Prince George County, Md., Ordinance, ch. 33, no. CB-102-1973 (Nov. 6, 1973).
69. 30 ME. STAT. ANN. § 244 (1973). Shortly after the passage of the law, Bangor tenants obtained enough signatures to place a rent control measure on the ballot. Two years later they obtained a court order compelling the city council to place the measure on the ballot. Bangor Tenants Union v. Mooney, No. 115476 (Penobscott County, Me. Super. Ct. 1975). The measure lost at the polls.
72. ALASKA STATS. § 34.06.010-050 (1975). The law stated that an emergency existed when there was "substantial impairment of free choice in residential housing" or when the vacancy rate fell below 3%. Id. § 34.06.020(a).
73. See text accompanying note 54 supra.
74. 1 U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, pt. 32, § 1, at 4. This compares to a 13.2% increase for the nation over the decade. Id. pt. 1, § 1, at 42. The increase in population in New Jersey was particularly great in the bracket of age twenty through twenty-nine.
75. The following table, comparing the number of building permits issued for single and multi-family dwellings, appears in NEW JERSEY DEPARTMENT OF LABOR AND IN-
den apartment complexes often containing several hundred units, were built in New York City suburbs. However, there developed a severe shortage of moderately priced apartments which has been attributed to several factors in addition to population growth. During this period, there was a big increase in young working people as a result of the postwar baby boom. Moderate income families, which had traditionally used the apartments as a way station to home ownership, could no longer afford the soaring prices of single family dwellings. Apartment builders had overbuilt luxury units without constructing an adequate supply of moderate income units. Even if housing could have been produced at a price middle income people could afford, zoning restrictions limited the construction of moderately priced single family dwellings and virtually precluded moderate income multi-unit construction.

DUSTIRY, DIVISION OF PLANNING AND RESEARCH, RESIDENTIAL BUILDING PERMITS (1976):

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Single Family</th>
<th>Five or More Family</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>41,166</td>
<td>30,690</td>
<td>6,244</td>
</tr>
<tr>
<td>1961</td>
<td>46,963</td>
<td>29,555</td>
<td>10,525</td>
</tr>
<tr>
<td>1962</td>
<td>46,655</td>
<td>29,025</td>
<td>13,708</td>
</tr>
<tr>
<td>1963</td>
<td>54,488</td>
<td>28,685</td>
<td>21,191</td>
</tr>
<tr>
<td>1964</td>
<td>68,078</td>
<td>27,673</td>
<td>35,284</td>
</tr>
<tr>
<td>1965</td>
<td>64,933</td>
<td>30,675</td>
<td>28,040</td>
</tr>
<tr>
<td>1966</td>
<td>50,163</td>
<td>23,868</td>
<td>19,258</td>
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<td>1967</td>
<td>46,958</td>
<td>24,380</td>
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<tr>
<td>1968</td>
<td>43,661</td>
<td>23,781</td>
<td>14,040</td>
</tr>
<tr>
<td>1969</td>
<td>37,887</td>
<td>21,030</td>
<td>12,854</td>
</tr>
<tr>
<td>1970</td>
<td>39,897</td>
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<tr>
<td>1971</td>
<td>58,040</td>
<td>28,424</td>
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<tr>
<td>1972</td>
<td>65,539</td>
<td>29,602</td>
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<tr>
<td>1973</td>
<td>52,145</td>
<td>27,851</td>
<td>20,376</td>
</tr>
<tr>
<td>1974</td>
<td>25,878</td>
<td>14,994</td>
<td>8,695</td>
</tr>
<tr>
<td>1975</td>
<td>23,215</td>
<td>15,720</td>
<td>5,523</td>
</tr>
</tbody>
</table>


77. In a landmark opinion, the New Jersey Supreme Court ruled that every municipality must tailor its zoning regulations to provide its fair share of the regional need for low and moderate income housing. South Burlington NAACP v. Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975). Citing a report by the New Jersey Department of Consumer Affairs, the court noted: "Zoning ordinance restriction of housing to single-family dwellings is very common in New Jersey. Excluding six large, clearly rural townships, the percentage of remaining land zoned for multi-family use is only just over 1% of the net residential land supply in 16 of New Jersey's 21 counties." Id. at 181 n.12, 336 A.2d at 729. A large portion of the apartment construction allowed, the court noted, has been permitted through the use of variance procedures.

Also, even the small amount of land zoned for multi-family housing is burdened by restrictions which discriminate against families with children. The New Jersey court estimated that "60% of the area zoned to permit multi-family dwellings is restricted to efficiency or one bedroom apartments . . . ." Id. at 181 n.14, 336 A.2d at 729. The court further noted that minimum lot and house size requirements for lots zoned for single family residences precluded housing for moderate income families: "[I]n the
Rent increases in New Jersey for the decade outpaced the inflation rate. The Consumer Price Index increase from 1960 to 1970 was 33.3 percent while the mean rent increase for New Jersey was 64 percent. The vacancy rate in the Northeastern New Jersey-New York Standard Metropolitan Statistical Area, which includes a majority of the state's population, was 2.6 percent. Presumably it was lower for moderately priced rentals.

B. The Formation of the New Jersey Tenants Organization and Efforts for Statewide Legislation

The contemporary tenants' movement in New Jersey started in 1969 when tenants in the primarily middle-income communities of the northeastern section of the state started to organize in protest against decreasing maintenance and substantial rent increases that ranged in many instances from 20 to 40 percent. The picketing and demonstrations which followed caused widespread publicity and in some cases led to reductions in planned rent increases, or better main-

16 counties covered by [the Department of Community Affairs] study, only 14.1% of the available single-family land is allowed to be in lots of less than one-half acre, only 5.1% (and that mostly in urban counties) in those of less than 10,000 square feet, and 54.7% of it requires lots of from one to three acres.” Id. at 183 n.16, 336 A.2d at 730.

In a concurring opinion, Justice Pashman explained the effect of the zoning ordinances and the variance procedure: “It should be noted that despite these restrictions a significant amount of multi-family housing has been built in the suburbs in recent years. Thus, even in Somerset County, which had no vacant land zoned for multi-family dwellings during the period between 1960 and 1970, 7,635 multi-family units were built in those ten years. This seems to have been achieved through variances and specially procured zoning ordinance amendments. Such individually negotiated variances and amendments, however, have usually been accompanied by formal or informal restrictions limiting development to small high-rent units . . .” Id. at 201 n.8, 336 A.2d at 739.

78. M. Marino, Rent Leveling in New Jersey, Jan. 1975 (report prepared for Bureau of Housing, N.J. Dep't of Community Affairs) [hereinafter cited as Rent Leveling]. This report discusses rent increases in New Jersey and attempts to refute some of the arguments against rent control. Marino attributes the uniformly high increases in rent to the housing shortage in the state rather than operating cost increases or new construction. Id. at 2-3.


80. The Sunday Record-Call (Hackensack, N.J.), Aug. 10, 1969, at 1, col. 5.

81. Landlords defended rent hikes, citing increased property taxes and operating costs. One manager of a thousand units located in several counties stated that landlords were hit by unbelievable increases in fuel, water, taxes, garbage, insurance, and maintenance. He claimed water was up 10 to 20%; fuel, 100%; taxes, 20 to 40%; garbage, 150%; insurance, 25%; gas and electricity, 25 to 30%; and maintenance, 30%. Others claimed that their mortgages were running out and that they would have to be refinanced at 9 or 10% rather than the 4 or 5% rate at which they were originally financed. Newark Star Ledger (N.J.), Feb. 2, 1971, at 12, col. 1.
tenance.82

(Although the middle-income base of the new movement gave it a new-found strength, tenant organizing was not limited to the middle class. Five nights of violent demonstrations in August 1969 over unbearable housing conditions and rising rents in slum areas of Passaic spurred landlords to agree to a moratorium on planned rent increases and caused the city to activate its power to control rents in substandard dwellings.)83

Renters in suburban Middlesex County, led by Gerald Nadel, a news reporter for a major New York radio station, formed the New

At times, landlords tried to justify substantial rent hikes on the basis of property tax increases. In a June 1976 interview, one landlord representative stated that property taxes are equal to roughly 17% of the gross income generated from rental properties. After landlords in letters to tenants in one city referred to huge property tax increases to justify rent increases, the town mayor pointed out that in fact property taxes had decreased. The Hudson Dispatch (Union City, N.J.) June 19, 1970, at 1, col. 1.

Tenants also complained that substantial rent hikes occurred when owners rented units in newly constructed buildings at relatively low prices and then raised the rents when the buildings became fully occupied.

82. When last spring the owner of one 666-unit building in East Paterson notified his tenants that he was raising their rents 20%, they picketed the renting office. Mayor Albert St. George got the owner to sit down and discuss the tenant demands, and eventually he worked out a compromise: a 15% across-the-board increase. One reporter commented: "If East Bergen [County] could in Chinese fashion designate 1969 as the 'year of' something, it would have to be 'Year of the Tenant.' It was the year that 'tenant rights' became a catchword, a political platform, and a rallying cry for groups."

"Landlords were thrown on the defensive—their rent increases challenged, maintenance practices deplored, and leasing procedures criticized by outraged tenants.” The Record (Hackensack, N.J.), Dec. 16, 1969, at C-1, col. 3.

83. N.Y. Times, Aug. 7, 1969, at 25, col. 1; id., Aug. 8, 1969, at 42, col. 1. Starting in 1970, over 11,000 occupants of Newark public housing projects withheld millions of dollars in rent strikes that lasted over three years. In 1973, the New Jersey Superior Court found that living conditions in one project were deplorable and ordered an 80% abatement of past and future rents of striking tenants. Housing Authority v. Alkens, No. 2919132 (Essex County, N.J. Dist. Ct., Nov. 29, 1973), cited in David & Callan, Newark's Public Housing Rent Strike: The High Rise Ghetto Goes to Court, 7 CLEARINGHOUSE REV. 581 (1974). In June 1974, an agreement, highlighted by provisions for tenant management, was reached, thereby settling the strike. In 1975, a $5.8 million grant from HUD for renovation of low cost housing was obtained. See David & Callan, supra, at 581; David, The Settlement of the Newark Public Housing Rent Strike: The Tenants Take Control, 10 CLEARINGHOUSE REV. 103 (1976). For a discussion of the difficulties encountered in organizing among poor tenants in New York City in 1963 and 1964, see Lipsky, Protest in City Politics; Rent Strikes, Housing and the Power of the Poor (1970). In October 1969 "[t]he independent black candidate for mayor in Paterson said his 12,000 member organization fully backs the NJTA and thanked landlords for exploiting highrise residents along with slum dwellers.” The Record (Hackensack, N.J.) Oct. 22, 1969, at B-16, col. 3.
Jersey Tenants’ Coalition. In September 1969, tenant leaders from Bergen County started a second tenants’ organization, the New Jersey Tenants Association (NJTA) for the purpose of forming a unified statewide tenants’ movement. These two organizations merged in January, 1970, to become the New Jersey Tenants Organization (NJTO). Martin Aranow, a thirty-three-year-old business machine company president who lived in a luxury high-rise in Fort Lee, was chosen to head the new organization. Aranow, who had no previous experience in politics, provided a clean cut establishment image, dynamic leadership, and integrity beyond reproach. His charismatic leadership significantly added to the strength of the organization.

During the following years, until his death from leukemia in 1973, Aranow and NJTO attorney Ron Atlas, who worked for a federally funded legal aid program, met almost nightly with tenants from all parts of the state. Rent control and the name Aranow became intertwined. NJTO leaders felt that by tying rent control to a “hero” they would give the movement additional strength. Also, tenants were particularly attracted to meetings at which an attorney would respond to individual legal questions about landlord-tenant problems. Fort Lee, a community of high-rise luxury apartments, became a center of rent control organizing. Organized protests after rent increases or reductions in services became standard in New Jersey. Often hundreds of tenants

84. N.Y. Times, Oct. 19, 1969, at 65, col. 1. Nadel first became active in the tenant movement when he started to organize cotenants in an 815 unit complex after the landlord would not make repairs requested by the tenants. Instead the landlord responded by refusing to renew the leases of forty tenants who had participated in the organizing activities. Hearings on A.B. 88, 599, 760, and 831 before the New Jersey Assembly Committee on County and Municipal Government (Apr. 24, 1970) (testimony of Gerald Nadel).

85. At that time the leaders of this organization were not conscious of the existence of the NJTC.


88. The Hudson Dispatch (Union City, N.J.), Sept. 13, 1969, at 22.

Aranow described his first organizing effort, following the failure of air conditioning in his building on May 30, 1969: “We hung banners from our balconies protesting the conditions. It made quite a sight for motorists driving down route 9W. We had the newspaper and television men out to take pictures and the landlord finally fixed the air conditioners.” Newark Sunday News (N.J.), Aug. 30, 1970, § 1, at 31, col. 1. As a result of the publicity, Aranow received calls from tenants in other communities.


90. Interview with tenant leader, June 1975.

91. For income and rental characteristics of Fort Lee see note 138 infra.

Monthly rents in the luxury highrises of Fort Lee and neighboring Hackensack av-
would attend tenant organizing meetings and participate in demonstrations. Tenant efforts became a daily news item.

In October 1969, the leadership of the NJTA, which had already become a powerful organizing force on a statewide level, formulated a legislative platform which included: tying rent increases to the cost of living in areas where the vacancy rate was less than 5 percent; requiring that tenants be offered two-year leases without rent increases; withholding of rent for repairs; enforcing minimum maintenance obligations; creating eviction standards; and prohibiting retaliatory evictions. (Rent “leveling” rather than rent “control” was advocated in order to avoid association with New York City rent control.) By this time, the NJTA claimed that it had 500,000 members, but during the gubernatorial campaign of that fall, tenant leaders and tenants were incensed that neither candidate responded to well publicized tenant inquiries as to his position on rent leveling. The tenant organization geared its initial efforts toward staging a statewide rent “moratorium”, a ten-day delay in rent payments in December, followed by moratoria in succeeding months which would increase by one day per month. Newspapers widely reported the plans for a moratorium which would have involved a few hundred thousand tenants. It is unclear how many tenants participated in the December moratorium. However, in the middle of December, the NJTA called off future moratoria, explaining that it wanted to sound out the new state administration on stronger tenant laws. But soon tenants, dissatisfied with the lack of action by political officials, shifted their strategy to strikes.

average over $300 per month for one-bedroom apartments and $450 per month for two-bedroom apartments. While the great majority of New Jersey tenants may have been unable to purchase homes, the highrise occupants did not necessarily fall into this category. Instead they were attracted by benefits such as freedom from maintenance obligations, security, and swimming pools. The Record (Hackensack, N.J.), Feb. 25, 1973, at C-16, col. 1. In some instances, facilities that they were promised were either late or not forthcoming.

Aranow and Atlas found newly-elected Governor Cahill unresponsive during a brief meeting in March. However, the state legislature was taking a greater interest in the tenants' cause. A total of forty landlord-tenant bills, including four rent control bills, and a bill prohibiting landlords from evicting tenants in retaliation for organizing activities, were introduced in the state legislature during 1970. Because fear of landlord reprisals seemed to be the biggest obstacle to even more successful organizing, Aranow and Republican Assemblyman Martin Kravarik of Middlesex drafted a bill requiring good cause for eviction, limiting rent increases to the percentage increase in the Consumer Price Index, and allowing landlords to pass along property tax increases. The NJTO was particularly careful in drafting its rent stabilization proposal to counter the criticisms of the New York City laws which had given rent control such a bad name. None of the rent control bills ever got out of committee. Even the more liberal legislators were afraid of the consequences of rent control for housing.

In February 1970, a Jersey City rent strike led to an agreement which provided tenants with lifetime leases. Under the agreement, rent increases were tied to the cost of living and tenants were given the right to withhold rent when the landlord did not meet his obligation to maintain the property. This success was particularly influential in leading to increased tenant interest in the NJTO.

In another development that spring, the New Jersey Supreme Court, in a unanimous decision, ruled that a tenant may withhold from

104. This information came from an interview with Ron Atlas in June 1975.
105. The results of studies of the effect of rent control have been inconclusive. See NATIONAL URBAN LEAGUE, NATIONAL SURVEY OF HOUSING ABANDONMENT (1971); STERNLIEB, supra note 24; TEMPORARY STATE COMMISSION ON LIVING COSTS AND THE ECONOMY [NEW YORK], REPORT ON HOUSING AND RENTS (1974). For reports analyzing rent control in Massachusetts, see note 34 supra. For an analysis of rent control in Washington D.C. see RESEARCH DIVISION, URBAN LAND INSTITUTE, NEW HOUSING PRODUCTION IN THE DISTRICT OF COLUMBIA: TOWARD POSSIBLE SOLUTIONS TO A PUBLIC POLICY DILEMMA (1975).
107. Id.
rent amounts necessary for the performance of reasonable repairs if the landlord fails to undertake repairs. In October, Governor Cahill signed the retaliatory eviction bill which tenant leaders had regarded as crucial. One month later, the New Jersey Democratic Policy Council endorsed rent stabilization.

In December 1970, the NJTO proposed statewide rent stabilization which would roll back rents to the January 1969 level with subsequent rent increases tied to the cost of living. The NJTO platform also contained proposals requiring landlords to pay interest on security deposits, establishing a rent receivership plan for deteriorating or sub-standard buildings, and prohibiting discrimination against tenants on welfare. Aranow attacked the Democrats and Governor Cahill for failing to implement any reforms: "Neither the Democrats nor Republicans has done a thing to alleviate this terrible condition that affects both the poor and middle class."

By the end of 1970, the NJTO reported that it had organized forty-three strikes involving 20,000 tenants. In response to five of the strikes, landlords dropped planned increases. In thirty cases, planned increases were spread over several years; in eight instances, tenants successfully negotiated for better housing conditions. Strikes were a particularly safe and effective tactic under New Jersey law, because striking tenants cannot be evicted if they agree to pay the rent that they have withheld when they appear in court in answer to an eviction complaint and nonpayment of rent is the ground upon which possession is sought.

109. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). The court reasoned: "It is of little comfort to a tenant in these days of housing shortage to accord him the right, upon a constructive eviction, to vacate the premises and end his obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction where as here the cause is the failure to make reasonable repairs. Id. at 146, 265 A.2d at 538. One year earlier, the state supreme court ruled that there was an implied warranty of habitability in residential leases. Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).


In 1971, several more rent control bills were introduced in the legislature. The NJTO opposed one of those bills which would have given localities the option of enacting rent controls. The NJTO also opposed tenant efforts to enact local ordinances which were of doubtful legality. The legislature did pass that year a law limiting security deposits to one and a half month’s rent and requiring landlords to pay interest on tenants’ deposits, thereby resulting in another tangible product of the NJTO’s efforts. However, it quickly became apparent that opposition from Republicans and the governor would prevent the passage of a rent control bill, despite widespread support for such a bill from local government officials.

The year 1972 produced no breakthroughs on the state level either. Five statewide rent leveling bills were introduced in the first three months of that year, but tenants were again unsuccessful in obtaining statewide rent legislation in 1972, although one bill made it through the assembly, lending hope for future success. About this time, Governor Cahill reversed his opposition to rent controls in the face of evidence that Phase II federal price controls had not halted rent gouging.

III. The Push for Local Legislation

The NJTO felt frustrated in its efforts to obtain statewide rent control, and as early as March 31, 1971, the organization reversed itself and declared its support for local rent control ordinances as well as for statewide legislation.

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116. In January, a Republican State Senator, Matthew Rinaldo, introduced a bill supported by NJTO, limiting rent increases in areas where the vacancy rate was less than 5%. Over three hundred tenants appeared at a senate hearing on S.972. The Daily Journal (Elizabeth, N.J.), Feb. 26, 1971, at 15, col. 1.

117. Aranow stated: “We’re not convinced that all communities will take advantage of local options. Why should people be forced to storm city hall when we all know the problem?” County Record, Mar. 7, 1971.


120. S.675 (1972); A.656 (1972); A.165 (1972); S.118 (1972); S.117 (1972).

121. A.656 (1972).

122. Earlier, Cahill had promised tenant leaders that he would support rent leveling legislation if federal controls did not halt rent gouging. Interview with Sylvia Aranow, June, 1975.

Aranow acknowledged that any local measure would have to be tested in the courts in light of a 1956 state supreme court ruling in \textit{Wagner v. City of Newark}\textsuperscript{124} denying municipalities the power to adopt rent control without specific enabling authority from the state.

\textbf{A. Wagner v. City of Newark}

The following events had culminated in the \textit{Wagner} decision. On June 30, 1956, one year prior to \textit{Wagner}, the state legislature allowed an enabling act,\textsuperscript{125} which had given municipalities the power to enact rent control, to expire. On July 31, in response to a petition from thirty-five cities, it passed special legislation allowing the petitioning cities to adopt rent controls.\textsuperscript{126} The Newark law, which had been adopted on June 21, did not conform with the special legislation.\textsuperscript{127}

The validity of the Newark ordinance, therefore, depended on whether cities had the power under the Home Rule Act of 1917\textsuperscript{128} and the Optional Municipal Charter Law\textsuperscript{129} to enact local rent control legislation. The court agreed that the two acts gave broad powers to cities,\textsuperscript{130} but noted an exception to home rule powers for "[m]atters that because of their nature are inherently reserved for the State alone and among which have been . . . landlord and tenant relationships

\begin{enumerate}
\item[128.] N.J. STAT. ANN. § 40:48-2 (1967). The Home Rule Act provides: "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."
\item[129.] N.J. STAT. ANN. § 40:69A-29 (1967). The Optional Municipal Charter Law provides: "Each municipality governed by an optional form of government pursuant to this act shall, subject to the provisions of this act or other general laws, have full power to . . . adopt and enforce local police ordinances of all kinds . . . and to exercise all powers of local government in such manner as its governing body may determine . . . ."
\item[130.] Wagner v. City of Newark, 24 N.J. 467, 475-77, 132 A.2d 794, 798-99 (1957).
\end{enumerate}
Such matters require specific state enabling legislation. "[They] are not proper subjects for local treatment under the authority of the general statutes." The scope of the Home Rule Act of 1917 and the Optional Municipal Charter Law was limited to matters of local concern, "and not to those matters involving state policy or in the realm of affairs of general public interest and applicability."

Furthermore, in the court's view, the actions of the state legislature in the 1950's indicated an intent to make rent control a matter of statewide concern and to preclude municipalities from acting independently of state authorization. It would be incongruous, the court argued, for the legislature to specify a law which thirty-five municipalities could adopt if municipalities could act under the authority of home rule provisions.

Also, the court found that the preamble to the July 31 law "expressly discloses an intention on the part of the Legislature to make the control of rents uniform in those areas where the local authorities find a public housing emergency in housing still exists . . . ." although it did not specifically state that municipalities could not enact measures which varied from the state act.

B. The Passage of Local Rent Leveling Ordinances and the Rejection of Wagner

No local rent control ordinances were adopted in New Jersey between 1956 and 1971. In the face of Wagner, most cities adopted the view that any local measure would be struck down by the courts, and

131. Id. at 478, 132 A.2d at 800.
132. Id.
133. Id. The issue of state preemption and the question whether municipal police powers include the power to enact rent or eviction controls has often arisen after municipalities have adopted local ordinances. See, e.g., Old Colony Gardens, Inc. v. City of Stamford, 147 Conn. 60, 156 A.2d 515 (1959); Ambassador East, Inc. v. City of Chicago, 399 Ill. 359, 77 N.E.2d 803 (1948); Warren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703 (1956).
134. 24 N.J. at 480, 132 A.2d at 801.
135. Id. at 480-81, 132 A.2d at 802. The preamble states: "The legislature deems it to be for the best interests of the people to pass I special law concerning this subject instead of a large number of special laws pursuant to said petitions in order to secure reasonable uniformity and to insure certain restrictions and limitations which shall be applicable to said ordinances when adopted by the respective governing bodies of said municipalities . . . ." 24 N.J. at 471, 132 A.2d at 796.
136. Attorneys who argued before the state supreme court in 1973 on behalf of cities which enacted rent control ordinances indicated in interviews that they felt they had a slim chance of prevailing prior to the ruling that cities could enact rent control in the absence of a state enabling act. See Inanganort v. Fort Lee, 120 N.J. Super. 286, 293 A.2d 720 (1972).
city attorneys advised local officials that a local ordinance could not possibly be legal.  

Tenants who felt frustrated by inaction at the state level, however, saw the preemption argument simply as one more excuse by public officials not to respond to tenant pressure for rent controls. In the following years, local officials in many cities had to be responsive to tenant interest in order to stay in office. City councils, under intense pressure from tenants, started to pass rent leveling ordinances. Apparently, some council members acted on the basis of their belief that they could vote for such ordinances without having to deal with their consequences, since the ordinances would be struck down by the courts. Starting in the fall of 1971, rent leveling laws were adopted primarily by middle income communities in northern Bergen County, near New York City. By February 1972 seven cities, including Fort Lee, had adopted rent leveling ordinances.

137. At a North Bergen Commissioner's meeting, the mayor explained that "it is a physical and legal impossibility in any community [to institute rent controls] by any stretch of the imagination. . . . Such action can only be instituted by the state and if anyone else tells you differently, he's a downright liar." See The Jersey Journal (Jersey City, N.J.), Apr. 8, 1971, at 8, col. 3. The city council, in line with the mayor's view, established a landlord-tenant relations bureau, declaring that it favored rent control but could not legally enact such an ordinance. Hudson Dispatch (Union City, N.J.), May 1, 1971, at 3, col. 2.

In 1973, the same mayor argued before the New Jersey Supreme Court that cities could adopt their own ordinances. The Jersey Journal (Jersey City, N.J.), Mar. 6, 1973, at 1, col. 1.

See also Paterson News (N.J.), July 30, 1971. (Wayne township counsel announced that a local rent control ordinance would be illegal); The Record (Hackensack, N.J.), Dec. 7, 1971, at C-3, col. 3 (similar announcement by Hackensack town counsel).


In Fort Lee the scene of numerous rent strikes in 1971, about a thousand residents attended a city council meeting at which rent control was discussed. Bergen Bulletin (Palisades Park, N.J.), Jan. 27, 1972, at 1, col. 1. Landlords raised the spectre of New York City's housing deterioration and higher taxes for homeowners following a decrease in the value of rental properties. Newark Star Ledger (N.J.), Dec. 23, 1971, at 9, col. 1. The City Council, which had Republicans in all of its six seats in 1971, became 5 to 1 Democratic in 1972. The focus of Democratic candidates on tenant issues helped cause this shift in power. The Record (Hackensack, N.J.), Nov. 22, 1972, at A-18, col. 1.

Census data indicates that the first cities to adopt rent control were primarily middle income people with a proportionately small number of poor people. They did not have an unusually high percentage of tenants. For data on total housing units, percent of units renter occupied, and median rent, see 1 U.S. BUREAU OF THE CENSUS, CENSUS OF HOUSING: 1970, pt. 32, N.J., Table I, at 7-8. For data on median income and percentage of families with an income of less than 125% poverty level, see 1 U.S. BUREAU OF CENSUS, CENSUS OF POPULATION: 1970, pt. 32, N.J., § 1, Table 57, at 241, Table 58, at 243, Table 107, at 486, 488, 492.
The North Bergen ordinance was immediately struck down by the superior court on the basis that New Jersey municipalities do not have the power to enact rent control. Two days after the Fort Lee ordinance was adopted, its implementation was enjoined by Judge Pashman of the superior court pending a ruling on its legality.

On January 11, 1973, federal price controls were terminated. A new surge in tenant organizing and demonstrations followed a new wave of rent increases. Fifteen members of the assembly sponsored a bill providing that rent controls would take effect in counties with a less than 5 percent vacancy rate. After tenant advocates commented at a legislative hearing that rent leveling should be based on local option, the bill was replaced by a measure that allowed municipalities with a vacancy rate of less than 5 percent to adopt the proposed bill as local law. That bill, which the governor indicated he would sign, was passed by the assembly on February 13. A senate bill would have permitted a municipality to limit rents if it found a housing shortage within its borders. Conservative legislators were not adverse to tying rent increases to the Consumer Price Index in light of the high rate of inflation at that time. On the local level, eighteen municipalities had adopted rent control ordinances by April 1973.

C. Inganamort v. Fort Lee

Meanwhile, in June 1972, the superior court for Bergen County upheld the Fort Lee and River Edge ordinances. The lengthy court opinion, which contained vigorous comments as to the need for rent control, is noteworthy because presiding Judge Pashman later sat on the New Jersey Supreme Court and wrote the opinion in a subsequent rent control case of crucial importance.
In upholding the local ordinances, the court rejected the view that rent control had been preempted by state law. Wagner was distinguished on the basis of a critical change of circumstances between 1957 and 1973. The Wagner court had held that the preamble to the 1956 special act disclosed an intention that rent control should be dealt with in accordance with the provisions of the state law or not at all. Since the expiration of the 1956 enabling act, there had been no state legislation dealing with rent control.

The court decided that although the circumstances surrounding Wagner may have indicated a legislative intent to preempt the area of rent control, they were not indicative of the legislative intent sixteen years later. In 1957 there was a state scheme which municipalities could follow. Since then there had been no statewide rent legislation.

Judge Pashman also rejected the Wagner view that rent control was not a proper subject for local treatment:

There is no inevitable need for a single statewide solution or for a single statewide enforcing authority. On the contrary, it may be useful to permit municipalities to act, for, being nearer the scene, they are more likely to detect the practice and may be better situated to devise an approach to their special problems.

Judge Pashman then expounded at length on the need for rent control, which he tied to the right to shelter. Without price regulation a tenant could be uprooted by rental increases at any time, thereby rendering any other rights to shelter meaningless. Therefore, there "should be a basis for assuring a tenant of continuous shelter upon reasonable terms" as well as a requirement that landlords provide housing that is fit for use.

Every human being has a right to be housed. And to some degree, he has a continuing right not to be uprooted annually. At

149. See text accompanying note 135 supra.
150. An exception was a state enabling act allowing municipalities to invoke rent controls for substandard dwellings. N.J. STAT. ANN. § 2A:42-74 (1966).
152. Id. at 318, 293 A.2d at 737. It is interesting to note that in distinguishing Wagner the Inganamort trial court quoted the expansive views of municipal powers set forth by then Superior Court Judge Weintraub in the trial court opinion reversed by the Wagner court. By the time of Inganamort, Justice Weintraub was Chief Justice of the New Jersey Supreme Court.
153. Id. at 317, 293 A.2d at 740 (emphasis deleted).
154. Id. at 326, 293 A.2d at 742.
least, such a person should have some area for participation in this annual procedure of rent revisions.155

The view that rent control is harmful was rejected as a myth:

Statements that rent control will hurt tenants, landlords, builders and homeowners are a myth. The ordinances under review have ample provisions for justifiable increases in rentals so that an owner of an apartment will receive a reasonable return on his investment and thereby be able to pay a fair share of the required municipal revenues.156

Finally, with an eye towards the inevitable supreme court review of his opinion, Judge Pashman, stating that he was speaking on behalf of the "inarticulate," made a plea for "judicial imagination" to rise and meet the realities at hand:

Perhaps the tenants will not win in this constitutional challenge. Perhaps the turning wheel of the police power will not stop at rent control. But someone must speak for a membership inarticulate in the law

The judicial imagination, the police power, and the right to shelter should go to greater lengths than ever before in extending the constitutional umbrella over the dignity of a regulated landlord-tenant relationship.157

In an atmosphere charged by vigorous demands for rent regulation from tenants of all economic classes, the New Jersey Supreme Court, in April 1973, affirmed the trial court's ruling that cities had the power to adopt rent leveling ordinances under home rule powers.158 Chief Justice Weintraub, writing for the court in his last year on the bench,

155. Id. Earlier in his opinion Judge Pashman comments: "The home, whether rented or owned, is the very heart of privacy in modern America. Man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street or moving from place to place is a traumatic experience." Id. at 323, 293 A.2d at 740.

Other judges have had a different perspective on a tenant's right to continuous shelter. In 1974, a concurring judge in Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 772 (Fla. 1974), placed the right to expect a fair return on capital well above tenants' rights: "The right to invest capital and expect it to earn a fair return is a basic civil right and one which should not be destroyed merely for the convenience of tenants who are living in accommodations apparently beyond their financial ability."

156. 120 N.J. Super. at 326, 293 A.2d at 742. Courts have typically assumed the harmful effect of rent controls. The trial judge in a California case commented: "The cure is not having rent control in Berkeley, thus tightening an already tight housing market." Birkenfeld v. City of Berkeley, No. 42871, at 14-19 (Alameda County, Cal. Super. Ct., 1973).

157. 120 N.J. Super. at 330, 293 A.2d at 744.

overturned the *Wagner* ruling,\(^{159}\) which in turn had reversed his own 1957 trial court decision in that case.

The court stated that it was faced with the same three issues faced by the court in the *Wagner* case:

1. does the state constitution prohibit delegation to municipalities of the power to control rents . . . ;
2. if that power may be granted, has the legislature done so; and
3. if the state statutes vesting police power in municipalities do indeed embrace the area, is the exercise of that power by local government preempted or barred by reason of the existence of other statutes dealing with the same subject matter.\(^{160}\)

Justice Weintraub relied on the same authorities cited in *Wagner* to reach opposite conclusions.

The court first pointed out that *Wagner* did not stand for the view that the state constitution prohibits the legislature from delegating to municipalities the power to adopt rent control,\(^{161}\) but rather for the proposition that an express delegation of power, as opposed to a broad grant of the general police power to cities, was a prerequisite to local rent control ordinances.\(^{162}\)

It then rejected the *Wagner* view that rent control was beyond the scope of the general grants of power contained in the Home Rule Act and the Optional Municipal Charter Law,\(^{163}\) stating that it could see no basis upon which the judiciary can carve out that exception [as it had in *Wagner*] from the expressed legislative intention "to confer the greatest power of local self-government consistent with the Constitution of this State."\(^{164}\)

The court took the position that when the legislature allowed the 1956 act to expire in 1957, it did not "thereby [ordain] that the subject matter shall thereafter be the province of the State Legislature alone."\(^{165}\) Thus, the court rejected the *Wagner* holding that the state landlord-tenant statutory scheme had preempted the field, noting that rent con-

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160. 62 N.J. at 527, 303 A.2d at 301.
161. *Id.* at 531, 303 A.2d at 303. The court noted that the *Wagner* court had not rejected, nor even cited or distinguished, Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954), *cert. denied*, 349 U.S. 904 (1955). Only two years earlier Jamouneau had upheld a state law giving cities the option of adopting a state rent control statute.
162. See note 132 & accompanying text *supra*.
163. 62 N.J. at 534-36, 303 A.2d at 305-06. For the text of the statutes, see note 128-29 *supra*.
164. *Id.* at 535, 303 A.2d at 305. In its discussion the court cited Fred v. Old Tappan, 10 N.J. 515, 92 A.2d 473 (1952). *Fred* had been cited by the *Wagner* court for the same rule, but to support the opposite conclusion.
165. 62 N.J. at 537, 303 A.2d at 307.
trol statutes dealt with an evil not covered by the state law, a housing shortage which enabled landlords to demand excessive rents.166

In a lengthy dissenting opinion, Justice Conford rejected the view that the Home Rule Act167 gave municipalities the power to adopt rent control ordinances.168 In reaching this conclusion, Justice Conford weighed the respective state and local concerns to determine if the legislature intended to grant the power to adopt rent control to municipalities under the provisions of the Home Rule Act.169 He noted that "even where the State Legislature has not spoken, some matters, inherently in need of uniform treatment, are not a proper subject of municipal legislation."170 He then declared that rent control fell within this category.

The following comments of Justice Conford, which were intended to refute the view that localities could adopt rent control, are particularly noteworthy as a prediction of the chaos that would follow from local legislation:

The public need for and constitutionality of rent control regulation depends upon the existence of a shortage of housing accommodations of emergency dimensions. This is typically a concomitant of general cyclical inflationary trends of regional if not national proportions. While the extent of the housing shortage may to some minor degree vary locally, the subject is predominantly of statewide rather than peculiarly local incidence and concern. There is therefore corresponding need that, if there is to be rent control at all, uniform statewide regulations be enacted in respect of such basic incidents as assurance of fair return on investment, provision for restrictions on eviction or termination of tenancy and as to adequacy of maintenance of services, fair procedures for administrative review of applications for relief by either landlords or tenants, and fair and sufficiently comprehensive administrative rules and regulations in all other pertinent respects to implement the legislative provisions adopted. All of these desiderata peculiarly require the manpower, expertise and funding typically available at state rather than local levels, permissibly supplemented locally with the resources of such municipalities as may opt (if local

166. Id. The existence of an emergency, which had been a critical issue in many rent control cases, was not questioned by the landlords in this case. See text accompanying note 244 infra.

167. See note 128 supra.

168. Justice Conford saw the grant of power under the Home Rule Act as narrow in scope, designed "simply [as] a catchall to pick up and delegate appropriate aspects of local police power which the Legislature may have overlooked in the course of its manifold delegations to municipalities of specified regulatory powers." 62 N.J. at 539, 303 A.2d at 308.

169. Id.

option is legislated) for coming into a program under legislatively fixed minimum standards.

... Chaotic conditions can be foreseen in relation to the interests of both owners and tenants if only a municipal boundary line can separate apartment houses subject to no rent controls whatever from those where any of an infinite variety of kinds of control may exist, none conformable to any state regulation. This is the fair prospect, under the determination of the majority, in solidly urban areas in the populous counties where a number of municipalities frequently are found to coexist within a few square miles, many with concentrations of apartment houses of every size, description and rental category, and usually forming an integral market area for such facilities, in which owners and potential occupants vie competitively.171

D. Fort Lee Ordinance Upheld in Federal Court

Landlords, having failed in their attacks at the state level, shifted their efforts to federal court. In August, the United States District Court for New Jersey turned down a poorly framed motion for a preliminary injunction against the enforcement of the Fort Lee ordinance as it applied to an apartment building financed through the Federal Housing Administration.

Plaintiffs in Helmsley v. Fort Lee172 claimed that HUD-FHA rent schedules promulgated under the National Housing Act, which are designed to allow landlords to meet operating expenses and mortgage payments, preempted local rent controls, and that the ordinance was unconstitutional because it was not justified by an emergency and did not provide for a "reasonable rate of return."173

The court noted that the plaintiffs failed to allege that they had actually foregone any rent increases due to the existence of the ordinance and that they had not even submitted an application for a rent increase to the Fort Lee rent leveling board.174 It wondered, under these circumstances, how plaintiffs could be entitled to an injunction against the ordinance's enforcement, as there had been no showing of irreparable harm resulting from the enforcement of the ordinance.175

171. 62 N.J. at 544-46, 303 A.2d at 310-12. In the Fair Return Cases, the court would state, in dicta, there was a necessity for uniform standards and procedures, using reasoning similar to that of the dissenting opinion. In those cases preemption and home rule powers were not at issue, having been settled in Inganamort. See text accompanying note 261 infra.

173. Id. at 586-87.
174. Id. at 587-88.
175. "There is nothing before the Court to indicate that the rents permitted under
The court then found that even if there had been a showing of irreparable harm, there was little likelihood that plaintiffs could succeed on the merits. It rejected the view that the ordinance was preempted by or conflicted with federal regulations. As to preemption the court found the subject matter of the federal regulations and the rent control ordinance to be unrelated. There was neither evidence of a conflict between the FHA regulations and the local ordinance, nor evidence that under the ordinance landlords would not be able to meet their FHA mortgage obligations.

The court did not rule on the plaintiffs' claim that the ordinance did not provide a reasonable rate of return. The court stated that it was "unable to conclude that the ordinance does not lend itself to a construction which recognizes a right to a reasonable rate of return on plaintiffs' investment," since it enabled the board to grant increases in accordance with increases in the Consumer Price Index.

Plaintiffs' claim that there was no housing emergency was based, in the view of the court, on data that distorted the "true rental situation." The plaintiffs' survey indicated that there was a 6.6 percent vacancy rate. The court's analysis of the data revealed that the vacancy survey, without any explanation, included three apartment complexes with an excessively high vacancy rate (over 50 percent). The exclusion of the three complexes resulted in a 2.2 percent vacancy rate in the borough, which accurately reflected the true rental situation.

the ordinance would differ from the rents plaintiffs are now charging, or from the rental schedule approved by the FHA." Id. at 588 n.8.

176. Id. at 589.
177. Id. at 591. HUD also took the position that its regulations did not preempt the Fort Lee ordinance in a letter to the city attorney. Id. at 591 n.11.
178. Id. at 589-91. "Sec. 10 [of the ordinance] provides for a variety of increases which clearly are relevant to plaintiffs' insolvency and impairment arguments. Sec. 2 thereof enables consumer Price Index increases to be obtained. Yet plaintiffs would imply that their rents are frozen by the ordinance, a contention belied by the plain language of the sections cited. . . ."

"Whether the Board impairs plaintiffs' ability to meet its FHA obligations, therefore, is still to be determined and must await administrative exhaustion." Id. at 591.

Section 10 provided: "In the event that a landlord cannot meet his mortgage payments and maintenance he may appeal to the Rent Leveling Board for an increased rental." Id. at 584, quoting Fort Lee, N.J., Ordinance 72-1, Feb. 9, 1972.

179. 362 F. Supp. at 592.
180. Id. at 594.
181. Id. The court also wondered why the assumption that there was a housing emergency was never challenged in the InGANAMORT case. Id. at 594 n.20.
182. Id. at 594.
IV. The Proliferation of Local Controls

The state supreme court ruling led to a proliferation of local ordinances, modeled after the Fort Lee ordinance, which used January 11, 1973, the date of the termination of federal price controls, as a base date for setting legal rents.

After the death of Martin Aranow in June 1973, his wife, Sylvia, became the new head of the NJTO. Her leadership, like that of her husband, was unquestioned. Until she retired from her position in January 1976, she devoted a substantial portion of her days and evenings to running the NJTO and meeting with tenant groups around the state.

The NJTO no longer saw any advantage in procuring statewide legislation. In September, Sylvia Aranow, on behalf of the organization, remarked:

The New Jersey Supreme Court has given us what we want by virtue of a court decision upholding the right of municipalities to adopt rent legislation by way of municipal ordinances. No state law can improve upon this.

Ms. Aranow also noted that a recent NJTO sponsored bill had fared poorly: "It has been subject to so many amendments, revisions, modifications, deletions, and additions that it is hardly recognizable, let alone meaningful."

In the ensuing period, during which the NJTO abandoned its efforts for statewide legislation, the focus shifted to the practical aspects of rent control and the legality of specific types of provisions.

The Fort Lee (NJTO model) ordinance, which covered all units in buildings with more than two units, provided for rent increases tied to the Consumer Price Index, surcharges for property

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183. By May 12, 1973, rent leveling ordinances had been adopted in thirty-two municipalities. N.Y. Times, May 12, 1973, at 76.
185. Id. See text accompanying note 143 supra.
187. Id. § 16. Many other cities excluded owner-occupied buildings with less than three or four units. The author could not find any data on how many tenants lived in units not covered under such laws; however, at a hearing on a state bill, a legal aid attorney commented that a substantial percentage of low income tenants live in dwellings with three units or less. Public Hearing before the New Jersey Assembly Committee on County and Municipal Government, Apr. 24, 1970, at 23A (testimony of Fred Schmidt, Camden Regional Legal Services).
tax increases,\textsuperscript{189} an unpaid board without staff,\textsuperscript{190} and hardship and
capital improvement increases,\textsuperscript{191} but not vacancy decontrol.\textsuperscript{192} Owners
could set rents on units rented for the first time, with future in-
creases subject to rent leveling limitations.\textsuperscript{188} The weaknesses and
strengths of the Fort Lee ordinance were of paramount importance,
since other cities copied the ordinance almost verbatim, including its
obvious errors\textsuperscript{194} and superfluous sections.\textsuperscript{195}

Many ordinances provided that the five member board must in-
clude two tenants and two landlords. Other ordinances did not specify
the composition of the board, simply providing that the city council ap-
point five members. Only Newark has a paid board.\textsuperscript{196} Volunteer
board members resented unforeseen demands on their time.

\textsuperscript{189} \textit{Id.} § 5. In two cases superior courts did not look favorably on provisions
which did not allow landlords to pass on to tenants all of their property tax increases. As to a provision which did not allow landlords to pass on the portion of increased prop-
erty taxes applicable to common areas, a court commented, "In effect the ordinance provision unfairly compelled the landlord to absorb a substantial portion of a tax increase." Albigese v. Jersey City, 127 N.J. Super. 101, 120, 316 A.2d 483, 493 (L. Div. 1974). The court did not actually rule on the legality of the provision since it had been replaced
by a provision which did pass on property tax increases attributable to the common areas. \textit{See Helmsley v. Fort Lee, 362 F. Supp. 581 (D.N.J. 1973).}

In the Fair Return Cases, however, the court commented in response to a plaintiff’s objections that they could not pass on 100\% of its property tax increase under the ordi-
nance in question: "[U]nfairness, however, is not a concept of constitutional dimen-

The court also rejected the view that an ordinance was unconstitutional because it
did not allow a capital improvements surcharge. \textit{Id.} at 596-97, 350 A.2d at 29-30. \textit{See text accompanying notes 241, 263 supra.}

\textsuperscript{190} Fort Lee, N.J., Ordinance 72-1, § 11, Feb. 9, 1972. Tenant leaders felt that
their proposed ordinances had to provide for unpaid boards, so that city councils and
rent control opponents could not use budgetary arguments against their proposals.

\textsuperscript{191} "In the event that a landlord cannot meet his mortgage payments and mainte-
nance he may appeal . . . for an increased rental." \textit{Id.} § 10.

\textsuperscript{192} Under vacancy decontrol provisions rent levels are no longer regulated in an
apartment after it becomes vacant.

\textsuperscript{193} Fort Lee, N.J., Ordinance 72-1, § 11, Feb. 9, 1972.

\textsuperscript{194} The ordinance excluded from its coverage “buildings in which up to one-third
of the occupied floor space is commercial.” \textit{Id.} § 1(b).

\textsuperscript{195} The ordinance defines just cause for eviction, although it does not require that
landlords show just cause prior to eviction. \textit{Id.} § 1(e). In \textit{Ingamanort}, the trial court
commented: “Oddly enough, while the term ‘just cause’ is defined, nowhere does it ap-
ppear in the substantive provisions of the ordinance. Therefore, the term is of no legal
effect. . . . Some verbiage and part of the format of the ordinance leave much to be
1972).}

The ordinance proposed by the NJTO required just cause for eviction. However, counsel for the city omitted that part. When other cities adopted rent leveling ordi-
nances they merely requested copies of the Fort Lee ordnance and copied it verbatim.

\textsuperscript{196} \textit{Newark, N.J., Rev. Ordinances} tit. 15, ch. 9B-10 (Supp. 1975).
Tenants interviewed in June 1975 repeatedly suggested that the boards be provided the services of an accountant to help analyze landlord financial statements; they commented that cities were parsimonious about providing any funds for rent leveling boards. They indicated that up to that time few applications for hardship increases had been filed, but expressed concern about the ability of their boards to process such applications when they were made. It would take considerable expertise to determine what return a landlord was actually receiving in light of depreciation, refinancing, the actual value of the property, and the reasonableness of claimed expenses. The head of one board in a larger city indicated that he simply took responsibility for the hardship applications since none of the other board members understood them.

Tenants also complained that the hardship standards of the ordinances did not provide any guidelines for determining what was a fair return. Numerous enforcement difficulties led tenant leaders to suggest repeatedly that landlords be required to register all units and rents and to post the register on the premises, in order to reduce the number of violations. The tenant leaders also speculated that far more hardship applications would have been filed had local rent boards not required landlords to disclose their rent rolls when making such applications.

A further problem was that board members, inexperienced with the power to regulate rents, were cautious in exercising their powers unless they were clearly and unambiguously spelled out. While doctrines of explicit and implied powers may have been clear to the attorneys who drafted the ordinances, they were not clear to board members.

Although much effort went into its preparation, the drafters of the Fort Lee ordinance were unable to see how the law would operate in a variety of circumstances. Tenant leaders in many cities repeatedly expressed complaints about the provision tying rental increases to increases in the Consumer Price Index, pointing to its lack of clarity and unforeseen consequences. The section provided:

At the expiration of a lease or at the termination of the lease of a periodic tenant, no landlord may request or receive a percentage increase in rent which is greater than the percentage increase between the Consumer Price Index sixty (60) days prior to the ex-

197. The ordinances did not actually state that landlords were entitled to a fair return. A right to a fair return, however, was assumed to be part of the law. In the Fair Return Cases that view was adopted. See text accompanying note 260 infra.

198. This information was gained from interviews with tenant leaders.
piration or termination of the lease and the Consumer Price Index at the date the lease was entered with said tenant. An unintended result was that the base rent figure onto which the Consumer Price Index increase was applied increased yearly. Capital improvement surcharges and hardship increases became part of the base figure. Also, it was unclear what rental figure applied as the base rent in the case of a lease of several years with an annual step-up provision. Tenants were confused and boards spent a large part of their time determining the amounts of increases allowed under their ordinances.

While the Fort Lee ordinance has served as a model, some of the ordinances contain substantial variations. One local law allows for 10 percent increases in apartments which become vacant. Another law ties rental increases to increases in a housing cost index. Others provide that landlords can pass on fuel cost increases.

A. Legal Challenges After Inganamort

After Inganamort, landlords, in a series of legal attacks on local ordinances, raised the argument that no emergency existed to justify the imposition of rent controls. They also challenged specific provisions of the ordinances.

In Albigese v. Jersey City, landlords maintained that there was no housing emergency in Jersey City and that the tying of rent increases to the Consumer Price Index had no rational basis. The court placed the burden of proving that no emergency existed on the landlord plaintiffs. It then found that the landlords had not met this burden, noting that the testimony by brokers, owners, and superintendents only indicated that there had been an increase in the number of advertise-

200. Massachusetts municipal rent control boards, which were aided by paid staffs, were faced with far more complex problems. The Massachusetts law stated that landlords shall be allowed a “fair net operating income.” Mass. Gen. Laws Ann. ch. 40 App., § 1-7 (Supp. 1976). Each board promulgated a formula for across-the-board increases which would meet this standard.
203. E.g., Clark, N.J., Ordinance 74-23, § 1, Oct. 21, 1974.
204. Subsequently the emergency requirement was discarded in the Fair Return Cases. See text accompanying note 244 infra.
206. Id. at 109, 316 A.2d at 486.
ments for vacant apartments and that in their opinion vacancies had increased. The court found that in contrast the defendant's expert witness, the Jersey City Director of Planning, relied on a "comprehensive report prepared . . . for submission to the governing body and to the appropriate federal agency . . . [in] September 1973." The report indicated that the vacancy rate was under 3 percent. Furthermore, it pointed out that many of the available units were beyond the financial reach of the families most in need of housing. The court also noted the defendants' evidence that the Mayor's Action Bureau received 350 complaints, including a list of specific rent increases. From this list there was "a substantial showing of exorbitant rent increases . . ." In response to the argument that the use of the Consumer Price Index to measure permitted increases was unreasonable, the court acknowledged that the standard was not perfect, but found that it was a reasonable yardstick which was widely used. The fact that another method for determining allowable increases might be preferable did not provide a legal basis for striking down the law. Although the ordinance did not affirmatively guarantee a fair profit or investment return to the landlord, the court ruled that the inclusion of provisions for tax surcharges, capital improvement increases, and hardship increases adequately served this purpose.

207. Id. at 109-12, 316 A.2d at 487.
208. Id. at 110, 316 A.2d at 487. The court rejected plaintiff's argument that the area, rather than merely the municipal rental market, must be considered. The court found some merit to this contention, but concluded: "Such a limitless panorama would lead to the absence of any finite basis for conclusion." Id. at 111, 316 A.2d at 488. The argument that there was not a rental housing shortage in one town because there was no shortage in neighboring towns had been rejected as a non sequitur by the state supreme court twenty years earlier. Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954).
210. "Although the CPI is not attuned exclusively to the cost factors involved in operating an apartment house, it serves as a convenient and logical barometer which measures inflation." Id. at 119, 316 A.2d at 492.
211. Id. at 119-20, 316 A.2d at 492.
212. The court also rejected attacks on the ordinance's rollback provisions, its limitation of coverage to buildings with more than four units, and its method of determining capital improvement increases.

Nine days after the Albigese opinion was handed down, the court incorporated its findings in a ruling on the legality of a North Bergen ordinance. However, it did invalidate a section of the North Bergen ordinance requiring that landlords refund to tenants increases in rent collected between the termination of federal price controls on January 11, 1973, and the enactment of the municipal ordinance on June 21, 1973. "The attempt of the North Bergen ordinance to compel divestiture of this vested interest is ar-
On appeal, an extension of the Jersey City ordinance was struck down on the basis of an issue that was ripe at the time of appeal although not at the time of trial.\textsuperscript{213} The Jersey City ordinance, which was originally adopted on March 12, 1973, like the Fort Lee ordinance contained a provision that it could be extended by resolution.\textsuperscript{214} The 1974 extension of the law by resolution was ruled invalid, since New Jersey law requires enactment of the legislative power by ordinance rather than by resolution.\textsuperscript{215}

In \textit{Gardens v. City of Passaic},\textsuperscript{216} another superior court rejected a legal challenge by Passaic apartment owners which also relied on the argument that there was no housing emergency. In this case the court held that the existence of a housing emergency had been determined at the state level, and therefore it could not be made a fact issue in a challenge to a local ordinance.\textsuperscript{217} The \textit{Albigese} court had noted that some opinions had taken judicial notice of an acute shortage of low income housing in urban centers, but ruled that a factual determination must be made as to the existence of an emergency in the affected locale.\textsuperscript{218} In contrast, the \textit{Passaic} court ruled that the 1974 New Jersey eviction-for-cause law\textsuperscript{219} constituted an implicit recognition by the legislature of a housing emergency, because a law which infringed upon the landlord's right of dispossession, a right recognized since the time of Henry VIII, "would not be constitutionally justified unless an emergency housing shortage made it almost impossible for dispossessed tenants to locate other housing accommodations."\textsuperscript{220} It also cited the state level determinations of an emergency in Governor Cahill's 1970 message to the legislature\textsuperscript{221} and the comment in the \textit{Inganamort} opinion that the state law did not "'deal with the evil at hand—a housing short-

\begin{footnotes}
\textsuperscript{214} Id. at 569-70, 324 A.2d at 578.
\textsuperscript{215} "We add that to require extension only by ordinance in a matter of public importance such as this serves the salutory objectives of public notice and participation and affords the opportunity for unhurried deliberation." Id. at 570, 324 A.2d at 578.
\textsuperscript{216} 127 N.J. Super. 369, 327 A.2d 250 (L. Div. 1974).
\textsuperscript{217} Id. at 377, 327 A.2d at 254.
\textsuperscript{218} 127 N.J. Super. at 109, 316 A.2d at 487.
\textsuperscript{219} See note 3 supra.
\textsuperscript{220} 130 N.J. Super. at 375, 327 A.2d at 253. The court also pointed to the statement appended to the bill when it was introduced that "the remedy sought was based upon a critical shortage of rental housing space in New Jersey." Id. at 377, 327 A.2d at 254.
\textsuperscript{221} Id. at 374, 327 A.2d at 252.
\end{footnotes}
age and concomitant overreaching of tenants.'”

In ruling on the validity of the annual increase provision in the Passaic ordinance, a cost of operations standard tied to the cost of operating and maintaining property, the court followed the logic used in the *Albigese* opinion, upholding the provision because it had a rational basis.

In December 1974, a superior court ruled that the extension of the Fort Lee ordinance by resolution from February 2, 1973, to November 6, 1974, was not valid, on the grounds the ordinance could only be extended by another ordinance. As a result, lease provisions providing for higher rents in the event that the municipal rent leveling law was not valid became binding. Tenants in some cases owed substantial amounts of back rent. This occurrence, based on a legal technicality, was a bitter pill for tenants who had actively campaigned for rent restrictions.

In January 1975, North Bergen banned increases in rent for “senior tenants” with a yearly income under $5,000, except in cases where the landlord could show that he was entitled to a hardship increase. After a landlord proved that he was entitled to a hardship increase, he could increase a senior tenant’s rent by 10 percent. The superior court struck down the provision, declaring that landlords should not be forced to undertake the subsidization of senior citizens—a responsibility of the whole community.

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223. 130 N.J. Super. at 379, 327 A.2d at 255.
224. Inganamort v. Fort Lee, 131 N.J. Super. 558, 330 A.2d 640 (L. Div. 1974). The court did not rule on the legality of a new ordinance which was passed on Nov. 6, 1974. The opinion cited the *Albigese* holding, which relied on the same grounds. See note 213 & accompanying text supra.
225. North Bergen, N.J., Ordinance 1577-71 §§ 1(1)(d)-(e), 5(4)(m)-(n), Jan. 16, 1975. “Senior tenant” includes persons age sixty-five or over having an income not in excess of $5,000 including pensions. Id.
226. Id.
227. Property Owners Ass'n v. North Bergen, No. A-2752-74 (N.J. Super. Ct., App. Div., June 1976). The court stated: “We agree with Judge Larner’s conclusion that the ordinance constitutes an unconstitutional deprivation of property without due process of law. As he stated, ‘... the burden of supporting these people partially, of granting them a subsidy, is a public burden and should be borne by the entire community.’ Here, however, the Municipality undertakes to attempt to shift this burden of all citizens and taxpayers of the Municipality to a particular class of individuals, namely persons who own property, and demand that those persons take care of the community as a whole. That in my mind constitutes a clear-cut taking of property without due process.”
B. The Sentiment Shifts Against Statewide Legislation

In November 1974, fifty tenant leaders met and almost unanimously reaffirmed the view of the NJTO leaders that tenants should not support a statewide law.\(^{228}\) It had become apparent that tenants had sufficient power on a local level to obtain favorable legislation, while it was unclear what type of state law would be adopted. At the same time landlords started to advocate statewide legislation, citing the difficulties posed by a multiplicity of regulations which varied from city to city. According to the chairman of the Apartment House Council the variety of local ordinances is "a constant headache" for anyone "trying to figure out what town is doing what," and is "a serious obstacle to new apartment construction."\(^{229}\)

The tenant response was that "[t]he municipalities are the governments which are closest to the local situation. The law that worked in one community wouldn't work next door."\(^{230}\) Sylvia Aranow stated:

Any statewide law would also have a local option, which would mean it would have to be approved by the municipality. Tenant groups would be back where they are now. They would still have to pressure local government to get the law in effect.\(^{231}\)

Several tenant leaders stated that they felt that real estate lobbyists would be able to exert more influence at the state level than in hundreds of municipalities.\(^{232}\)

Other tenant leaders, however, felt that a statewide law was needed. One foresaw the repeal of municipal ordinances in response to pressure from homeowners who wanted to increase the tax base. Another indicated concern that tenants would lose hardship appeals before unsophisticated local boards unless the state established hardship...

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\(^{228}\) The Record (Hackensack, N.J.), Nov. 26, 1974, at A-4, col. 5.

\(^{229}\) N.Y. Times, Sept. 22, 1974, at 83, col. 8. The New Jersey Supreme Court later agreed with this view. See text accompanying note 261 infra.

\(^{230}\) The Record (Hackensack, N.J.), Nov. 26, 1974, at A-4, col. 5.

\(^{231}\) Id.

\(^{232}\) Id. An example of tenant influence at the local level occurred in March 1976 when Fort Lee tenants forced the city council to amend its ordinance after a property tax increase led to a substantial increase in rents under a property tax pass-through provision. Under the new provisions, the automatically permitted annual rent increase was raised from a maximum of 2½% to a maximum of 5% and the tax pass-through provision was repealed. Fort Lee, N.J., Ordinance 76-8, § 3, Mar. 1976.

The ordinance amendments also provide that the new sections increasing permitted annual rent increases should not take effect until thirty days after the final disposition of the landlords' appeal of the superior court decision upholding the 2½% limit. Fort Lee, N.J., Ordinance 76-8, § 9, Mar. 1976. See note 239 infra. The provision was apparently intended as an inducement for the landlords to settle the case.
guidelines. A report by the Department of Community Affairs which was favorable to rent control pointed to the need for a uniform rent-leveling formula.\textsuperscript{238}

In addition to the passage of the state eviction-for-cause law,\textsuperscript{234} the year 1974 saw several changes in the local rent-leveling ordinances. Tying rent increases to increases in the Consumer Price Index became unacceptable as the annual rate of inflation exceeded 9 percent.\textsuperscript{235} Many cities amended their laws to limit increases to one half of the increases in the Consumer Price Index.\textsuperscript{236} Others limited increases to a fixed percent ranging from 2½ to 7½ annually.\textsuperscript{237} Ironically, landlords, in response to the new stricter limitations, started to advocate the Consumer Price Index formula which they had opposed earlier.\textsuperscript{238}

V. The Fair Return Cases

The new restrictions which limited annual rent increases to an amount less than the percentage increase in the cost of living provided the basis for a new constitutional attack by landlords, who argued that they were squeezed in particular by skyrocketing fuel costs.

In July 1974, the superior court upheld Fort Lee's restriction of rent increases to 2½ percent per year.\textsuperscript{239} However, its enforcement

\textsuperscript{233} Rent Leveling, supra note 78, at 12.
\textsuperscript{234} See note 3 supra.
\textsuperscript{235} Between 1970 and 1974, the Consumer Price Index increased 32%. Rent Leveling, supra note 78, at 3.
\textsuperscript{236} The Record (Hackensack, N.J.), Dec. 9, 1974, at B-1, col. 3.
\textsuperscript{237} Id. By 1976, almost all of the larger cities had provisions limiting rent increases to a fixed percent or a percentage of the increase in the cost of living.
\textsuperscript{238} Id.
\textsuperscript{239} Helmsley v. Fort Lee, No. L-11348-74 (Bergen County, N.J., Super. Ct., June 30, 1975). The court rejected the landlords' argument that a 2½% flat rate automatic increase was constitutionally insufficient because it did not respond to the vicissitudes of the economy. It noted that the courts had never required rent control statutes to provide for a particular method for increases.

In a brief but cogent discussion, the court also rejected the argument that the landlords were not making a fair return on their investment. Landlords provided evidence that they were not receiving an 11% return on their investment which they defined as the replacement cost of their property. It was undisputed that an 11% rate of return was fair. The court found, however, that the use of replacement cost as a determinant of value was inappropriate and distorted: "Use of the replacement cost method to determine market value is an arbitrary if not altogether fictitious concept in this setting. Nonetheless it constituted the foundation upon which plaintiffs' theory was built and its use distorted and inflated all that followed. Here we have the benefit of testing this hypothesis by applying it to actual 1974 market conditions. The 2½% limitation on rent increases was not in effect and the weighted average rent for a Luxury I type apartment was $447 per month. Acceptance of such rent on the basis of plaintiffs' computations deprived every plaintiff of a fair net return last year. The required rent for the
was suspended pending the outcome of the Fair Return Cases.\textsuperscript{240} On December 11, 1975, the New Jersey Supreme Court handed down its three sweeping decisions in the Fair Return Cases upholding the revised statutes.\textsuperscript{241}

In a thorough discussion of the issues raised by the plaintiffs, the court in \textit{Hutton Park Gardens v. West Orange}\textsuperscript{242} rejected the view that local ordinances were invalid because they failed to require that landlords receive a fair return on their investment. It also rejected the view that restricting rent increases to a few percentage points or a percent-

same apartment, depending on the building involved, would have ranged from $598.98 to $1,121.97 per month, increases of 34\% to 151\%. As a practical matter, this specious position would negate any rent control, in Fort Lee." \textit{Id.}

In dicta, the court also noted that computing fair return on the basis of equity would not be reasonable, since it would justify different rents due to variations in financing. Only a market price basis was approved: "In the vernacular of the real estate industry, investment ordinarily means actual cash invested; equity means the interest of the owner determined by deducting encumbrances from market value. Neither is an appropriate base as may be demonstrated by the following hypothetical example: Three apartment houses, identical in all physical respects with exactly the same rent rolls and operating costs are sold simultaneously on the open market by an owner under no compulsion to sell. The price of $1,000,000 per building is fair market value. New owner of Blackacre East invests $500,000 cash and obtains an institutional first mortgage for $500,000. Purchaser of Blackacre West obtains the same first mortgage, arranges second financing of $700,000 and pockets $200,000. Blackacre North's buyer sells the fee for $600,000, takes a 99 year lease and obtains leasehold financing of $300,000, leaving a cash investment of $100,000 for the leasehold. The fair net return should remain identical for these three buildings even though the investments and equities are unduly disparate. Diverse financial arrangements should not be a factor. The base figure should be pegged to true market value, an approach that can be uniformly applied in all cases." \textit{Id.}

The court did strike down a section which tied the allowance of automatic rent increases to compliance with the housing code, since a forfeiture of a rent increase could result in a "penalty" of thousands of dollars. Such a provision was held to be contrary to the five hundred dollar limit on fines that may be imposed by New Jersey cities. The court distinguished the Fort Lee provision from provisions in other rent control laws which have allowed boards to condition discretionary increases on compliance with housing codes.

Also struck down was the tax surcharge provision of the ordinance, on the ground that it failed to encompass the tax increase applicable to common areas used by tenants, thereby unfairly burdening the landlord.

\textsuperscript{240} Landlords' testimony in that case had included a mammoth $35,000 study on rent control in Fort Lee completed in May 1975 by the New Jersey Center for Urban Policy Research under the direction of George Sternlieb. \textit{See N.Y. Times, July 3, 1975, at 61, col. 8.}

\textsuperscript{241} \textit{Hutton Park Gardens v. West Orange}, 68 N.J. 543, 350 A.2d 1 (1975); \textit{Troy Hills Village v. Township Council}, 68 N.J. 604, 350 A.2d 34 (1975). The cities which were defendants in the case prepared short briefs. Extensive briefs were prepared by the New Jersey Public Advocate which is funded by the state and may participate in cases which it deems to be in the public interest.

\textsuperscript{242} 68 N.J. 543, 350 A.2d 1 (1975).
age of the annual increase in the Consumer Price Index made the ordinances invalid on their face. Instead, the court held that an ordinance would not be stricken down unless it was shown that landlords as a class were not in fact receiving a fair return on their investment. The court set forth rough legal guidelines to be used by lower courts in determining whether landlords were receiving a fair return.

The opinion, written by Judge Pashman, who strongly believed in the need for rent control, went well beyond the issues which were determinative of the cases before the court. The court began by rejecting the traditional view that a housing emergency is a prerequisite to a valid rent control ordinance. It maintained that the use of the emergency standard in rent control cases was inappropriate in light of modern judicial attitudes toward economic regulation. The court noted that in the 1930's the United States Supreme Court had rejected the economic substantive due process standards upon which the emergency requirement was founded. Therefore, the court concluded:

[R]ent control ordinances are subject to the same narrow scope of review under principles of substantive due process as are other enactments under the police power: could the legislative body rationally have concluded that the enactment would serve the public interest without arbitrariness or discrimination?

Any legal attack on rent control based on the view that there was no housing emergency was thus laid to rest. The doctrine was held to make no sense in light of the post 1920's constitutional doctrines relating to price controls.

243. See text accompanying note 155 supra.
244. 68 N.J. at 561-62, 350 A.2d at 10. It was necessary for the court to take this position in order to set forth fair return standards which could be applied permanently rather than temporarily. None of the parties before the court questioned the view that emergency conditions existed in New Jersey. However, plaintiffs in the New Milford case attacked the city ordinance for its failure to include an emergency finding. For a history of the housing emergency requirement, see Baar & Keating, The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control, 7 Urban Law. 447 (1975).
245. 68 N.J. at 562, 350 A.2d at 11.
246. Id. at 563-64, 350 A.2d at 12.
247. The New Jersey courts' approach stands in contrast to the approach used by other courts, such as the New York Court of Appeals. In a series of eight opinions between 1960 and 1970, the New York Court of Appeals found that rent controls were justified by a housing emergency without clearly delineating an emergency standard. In 1956, the court ruled: "Rent controls, all will agree, ought not achieve a status of permanence in our economy. They have no justification except in periods of emergency." Lincoln Bldg. Ass'n v. Barr, 1 N.Y.2d 413, 420, 135 N.E.2d 801, 806 (1956). Six years later the same court found that the existence of an emergency "may not . . . [be] denied." Bucho Holding Co. v. Temporary State Housing Rent Comm'n, 11 N.Y.2d 469, 184 N.E.2d 569, 571 (1962).
248. One week after the Fair Return Cases were handed down, the Maryland Court
The court then discussed what types of price controls would be valid during "a chronic housing shortage of indefinite duration." The court held that, in order to be constitutional, price controls must be "non-confiscatory," permitting an "efficient operator to obtain a 'just and reasonable' return on his investment . . . ." After acknowledging that the terms "non-confiscatory" and "just and reasonable" cannot be precisely defined, the court attempted to describe a just and reasonable return. The mere fact that rent regulation reduces the value of the property or causes hardships for inefficient operators, it was said, does not make it unreasonable. A fair return is "one which is generally commensurate with returns on investments in other enterprises having comparable risks." The interests of the consumer and the general public, as well as the investor, must be weighed in the process of determining what constitutes a fair return.

The Wayne and West Orange ordinances under review were typical of the local ordinances as amended since the steep inflation of 1974. The West Orange ordinance tied rent increases to annual increases in the Consumer Price Index plus increases in taxes. However, it limited rent increases and surcharges to 5 percent of the rent per year. Landlords could apply for additional increases, not to exceed 10 percent of the rent, in the case of hardship or capital improvements. The Wayne ordinance limited increases to 50 percent of the increase

of Appeals expressly rejected the emergency requirement in Westchester West No. 2 Limited Partnership v. Montgomery County, 276 Md. 448, 348 A.2d 856 (1975). "We recognize that the Supreme Court has not expressly overruled the early rent control cases . . . and that courts in some other jurisdictions have continued to use the "emergency" standard. . . . Nevertheless, we agree with the United States Court of Appeals for the Second Circuit [holding] in Eisen v. Eastman: 'The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that Nebbia v. New York was decided.'" Id. at 466, 348 A.2d at 865 (citations omitted).


249. 68 N.J. at 553, 350 A.2d at 6.

250. Id. at 569, 350 A.2d at 15.

251. Id. at 570, 350 A.2d at 15.

252. Id.

253. Id.


255. 68 N.J., at 553, 350 A.2d at 6.
in the Consumer Price Index.\textsuperscript{256} In addition, landlords could apply for permission to pass through property tax increases or to impose hardship increases not exceeding 15 percent of the rent.\textsuperscript{257}

The supreme court held that the two ordinances were not invalid on their face, although they did not allow rents to increase as fast as some landlords' operating costs. It stated that there were circumstances under which an ordinance could be invalid on its face. Examples given included rents set so low that all members of the industry would have to operate at a loss and a rent control ordinance in operation for fourteen years without any provisions for increases.\textsuperscript{258} The court then expressed its view in the cases of West Orange and Wayne:

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The return which landlords were obtaining at the base rent levels may well have been so far above the just and reasonable mark that the present diminished rate of return may still be more than just and reasonable even if current cost increases are outpacing permissible rent increases.\textsuperscript{259}

The court further held that ordinances need not explicitly provide for a just and reasonable return. Instead, such provisions would be read into the ordinances, if possible.\textsuperscript{260} Since the plaintiffs did not present any evidence as to their actual profits and losses, the court did not determine whether the ordinances were in fact confiscatory.

After commenting that it was not the role of the court to indicate the method of rent controls to be employed, the court pointed to a need for a uniform state rent control law, stating that the local statutes were poorly drafted and frequently altered to meet unforeseen problems and new economic conditions. In addition, the court noted that the disparity among local controls discouraged new construction, capital improvements, and property maintenance.\textsuperscript{261}

In the companion \textit{Brunetti} case, the court rejected several other arguments advanced by the landlords.\textsuperscript{262} One argument was that the ordinance was confiscatory because it failed to provide for increases to offset capital improvements. The court held that this failure did not invalidate the ordinance on its face, since it was possible that landlords

\begin{itemize}
\item \textsuperscript{256} Wayne Township, N.J., Ordinance 51-1974, § 4.
\item \textsuperscript{257} 68 N.J. at 554, 350 A.2d at 6.
\item \textsuperscript{258} \textit{Id.} at 571, 350 A.2d at 16.
\item \textsuperscript{259} \textit{Id.} at 572, 350 A.2d at 16.
\item \textsuperscript{260} "Every rent control ordinance must be deemed to intend, and will be so read, to permit property owners to apply to the local administrative agency for relief on the ground that the regulation entitles the owner to a just and reasonable return." \textit{Id.}
\item \textsuperscript{261} \textit{Id.} at 573-74, 350 A.2d at 17.
\item \textsuperscript{262} \textit{Brunetti v. New Milford}, 68 N.J. 576, 350 A.2d 19 (1975).
\end{itemize}
could recoup the funds necessary for capital improvements from gross rental income or additional rent increases allowed pursuant to hardship provisions.\footnote{263}

Plaintiffs also argued that the ordinance was unworkable because it required landlords to apply for rent increases forty-five days in advance on the basis of cost of living data not yet available.\footnote{264} The court responded that if in fact the plaintiffs' allegation was true, the invalid provision should be severed from the ordinance.\footnote{265}

Landlords also argued that eviction sections of the ordinance had been preempted by the state eviction-for-cause act of 1974.\footnote{266} The court agreed and severed these sections while upholding the remainder of the ordinance.\footnote{267}

In the third decision, \textit{Troy Hills Village v. Township Council},\footnote{268} landlord plaintiffs argued that the ordinances were unfair as applied, supporting this conclusion with evidence that one complex's gross income went up 6.7 percent in fiscal 1974 while operating expenses went up 19.2 percent, and that another complex's gross income went up 3.8 percent while expenses went up 24.6 percent. However, in nei-

\begin{itemize}
\item \textit{Id.} at 595-96, 350 A.2d at 29. Since the plaintiffs were precluded by the trial court from presenting evidence as to the actual return they were receiving, the court did not rule on whether the ordinance allowed them a just and reasonable return. \textit{Id.} at 595, 350 A.2d at 29.
\item \textit{Id.} at 598-99, 350 A.2d at 30-31. Landlords were required to present cost of living figures for the period ending ninety days prior to the proposed rent increase. Often, according to plaintiffs' allegations, these figures were not available forty-five days prior to the proposed increase.
\item \textit{Id.} at 600, 350 A.2d at 31-32. The court directed lower courts to "construe said ordinance in such a manner as to allow landlords a reasonable period of time prior to the effective date of a proposed increase in which to submit their computations to the board." \textit{Id.}
\item \textit{Id.} at 601, 350 A.2d at 32. See text accompanying note 3 supra.
\item The fact that the eviction sections of the local ordinance essentially duplicated state provisions did not overcome the finding of preemption. Eviction sections of municipal control ordinances have been struck down on preemption grounds in almost all cases. See, e.g., Burton v. Hartford, 144 Conn. 80, 127 A.2d 251 (1956); Heubeck v. Baltimore, 205 Md. 203, 107 A.2d 99 (1954); FTB Corp. v. Goodman, 300 N.Y. 140, 89 N.E.2d 865 (1949). In 1976, the California Supreme Court ruled that the requirement in the Berkeley ordinance that a landlord obtain a certificate of eviction from the rent control board before seeking repossession was invalid because it defeated the summary nature of the California repossession procedure. However, the court ruled that a limit on the grounds upon which a landlord may bring an action to repossess a rent controlled unit would be valid and did not conflict with the state summary repossession procedure. Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 147-53, 550 P.2d 1001, 1014-18, 130 Cal. Rptr. 465, 478-82 (1976).
\item 68 N.J. 604, 350 A.2d 34 (1975).
\end{itemize}
ther instance was evidence presented to show that owners were receiving less than a fair return on their investment.\textsuperscript{269}

The court indicated that it would not give a full treatment to the fair return issue, since plaintiffs had not presented any evidence concerning their net income.\textsuperscript{270} However, in lengthy dicta, the court set forth guidelines which lower courts should follow in fair return cases, and suggested procedural guidelines which municipalities should enact into their rent leveling ordinances. For instance the court commented that local ordinances should, but are not required to, "set forth standards and criteria by which the parties, the local rent control agency, and reviewing tribunals can be guided in determining the adequacy of returns actually received under the ordinance."\textsuperscript{271} A clause merely stating that landlords may seek relief if they cannot realize a reasonable return was not considered adequate for this purpose. In discussing confiscatory rates of return, the court distinguished a fair return from the "best" rate of return used in utility cases: "Courts should not be concerned with balancing competing interests and determining what is the 'best' rate level. Rather, their sole task is to determine the lowest constitutionally permissible rate."\textsuperscript{272} It declared that the minimum constitutionally permissible rate of return was largely a determination of "fact." The court added:

\begin{quote}
[A] rate of return must be high enough to encourage good management including adequate maintenance of services, to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit. A just and reasonable return is one which is generally commensurate with returns on investments in other enterprises having corresponding risks.\textsuperscript{273}
\end{quote}

The fact that the minimum rate of return "may drive inefficient operators out of the market and may preclude persons who have paid in-

\begin{footnotes}
269. Id. at 620, 350 A.2d at 42. Furthermore, the landlords' figures indicated that there was a very large gap between operating expenses and gross income.

270. Id. The court commented: "We do not regard this appeal or the companion cases as the appropriate vehicle for a comprehensive or definitive formulation of the methodology for determining whether a landlord is receiving a fair return under a given rent control ordinance. The law concerning fair return is still in its nascent stages." Id.

271. As an example of a statute containing such standards and criteria, the court cited the 1953 New Jersey rent control statute. Id. at 620-21, 350 A.2d at 43. Under this law the net operating income was considered less than fair if it was less than 20% of the annual income of the building. In computing expenses, operating costs, real estate taxes, and depreciation were allowed. However, mortgage interest was excluded. Ch. 216 [1953] N.J. Laws.

272. 68 N.J. at 622, 350 A.2d at 43.

273. Id. at 629, 350 A.2d at 47.
\end{footnotes}
flated prices for buildings from recovering a fair return," the court added, does not make it unconstitutional.\(^{274}\) Also, the court indicated that landlords need not wait until they have suffered before seeking judicial relief where they can predict the future effect of a particular ordinance with reasonable accuracy.\(^{275}\)

The court's guidelines for determining the fair rate of return reflected the extreme complexities surrounding the issue, without offering a specific formula. The determination of value, a prerequisite to a determination of rate of return, should not be based on present rental income, the court said, since a reliance on current inflated rents to determine value would defeat the purpose of rent control ordinances.\(^{276}\) Instead, value and rent levels used to determine fair return should be those which would prevail in a market free of aberrant forces, "in the context of a hypothetical market in which the supply of available rental housing is just adequate to meet the need of the various categories of persons actively desiring to rent apartments in a municipality."\(^{277}\)

Lower courts were also advised to evaluate the expenses claimed by landlords and to substitute reasonable figures where unreasonable expenses have been claimed.\(^{278}\)

\(^{274}\) Id. at 628, 350 A.2d at 47.

\(^{275}\) Id. at 630, 350 A.2d at 47-48.

\(^{276}\) "[V]aluation based on inflated rents would inevitably and erroneously lead the courts to a conclusion that a regulation which fails to permit such inflated rents is confiscatory." Id. at 623, 350 A.2d at 44.

The court entered into a brief discussion of the three methods of valuation of property: depreciated replacement cost, capitalized income figures, and market value based on sales of comparable properties. It had difficulty with each of these approaches. Sales of comparable properties and capitalized income figures reflect the existence of rent controls and the aberrant housing market. Replacement costs reflect steep rises in construction costs rather than market value. The court concluded its discussion by advising: "In determining value, the court should take full advantage of the enlightenment which these methods of valuation may provide, as well as that provided by any other soundly conceived method . . . ." Id. at 626, 350 A.2d at 46.

\(^{277}\) Id. at 623-24, 350 A.2d at 44. The court noted that this technique has been used in Great Britain for years. For a discussion of rent control in Great Britain, see MANDELMAN, HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND 139-72 (1973); WOLMAN, HOUSING AND HOUSING POLICY IN THE U.S. AND U.K. (1975).

\(^{278}\) 68 N.J. at 627, 350 A.2d at 46. In a concurring opinion, Justices Conford and Clifford criticized the majority for embarking on an extensive exploration of what constitutes a fair return, since the question had not been raised by the parties. Id. at 634, 350 A.2d at 50. Conford wrote that the theoretical discussion by the majority, which used the legal jargon that had been applied in utilities cases but which rejected the utility regulation legal standard, may tend to confuse rather than clarify the issue. Id. at 634-35, 350 A.2d at 50. He suggested that "a local rent control agency of typically inexpert part-time people . . . needs simple, practical and inexpensively administrable rules [such as those provided for in the 1953 New Jersey rent control statute.]" Id. See note 271 supra.
The holdings of the Fair Return Cases may have created as many problems as they resolved. The court's discussion resembled a philosophical rather than a legal guide which could be applied to specific cases. Guidelines such as these, which do not indicate precisely which rate of return would be considered fair, will insure that lower court judges will have an immense, if not impossible, task in reviewing hardship appeals, and that no two courts will arrive at the same result. Lower courts may only guess what rate of return would be fair.279

Inherent in the court's discussion was the assumption that an intelligent standard for determining what constitutes a fair rate of return may be found. No one yet, however, has been able to devise a widely accepted standard, despite the fact that rent control has been widespread at various times during this century and has been in effect in the nation's largest city since 1942.

The court in *Troy Hills* did not suggest a method of computing the landlord's rate of return. Rather, in textbook fashion it recited:

> "In order to establish the rate of return actually being received under a given ordinance, one must deduct reasonable expenses from gross rental income, and then calculate the percentage relationship between the resulting "net income" and the value of the landlord's property."

Yet, the court could not even decide how to determine the value of rental property. Instead, it discussed the possible techniques for determining value, referred to a textbook on real estate appraising, and noted: "Because value in the sense used here is to some degree hypothetical, it admittedly poses difficult problems of proof."281 The court's command that "aberrant forces," in this case a housing shortage, should be discounted in determining value, without offering any guidelines as to how to perform this exercise, only makes the task more difficult. The just and reasonable return standard left lower courts with only abstract guidelines.

While the court may be criticized for discussing considerations involving fair return without offering precise answers, silence may not have been a better solution, since trial court review of rent leveling board rules on hardship applications was inevitable. However, the court might have been more realistic had it stated that a resolution in the form of precise guidelines may be impossible.

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279. For a discussion of the approaches to fair return used in other rent control laws and the difficulties they involve, see *Urban Planning Aid, Less Rent More Control* (1973); Willis, "Fair Rents" Systems, 16 Geo. Wash. L. Rev. 104 (1947).
280. 68 N.J. at 622-23, 350 A.2d at 44.
281. *Id.* at 624, 350 A.2d at 45.
A. Defining Fair Return

The supreme court's comments, and the difficulties presented by trying to determine what is a fair return, have increased the demand for a statewide law which would define a fair return standard.282

The new head of the NJTO, Dave Baslow, has taken the position that a statewide fair return formula is needed. Otherwise, according to Baslow, the local boards, unable to understand landlords' books, will grant undeserving requests for hardship increases.283 Rent board members also have taken the position that they need a state formula to provide guidance in fair return cases.284 And some cities have attempted to define fair return in their ordinances.285

It took the Fort Lee Rent Leveling Board several months to rule on a hardship application in a particularly complicated case involving a 1260 unit complex.286 In at least one case, a superior court has overturned a rent leveling board denial of an application for a hardship in-

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282. The legislature, in considering a fair return formula, would have resources which would not be available to a court. However, the passage of a rigid formula may lead to far more difficulties than a judicially mandated formula, which is subject to judicial interpretation and modification.


284. One board member commented, "Who of us can read a profit-and-loss statement or understand what goes into determining what a fair and equitable profit would be? I frankly would be at a loss." Id.

Another board chairman, a landlord, commented: "If it was done with professionals running it, instead of people who mean well but don't really know what they're doing, it would be more equitable." Id.

In October 1976, at a meeting of the New Jersey Rent Leveling Association, rent control administrators from twenty-one cities urged the state to devise a uniform formula to determine a fair return of profit for landlords. Newark Star Ledger (N.J.), Oct. 21, 1976, at 36, col. 7.

285. The municipalities of Paterson and Weehawken have defined a fair return as a rate of return on equity 6% above the prevailing rate on demand deposit savings accounts. Weehawken, N.J., Ordinance, Mar. 10, 1976; Paterson, N.J., Ordinance, Mar. 3, 1976. Prior to adopting this formula the Paterson town council rejected a proposal by a tenant leader which would have been more favorable to landlords. According to the tenant leader the council did not understand that it was passing an ordinance that was even stricter than the one proposed by the tenants. See note 266 supra for a discussion of the irrationalities of tying fair return to equity.

286. The Record (Hackensack, N.J.), Mar. 16, 1976, at B-1, col. 1. "Tenants of Horizon House say the buildings did not lose nearly as much as the landlord says [over one million dollars the previous year], if they lost anything at all. Tenant leaders insist that the mountain of financial data submitted by management—the Horizon House application [is] at least three inches thick—is incomplete and often misleading.

"Those who will have to decide the case—the seven volunteer members of the Fort Lee Rent-Leveling Board—face an overwhelming task.

"For three months, they have studied the Horizon House application—which would
crease which had been affirmed by the city council.287

There have been other sources of pressure for statewide legislation. Many tenant leaders dissatisfied by their local rent leveling ordinances, favor state legislation. At a meeting in March 1976, tenant leaders from about forty towns almost unanimously supported statewide legislation.288 Others, in reaction to the state supreme court's comments in the Fair Return Cases, feel that the state judiciary will lose patience with the failings of local rent leveling ordinances. One tenant leader commented that judges had indicated to him that they feel that the balance of power had shifted too far in favor of tenants in some towns.289

(In the first half of 1976, the legislature was too preoccupied by a court order compelling it to provide an alternative tax method of financing its schools to consider highly controversial rent legislation.)290

VI. Conclusion

The New Jersey judicial precedents in rent control cases may be particularly valuable to tenants in other states. The New Jersey courts

raise rents $112 a month for an average apartment. . . . Rents now range from $280 . . . to $900. . . .

"The rent board has commissioned an outside audit. It has also sat through two lengthy hearings and expects to sit through more. . . .

"Even the sophisticated and experienced Fort Lee rent board, whose members include an accountant and a mathematician, is finding the Horizon House case a burden." Id.


A Massachusetts court overruled a Brookline Rent Board holding that a net return equal to 6.8% of the total value of a building after deducting operating expenses (but not interest payments) was confiscatory in light of the fact that prevailing interest rates on mortgages at the time the building was purchased in 1972 was 9%. Zussman v. Rent Control Bd., 343 N.E.2d 889 (Mass. App. 1976).

288. This was the opinion of Hanni Duffy, vice president of the NJTO, and Dave Baslow.

289. This information was gained from an interview with a tenant leader. In one opinion a judge commented: "[Municipalities are taking advantage of their power to institute rent controls] by amending their Ordinance daily, weekly, monthly, making changes all the time, merely because they have been given a power to control rents by virtue of the Inganamort case. There must be a stop to this." Keen Realty v. West New York (unreported oral decision, June 27, 1975), cited in New Hudson Realty Co. v. North Bergen, No. L-4087-75, at 17 (Hudson County, N.J., Super. Ct., L. Div., Dec. 18, 1975). Also, suburban homeowners tend to see the apartment dwellers as a less desirable type of citizen and as a tax burden on homeowners. In fact, the costs associated with single family dwellings and their occupants tend to place a greater financial burden on communities than apartments. See NEW JERSEY COUNTY AND MUNICIPAL GOVERNMENT STUDY COMMISSION, HOUSING AND THE SUBURBS, FISCAL AND SOCIAL IMPACT OF MULTIFAMILY DEVELOPMENT (1974).

have upheld ordinances which have vague guidelines rather than concrete formulas. In instances where ordinances were unclearly or inaccurately drafted, the courts have attempted to read the ordinances in accordance with legislative intent rather than with their literal meaning. They have also read into the laws provisions such as fair return requirements, which are necessary for their constitutionality.

In addition to ruling on the legality of ordinances, the New Jersey courts have acted as an advisory body, with the intent of helping to make rent control work. In the Fair Return Cases, the state supreme court was particularly concerned about the practical as well as the legal questions surrounding local rent control. The court used its position to influence the form of rent control as well as to determine its legality. Although the passage of a state law, which the court viewed as highly desirable, has not yet occurred, tenant leaders have reacted to the court's advice as if it were a compelling command.291

Tenant attorneys repeatedly pointed out that New Jersey courts have traditionally been very responsive to consumer needs. One may surmise that the broad base of the tenants' movement has had a strong effect on the attitude of the New Jersey courts towards rent control. In states where the rent control movement has been broadly based, state courts have adjudicated the issues surrounding rent control controversies with relative speed. In New Jersey the state preemption issue was settled by the state high court within fifteen months after localities started to pass ordinances. The Massachusetts Supreme Judicial Court struck down two local ordinances within one year after they were adopted.292 Then it upheld a state law six months after it was passed.293 On the other hand, Miami Beach, Bangor, and Berkeley rent control measures were bogged down in the appellate courts for years pending ultimate determinations as to their legality.294 The courts of Florida, Maine, and California probably would not have taken so long to rule on the legality of rent control ordinances had twenty cities in each of those states passed such laws.

The suburban middle class character of the New Jersey tenants' movement has also played a significant role in its success. The New Jersey suburbs of New York City have a high percentage of middle

291. The author received this impression from interviews with tenant leaders in June 1976.
292. See note 33 & accompanying text supra.
293. See note 34 & accompanying text supra.
294. See notes 42-51 & accompanying text supra.
income tenants who are accustomed to voting and having their desires met. Furthermore, many New Jersey tenants, unlike tenants in other parts of the country, have benefited from rent control as former New York residents. Their strength has been compounded by the fact that they tend to live in newer, larger apartment complexes which are easier to organize than smaller buildings. A fifth of the tenants in a three hundred-unit apartment complex can lead a demonstration which will seem large and receive publicity. A fifth of the tenants in a ten-unit building could not form a crowd.

In quiet suburban communities, which do not feel torn by many of the issues that dominate inner cities, rent control can become a most exciting local political issue. It offers the additional distinction of having an immediate solution, the imposition of controls, unlike basic education issues, for example, which seem beyond resolution. Also, local politicians cannot argue that rent regulation, like unemployment or inflation, is beyond their control.

Where tenants make up a substantial percentage of the electorate, their opposition can drive local politicians out of office. Where tenants are of the same economic and social status as homeowners, tenant demands are less likely to be associated with the radicalism of many rent control advocates in university communities. However, even middle class tenants may be viewed as outsiders to long time residents of older suburbs.

Martin Aranow often stated that the NJTO represented poor as well as middle class tenants. However, legal services attorneys who were involved in tenant organizing repeatedly noted the relative ease with which middle class tenants could be organized. The middle class tenants had the resources and the skill to mount effective rent strikes and campaigns for rent control. Their efforts received prompt and favorable publicity. They could afford all the legal representation they needed. Also, they were not as frightened as the poor by the threat of eviction, since they could hire legal counsel and could obtain substitute housing.

Those who feel that the basic forms of ownership of housing need to be changed and would like to use the housing movement as a forum for advocating more radical reform have been frustrated by the NJTO, which has carefully limited its involvement to rent control and housing

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295. Thirty-four percent of Fort Lee’s apartment dwellers moved there from New York City. CENTER FOR URBAN POLICY RESEARCH, RENT CONTROL IN FORT LEE, NEW JERSEY, at VI-9 (1975).
The NJTO has established middle class organizations which can communicate effectively with the leaders of the local and state establishment who are from the same economic class. At one meeting the author attended, one group of tenants complained about the failure of the air conditioning in their building. A few minutes later, another group of tenants, somewhat embarrassed, discussed their problems with rats and roaches. One could not quite imagine the two groups meeting on a common ground other than a tenants' meeting which focused on rent control and specific tenant complaints.

Although the NJTO was run primarily by middle income tenants, the legislative changes that it brought about were of use to low income tenants. Poor tenants as well as middle income tenants are affected by widespread rent increases. The tying of rent increases to maintenance may be of particular benefit to low income tenants in light of the continual failure of code enforcement efforts.

It is hard to assess the importance of a strong leader to the success of a movement. However, it is clear that Martin and Sylvia Aranow played a major role in the success of the New Jersey tenants' movement. Their unquestioned leadership gave unity to a movement that might have divided along socio-economic lines. Tenants could focus their inquiries, efforts, and hopes on the fate of two visible and attractive leaders. During the period of their leadership there was in almost all cases only one tenant strategy toward the state legislature and local officials.

The respective positions of landlords and tenants for and against statewide rent controls have been determined by their relative strengths at the state and local level. Where tenants have the balance of power within a municipality, they see little need for a state law. Tenants from towns with weak rent control laws or no controls often favor a state measure. Landlords and builders, who have felt powerless at the local level in New Jersey, are in favor of statewide legislation.

Rational arguments can be made for and against statewide controls. Proponents of statewide legislation point out that under the present system each municipality has a different rent leveling scheme. Furthermore, the uncertainty that it caused by the frequent changes in local ordinances discourages investment by making it impossible to predict future returns. It has been predicted by many that continued local
legislation will lead to disaster as boards become unable to cope with hardship appeals. There have been no surveys of the number of hardship appeals that have been filed, but it does not appear that the number to date has been great.\textsuperscript{297} One tenant attorney expressed concern that the overly strict local controls which have been instituted in some cities, such as Fort Lee, may lead to a backlash by homeowners and the courts against rent control. He felt that the survival of controls hinged on the passage of an orderly and reasonable statewide scheme.

Opponents of statewide legislation feel that any measure that was passed by the state would be weaker than local ordinances. Furthermore a state law could not be changed easily or adapted to local conditions. Local laws have been amended frequently in response to changing conditions. It is doubtful that the state would move quickly in light of the diverse interests and numerous committees that must be satisfied to effect a change in the state law. It is feared that a key committee member, possibly one who had few tenants in his district, could bottle up a critical piece of legislation.

The failure of New Jersey cities to budget funds for the purpose of providing rent leveling boards with technical staffs has put local controls in a particularly bad light. Presently the local boards do not have sufficient expertise to understand the complexities of rent regulation and real estate finance. The draftsmanship of local legislation has left something to be desired. Ordinances are copied from the neighboring municipality or the Fort Lee ordinance without much input from those who are trying to administer the "model" ordinance. The ineptitude and uncertainty surrounding local rent legislation has provided strong arguments for a state law. (These factors provided the basis for the arguments made by the state supreme court in the Fair Return Cases.) Tenants who spend thousands of dollars a year in rent might consider legislation providing that tenants pay a fee of $10 to $15 per year for the purpose of providing rent leveling boards with some professional staff.

The difficulties surrounding fair return and hardship determinations have increased the pressures for statewide controls. Local officials are looking to the state for a hardship formula which will alleviate their uncertainties about the determinations of a fair return for land-

\textsuperscript{297} This conclusion is based on interviews with rent leveling board members and tenant leaders. The low number of hardship appeals may be explained by the fact that until the middle of 1974 almost all ordinances allowed for rent increases equal to the percentage increase in the Consumer Price Index. But see text accompanying note 198 \textit{supra}. 
lords. It may be true that a statewide ordinance would be devoid of technical errors and ambiguity, and might provide more certainty than exists now. It would be amazing, however, if it included a workable formula for dealing with hardship appeals. Intelligent understanding and review of hardship claims requires a knowledge of real estate economics. No statute can embody this understanding.

A few localities have attempted to deal with the hardship and fair return question by defining these terms in their local ordinances. If localities start to copy "fair return" formulas from ordinances of other localities, applying them literally, without an understanding of their implications, the local ordinances may become unworkable, and possibly even unconstitutional, rather than merely containing small technical errors which make for minor difficulties and some amusement.

In Massachusetts, local boards (which have the assistance of paid staff) are required to provide landlords with a "fair net operating income." But these localities, when granting across the board increases rather than devising formulas which take into account a landlord's investment and expenses, have calculated what percentage across the board increases would meet the requirements of the law. If across the board rent increase formulas are used they should be tied to increased living and operating costs rather than the peculiarities of individual equity or investment in particular buildings. In establishing formulas it should not be forgotten that a substantial percentage (about 40 percent on the average) of housing costs, such as mortgage interest and profit, can remain at fixed levels.

Up to now, limits on rent increases have been tied to cost increases in a rational if not perfect fashion. However, if rent leveling boards, or the state legislature, seek solutions to the complex problems presented by long term controls through rigid legislation or unrealistic fair return formulas, the dramatic victories that the rent control movement has achieved in New Jersey may be lost.