ABANDONED AND VACANT HOUSING UNITS: CAN THEY BE USED DURING HOUSING CRISES?

The lack of housing across the country has undeniably reached crisis proportions.[1] In New York City, for example, the crisis has become so severe that there are virtually no habitable units available for occupancy.[2] The seriousness of the situation is compounded by the fact that no immediate solution of the national crisis is foreseeable. For the present, therefore, the country must attempt to make do with the inadequate housing it now possesses.[3]

Although the scarcity of present housing dictates the conservation of our present housing stock until long-range solutions can be attained, exactly the opposite is occurring. The phenomenon of abandonment is making itself felt throughout the country resulting in a steady decrease in a portion of our housing stock.[4] The curtailment of this trend should be of paramount importance.

The extent of abandonment in New York City was pointed out in the Rand Institute's 1968 study of the city housing market.

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1. The President's Committee on Urban Housing, United States Housing Needs, 1968-1978 (1968). The committee, recognizing the immensity of the housing crisis, determined that, "during the next ten year period, 1968-1978, housing construction needs will approximate 27 million units." Id. at 7.

2. See P. Niebanck, Rent Control and the Rent Housing Market in New York City (1970). The author stresses "the social significance of the fact that there are only 26,000 available vacant units out of a total rental stock of 2,122,000." Id. at 40.

3. The President's Committee on Urban Housing noted that, although 27 million units are needed in the next ten years, the current inventory is only 66 million, of which 6.7% are substandard. President's Committee, supra note 1, at 6.

4. This Note will adopt the use of the term "abandonment" as used by the Rand Institute to include those units "vacant and boarded up, vandalized, or burnt out." 1 New York City - Rand Institute, Housing Study 6 (1970) [hereinafter Rand Study].

> The number of unrecorded losses to the housing inventory rose from 15,000 annually in 1960-64 to 38,000 annually in 1965-67. Furthermore, these recent losses of the last three years are not confined to the worst part of the stock.... At least 80 percent to the unrecorded losses of the last three years were in buildings classified in 1965 as either sound or deteriorating, but not dilapidated.[5]

This documentation illustrates that in New York City (as in other cities across the country where abandonment is occurring), a present housing stock is available for almost immediate occupancy if the legal tools are made available which can impose on the landlord an obligation to rent those units he has withdrawn from the housing market.

The imposition of an outright obligation to rent these vacated units is contrary to many of the principles of our private enterprise system, no matter how injurious this position might be to the family without shelter. It is the purpose of this Note to develop viable legal theories which may be used to return some of the abandoned housing stock at least temporarily to the housing market.[6] From the outset, it is understood that the development of these theories must have their limitations, especially those theories pertaining to the private landlord where a large freedom of choice as to leasing units is maintained. However, the narrow use of these theories may be useful in providing housing for families badly in need of shelter. One of the theories will be narrowly applicable to New York City where rent control regulations[7] afford a unique means of controlling the

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5. Id. In addition, the Rand Study has yielded the information that, "a search of HDA records in 1968 turned up 7100 buildings that were officially recorded as vacant and boarded up, vandalized or burnt out. These contained an estimated 57,000 units. The list is believed to be far from complete." Id.

6. The author would like to express his indebtedness to George Rodenhausen, an attorney at Community Action Legal Services, for his valuable assistance in the development of this Note.

7. Rent and Eviction Regulations of the Housing and Devolpment Administration, Department of Rent and Housing Maintenance, Office of Rent Control, City of New York (1968) (enacted pursuant to the Administrative Code of the City of New York, ch. 51, Tit. Y) [hereinafter Rent and Eviction Regs.].

rental market. Other approaches based on federal housing legislation and equal protection theories will be more broadly applicable.

In returning abandoned units to the housing market, it is often urged that a set of defenses should be developed to defend a family which has simply moved into a vacant unit and started to live there. In the author's opinion, this task is nearly impossible. In New York, the squatter subjects himself to criminal trespass proceedings, as well as to almost immediate eviction if the owner brings an action against him.[8] It is, therefore, the position of this Note that the group which seeks to be housed in these vacant units must first initiate legal proceedings since it is unlikely that forced entry can ever lead to legal occupancy.[9]

In developing theories to impose an obligation to rent on the owners of these vacant units, it is useful to catalog different fact situations, keeping in mind the development of different legal theories. For each area the final objective will be to restore vacant, but habitable, units to the housing market. For purposes of study, the following classifications will be made pertaining to different varieties of vacant housing: A) Vacant apartments subject to rent control regulations; B) Governmental ownership of vacant units, subdivided into: 1) ownership of units because of urban renewal or similar governmental purpose; 2) ownership of units not pursuant to urban renewal or similar governmental purposes; and C) "Quasi-public" and private ownership of vacant units. Each classification will have its distinct characteristics, but often arguments will be interchangeable.

A. Vacant apartments subject to Rent Control regulations

New York City has been empowered by its Rent and Eviction Regulations to have an extraordinary power over a large portion of its housing stock.[10] It has been

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8. N.Y. Real Prop. Actions, § 713(3) (McKinney 1963).

9. Thirty-two persons at a New York City squatter site organized by a community group called Operation Move-In were recently arrested and charged with criminal trespass. N.Y. Times, November 18, 1970, at 51, col. 6.

10. Most housing accommodations built before 1947, except for those substantially demolished and decontrolled, are subject to rent control. See Rent and Eviction Regs. § 2(f)(8).

demonstrated that a larger proportion of lower income families live in these controlled units than do families from other income brackets.[11] In addition, because of the reduced income from the rent control apartments as opposed to the uncontrolled sector,[12] the majority of units being withdrawn from the housing market are subject to rent control. If further withdrawal of these units is to be curtailed, or if restoration of these withdrawn units is to be made possible, a reliance on rent control regulations will be crucial.

It is not always the case that landlords withdraw rental units from the housing market only because of financial hardship imposed by rent control. In addition to economic difficulty, removal of units is often based on pure business speculation. Landlords wait for rezoning so that they can build high rise apartments or convert to profitable business uses. They realize that by keeping their apartments vacant and by withdrawing units from the market, they can avoid the expensive relocation costs and burdensome procedures imposed on them by rent control regulations before other business plans can be consummated. Vacant units are amassed in a particular building as a result of turnover, harassment, diminished services, deterioration, and the deleterious effect of empty units on the rest of the building. As the units become vacant, they are usually sheeted up in anticipation of future business developments.

If one's object is to return these vacant units to the housing market, Section 14 of the Rent and Eviction Regulations becomes an immediate obstacle:

> §14 Withdrawal from the Rental Market. Nothing in these regulations shall be construed to require any person to offer any housing accommodation for rent, but housing accommodations already on the market may be withdrawn only after an order is issued by the Administrator under Section 59 of these Regulations, if such withdrawal requires that a tenant be evicted from such accommodation.

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11. "The ratio of controlled to not controlled low income families is nearly six to one in the below $4000 income bracket. The proportion of controlled to not controlled in the $8000 to $10,000 income bracket is less than three to one."

City Rent and Rehabilitation Administration, People, Housing and Rent Control in New York City 84 (1964).

12. G. Sternlieb, The Urban Housing Dilemma, 1970, 368-72 (1970) [hereinafter Sternlieb]. This is a study prepared for the New York City Housing and Development Administration.

Because of the narrow wording of this regulation restoration of units to the rental market is limited to those which have been withdrawn because of illegal evictions. The number of apartments in this category is probably few, but it is worthwhile to develop a theory to return these units to the market both to increase the housing supply and to deter future landlord harassment.

A closer examination of the rent control regulations is necessary to determine what constitutes an illegal eviction, and what the consequences of an illegal eviction may be. The landlord of the controlled apartment building is seriously limited in evicting statutory tenants. Section 59, pertaining to "Withdrawal of Occupied Housing Accommodations from the Rental Market,"[13] specifies the grounds upon which the certificate of eviction, a prerequisite to most eviction proceedings, may be issued. These grounds have been narrowly construed, and recently the city administrator of the regulations indicated his future unwillingness to grant certificates of eviction when a landlord wishes to demolish his apartment building.[14] A landlord's failure to obtain a certificate prevents him from legally evicting a statutory tenant who fulfills all his obligations of tenancy.

Cases indicate that the courts also have strictly interpreted those provisions of the Rent and Eviction Regulations concerned with withdrawal of units from the rental market. The Appellate Division has recognized that the mere assertion by the landlord that he desires in good faith to withdraw the property from the rental market is not enough as the "...landlord will be required to meet the objective standards set up in..." Section 59 of the Regulations.[15] Even where a certificate of eviction has been properly granted, in certain circumstances, that certificate can later be withdrawn.[16]

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13. Rent and Eviction Regs. § 59. See also Administrative Code of the City of New York, § Y 51-6.0 [hereinafter Administrative Code].

14. N.Y. Times, July 24, 1970, at 36, cols. 1-2.

15. Asco Equities v. McGoldrick, 285 App. Div. 381, 385, 137 N.Y.S.2d 446, 450 (1st Dep't 1955).

16. In Application of New York University, 205 Misc. 790, 794, 129 N.Y.S.2d 77, 81 (Sup. Ct. 1954), the court held that even where certificates of eviction had been issued, those certificates could be withdrawn if the time for demolition was still indefinite, concluding that there was "neither immediate nor compelling necessity" shown. Later it went on to say, "the landlord cannot at all times have his property to do with as he chooses; for it would not be altogether just to punish blameless people for living in a time and place where there is no room for them." Id. at 797, 129 N.Y.S.2d at 83.

Because of the difficulty in obtaining certificates of eviction, a landlord will often resort to other methods in order to gain control of those apartment units which he wishes to keep vacant. In the case of removal from the rental market of voluntarily vacated apartments through turnover, vacancy is clearly legal. Those units which have become vacant because of landlord harassment, however, are not so clearly withdrawn from the rent control market. In these cases the tenant leaves his apartment because the conditions of his dwelling force him to move. Such constructive eviction, where clear evidence is shown, is proscribed by Section 61 of the Regulations.[17] The Administrator, once proscribed conduct is clearly shown,[18] can then determine that the units in issue have not been vacated by voluntary surrender.[19] After this determination, the delinquent landlord becomes subject to various prescribed sanctions.[20]

A determination that units were not vacated by voluntary surrender would indicate that these vacated units have not been legally withdrawn from the rent control market. The Rent and Eviction Regulations state that nothing can force an owner to rent, "but housing accommodations already on the rental market may be withdrawn only after an order is issued by the Administrator...."[21] Where harassment is shown and illegal withdrawal of units is proved, this regulation implies that courts have the power to grant injunctive relief forcing delinquent landlords to rent illegally vacated units.

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17. It shall be unlawful for any person, with intent to cause any tenant to vacate housing accommodations, or to surrender or waive any rights of such tenant ..., to engage in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of such tenant....

Administrative Code § Y 51-10(d)(1); for equivalent provisions, see Rent and Eviction Regs. § 61(b)(1).

18. The necessity and some problems of such a proceeding will be described later in this Note. See text accompanying notes 22-26 infra.

19. In Reichman v. Brause Realty, Inc., 34 A.D.2d 338 (1st Dep't 1970), a landlord illegally harassing tenants in order to have them leave so that he could convert to commercial purposes was enjoined from further illegal conduct under provisions set forth in the Administrative Code, § Y 51-10.0.

20. Rent and Eviction Regs. §§ 61 and 71.

21. Id. § 14.

As stated previously, before an action to compel re-renting can be brought, it would first be necessary to show before the Department of Rent and Housing Maintenance that the landlord has vacated such units through proscribed conduct.[22] Such a proceeding[23] would be limited to either the tenant who has already vacated[24] or to tenants who are now in possession but are being harassed.[25] In all cases, a hearing would be a prerequisite for a conclusion vacated units are still subject to rent control provisions.[26] After this determination of illegal withdrawal, families wishing to rent these apartments should seek assistance from the Department of Rent and Housing Maintenance or apply to the courts in order to compel re-renting of illegally vacated units.

The application of this approach for restoring units to the housing stock will naturally be limited to specific fact situations where harassment and illegal evictions can

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22. Courts have been reluctant to interfere with renting and eviction procedures traditionally controlled by the Department of Rent and Housing Maintenance. See, e.g., New York Telephone Co. v. Mason (1st Dep't Dec. 29, 1970), in 164 N.Y. L.J. No. 123, p. 16, col. 4. In a similar case concerning harassment, the court stated, "There are sharply disputed issues of fact regarding harassment ... which can be resolved only at trial. Plaintiff's [landlord's] handling of the matter should also be brought to the attention of the Commissioner of the Department of Rent and Housing Maintenance." Ferguson v. Hirent Realty Corp. (1st Dep't Dec. 17, 1970), in 164 N.Y.L.J. No. 116, p. 14, col. 3.

23. To begin such a hearing, documentation on Application Form A-60H, "Tenant's Statement of Violation - Harassment," New York City Office of Rent Control, should be gathered.

24. The difficulty in finding tenants who have already vacated will be an obstacle to this proceeding.

25. In the compilation of material to support a harassment claim, the retention of vacant units in a building can often constitute evidence of harassment because of the likelihood of resulting vandalization and illegal activity. Telephone Interview with Mike Rosen, an attorney for Mobilization for Youth, in New York City, November, 1970.

26. Interview with Harry Michelson, Litigation Division, New York City Department of Rent and Housing Maintenance, in New York City, November, 1970.

be demonstrated. A strong tenant organization, committed not to submit to landlord inducements to vacate, will be necessary to prove instances of illegal landlord activity. If this approach is workable, a valuable addition to the housing stock can be provided and a strong precedent will be established to deter future abandonment caused by illegal harassment.

B. Governmental ownership of vacant apartments

The retention of vacant units is not a phenomenon limited to the private sector of the housing market. Many of the housing units in New York City, and in cities across the country, which are now awaiting demolition or which stand vacant with no determined purpose, are subject to governmental ownership. Such ownership can generally be divided into two classes: 1) ownership of units pursuant to urban renewal or other related governmental purpose; and 2) ownership of units not related to such purposes. Each category offers unique opportunities for restoring units, at least temporarily, to the housing market.

1) Ownership of units pursuant to urban renewal or other related governmental purpose

Local public agencies operating under funds from various federal programs (primarily urban renewal) hold a number of housing units across the country. It is common that when properties are acquired for future developmental purposes, housing units are emptied and left unoccupied for an unspecified length of time before future action is taken. The vacancy of these habitable units during this interim period must be considered as contributing to the housing shortage. In addition, it should also be recognized that these units, if put to good use during this period, could provide a valuable temporary housing stock.

The recent case of Talbot v. Romney[27] may prove to be extremely influential in returning these emptied units back onto the housing market, at least until demolition proceedings are ready to begin. In Talbot, plaintiffs were New York City tenants who were to be displaced by an urban renewal project. They brought an action against the Department of Housing and Urban Development (HUD) and the Housing and Development Administration (HDA) of New York City seeking to restrain eviction from their apartment units on the grounds that plans were such that the city could not proceed with demolition for an indeterminate period. The court held that to evict these tenants in the midst of a housing crisis when demolition of the premises was not in immediate sight

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27. Civil No. 2402 (S.D.N.Y., August 20, 1970).

would be tantamount to violating the clear policy of the Urban Renewal Act.[28] The court recognized that the effect of eviction could only be to aggravate the severity of the housing crisis already in existence.[29]

The natural extension of this decision should lead to the conclusion that if present tenants are allowed to remain on site until time of demolition, those other vacant and habitable units in the urban renewal site should be rented until urban renewal purposes can be fulfilled.[30] Purposeless reduction of the housing stock in the midst of a housing crisis can only create undue hardships which slum clearance purportedly is designed to avoid.[31]

Furthermore, the Urban Renewal Act specifies that in certain instances a one-to-one replacement of low and middle income housing acquired is necessary.[32] It is evident that

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28. Talbot cited the following provision from 42 U.S.C. § 1455(b)(ii) (1964).

> When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees and their assignees shall be obligated ... to begin within a reasonable time any improvements on such property required by the urban renewal plan ....

Id. (emphasis added by the court).

29. Talbot cited Rand Study statistics to illustrate the extent of the housing crisis in New York City. Id.

30. 42 U.S.C. § 1455(b) (1964).

31. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 933 (2nd Cir. 1968).

32. If any Urban Renewal project which receives Federal recognition after the date of the enactment of this subsection [1969] includes the demolition or removal of any residential structure or structures ... there shall be provided in the area within which the local public agency has jurisdiction (by construction or rehabilitation) standard housing units for occupany by low and middle income families ... at least equal in number to the number of units occupied by such families prior to the demolition or removal of such structure or structures.

42 U.S.C. § 1455(h) (Supp. V. 1970).

many cities have not been able to comply with these provisions and are either threatened with or have had urban renewal funds curtailed.[33] When local public agencies are unable to comply with relocation and construction requirements, demolition and displacement of tenants still on site will have to be stopped.[34] When a determination is made that future displacement must be curtailed or when demolition cannot proceed,[35] the renting of previously vacated units seems both necessary and in harmony with urban renewal purposes.[36]

The low income families in the urban renewal area who are unable to find housing elsewhere are directly harmed by the retention of these vacant units. Provisions of urban renewal legislation are specifically devoted to the retention of the same number of housing units in the low and middle income category[37] which have had a history of being

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33. In a recent article discussing cut-offs of federal housing funds, it was noted that fourteen cities are presently under such "embargos." N.Y. Times, Feb. 12, 1971, at 1, col. 8.

34. See Hubbard, Landlord Duties of the Local Public Agency: A Source of Protection for Residents in Urban Renewal Areas, 45 N.Y.U. L. Rev. 1015 (1970). The author suggests that when urban renewal projects cannot meet relocation requirements, only displacements should be curtailed, rather than a complete termination of funds. Id. at 1018.

35. E.g., Talbot v. Romney, supra note 27, where the court, though unwilling to hold that alleged inadequate relocation for future displacees dictated the continuance of the project, did state:

> Until such time as the HDA can make a good faith showing that it is actually ready, willing, and able to proceed with construction of the project, eviction of plaintiffs herein and the resulting demolition of their otherwise habitable dwellings would constitute not only an undue but an unnecessary hardship.

36. In 42 U.S.C. § 1441 (1964), Congress re-affirmed the goal of housing programs as a " ...decent home and a suitable living environment for every American family." Certainly, this should mean that until sufficient housing can be constructed, every American family should have a home, even if temporarily substandard.

37. 42 U.S.C. § 1455(h) (Supp.V. 1970).

depleted by such projects.[38] Standing of low income families seeking to rent previously vacated units which cannot be immediately utilized can be asserted under this provision where cities have been unable to comply with relocation and replacement housing requirements.[39] Furthermore, the courts have been willing to grant standing to area residents affected by urban renewal projects.[40]

Such low income families could be awarded a temporary tenancy in previously vacated units allowing the local public agency to terminate the tenancy when demolition is at hand or urban renewal plans can again proceed.[41] Relocation benefits would not necessarily have to be extended on the grounds that the families who moved in had proper notice that they would assume only a temporary tenancy. The extent of future relocation requirements would depend both on the court's decision and upon the type of relief initially requested. Even if the only relief granted was a month to month tenancy with no relocation benefits, at least a temporary housing stock could be provided.

Much of the above argument is based on urban renewal regulations. It is possible, however, to base similar arguments on other housing programs where stringent relocation requirements are specified.[42] In each case, a favorable

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38. Approximately 400,000 dwelling units have been demolished in urban renewal areas, the majority of these being housing for low- and middle-income families .... The 400,000 demolished units are gone, and only 41,580 units of low- and middle-income housing have taken their place. Eventually, 73,931 will be restored.

The National Commission on Urban Problems, Building the American City 163 (1968).

39. N.Y. Times, Feb. 12, 1971, supra note 33.

40. See, e.g., Western Addition Community Organization v. Weaver, 294 F.Supp. 433 (N.D. Calif. 1968); and Powelton Civic Home Owners Ass'n v. HUD, 284 F.Supp. 809 (E.D. Pa. 1968).

41. For a discussion of the duties of the local public agency as landlord during this period, see generally Hubbard, supra note 34.

42. See, e.g., Model Cities relocation requirements. 42 U.S.C. §3307 (Supp. 1970).

decision might rely on holding the local public agency to the clear policies of its enabling legislation, just as occurred in Talbot v. Romney, supra.

2) Governmental ownership of vacant units not related to urban renewal or similar governmental purposes

It is unlikely that a court would extend a decision based on urban renewal or similar legislation to force a governmental agency to rent vacant units when ownership of these units is not related to an urban renewal situation. Ownership of these units should particularly not go unnoticed in attempting to restore withdrawn units back onto the housing market. In New York City alone, by the end of 1968 the city owned at least 1800 buildings from procedures such as foreclosures of tax liens.[43] The N.Y. Times has noted that "typically, half or more of the apartments in such buildings are still occupied, with the city making repairs and routine maintenance, and collecting rents."[44] The other half of these apartments are vacant, thus providing a possible supply of housing.[45]

It is the contention of this section of the Note that New York City, by failing to offer for rent such a large portion of the housing stock, invidiously discriminates against low income minority families desperately in need of housing. This section will seek to prove that by retaining these units, governmental ownership has the effect of creating a violation of the Equal Protection Clause of the Fourteenth Amendment.

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43. Rand Study, supra note 4, at 20-21.

44. N.Y. Times, Nov. 15, 1970, § 8, at 1, cols. 1-3.

45. The immediate use of such vacant units is limited because of past vandalism which has made most almost uninhabitable. The foreclosure process on tax liens takes four years during which time there is a steady deterioration. Legislation has been enacted to speed the acquisition process to three years, but, in addition, strict procedures should be enforced to prevent vandalism and illegal use. Id.; see also, Rand Study, supra note 4, at 15-20.

Although this problem presents a serious obstacle to the return of these units, new tenants' rent could be used specially for repairs. At the outset, the city would have to make large outlays of capital for repairs, but such amounts could be diminished by future collection of rents, and supplemented by possible rehabilitation grants.

Although there is no one test for determining whether there is a violation of the Equal Protection Clause, the Supreme Court has stated:

> ... the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination....[46]

Not all classifications by statute or through state action are invalid.[47] Ordinarily, a rational basis for state action will suffice to uphold the constitutionality of its classification.[48] In certain instances, however, the state will be required to show more than a rational basis for its classificatory action. Traditionally, racial classifications have been subjected to a "rigid scrutiny."[49] Also, where a classification involves a basic civil right[50] or fundamental rights,[51] the court has held the state must show a "compelling state interest"[52] in order to justify its action.

An analysis of whether New York City's retention of a vast number of housing units[53] in the midst of a housing crisis constitutes a violation of the Equal Protection Clause must show that all elements of such a breach are proved. The first required element of state action would be satisfied by

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46. Loving v. Virginia, 388 U.S. 1, 10 (1967).

47. For a comprehensive discussion of Equal Protection, see, Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065 (1968).

48. An example of this position is illustrated in Dandridge v. Williams, 397 U.S. 471 (1970), where the Supreme Court, in upholding Maryland's upper limit on welfare payments for AFDC recipients with large families, observed that it is " ...enough that the state's action be rationally based and free from invidious discrimination." Id. at 487.

49. Korematsu v. United States, 323 U.S. 214, 216 (1944).

50. Cf. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

51. Shapiro v. Thompson, 394 U.S. 618 (1969).

52. Id. at 638.

53. N.Y. Times, Nov. 15, 1970, supra note 44.

the governmental ownership of these units.[54] The fact that they are owned by the city and not the state should not exclude them from the reach of the Fourteenth Amendment. Avery v. Midland County has held the Equal Protection Clause controls subdivisions of the state.[55]

The next element of an equal protection violation is the classification of a group or class of citizens as a result of the state action in question. The following analysis will seek to prove that the effect of the city's retention of these vacant units is to classify the low income minority family normally housed in such units.

New York City has typically gained control of these vacated apartments as a consequence of abandonment. The abandonment of housing units by the private landlord will primarily occur in the older housing stock[56] where profit margins are low[57] and where housing conditions will naturally be poorer. Through foreclosures on tax liens, receiverships, and other mechanisms, the city has become owner of many of these abandoned units.[58]

From examination of the city's housing stock and its population characteristics, it becomes evident that these abandoned units, because of their previously deteriorating character, would tend to be the main source of housing for

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54. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the state taking the action .

Cooper v. Aaron, 358 U.S. 1, 17 (1958).

55. 390 U.S. 474, (1968).

56. Rand Study, supra note 4, at 6.

57. Sternlieb, at 368-72.

58. Since many of these apartment buildings are partially occupied, the city is also acting in the capacity of landlord for these buildings. N.Y. Times, Nov. 15, 1970, supra note 44.

more non-white families than for white families.[59] In addition, all lower income families are affected when these units are kept off the market due to the fact that older units naturally flow to these lower income levels.[60] Governmental ownership of these abandoned units, in view of population statistics, must be considered as classifying the lower income minority family since ownership of housing units primarily affects this segment of the population.[61]

Although the city has received these abandoned units through various legal processes in somewhat of a neutral capacity, it still must be recognized that it is now the holder of housing units which would normally provide dwellings for lower income families. The city's intention may not be to discriminate against these lower income minority families, but the effect certainly contributes to the severity of the housing crisis for this particular class of citizens. Courts have not in all cases required intent to prove an equal protection violation; it has been stated in finding a breach of the Fourteenth Amendment that, "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of the willful scheme."[62]

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59. Among white households, six out of every seven live in units that are sound with all facilities, and only one out of twenty live in substandard accommodations. Among non-white and Puerto Rican households, fewer than four out of every seven live in sound units with all facilities, and about one out of six lives in a substandard unit.

    Regardless of the fact that white households outnumber non-white and Puerto Rican households in New York City by almost 3:1, among residents of substandard units, members of the latter groups outnumber the former by more than 3:2. Even in deteriorating units with all facilities, there are more non-white and Puerto Rican households than white households.

Niebanck, supra note 2, at 118, 120.

60. Id. at 120.

61. Michelman, Foreword to Supreme Court, 1968 Term, 83 Harv. L. Rev. 7 (1969), analyzes the possible utilization of the Fourteenth Amendment for low-income families.

62. Hobson v. Hansen, 269 F.Supp. 401, 497 (D.D.C. 1967), remanded on other grounds sub. nom. Smuck v. Hobson, 408 F.2d 175 (D.C., Cir. 1969); but for a conflicting view, see Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

When considered with concurrent governmental displacement,[63] the retention of vacant housing units can only be considered as exacerbating the pressures on low income minority families in need of housing.[64] The pressures on the low income minority housing market created by various governmental actions should not be separated in analyzing the severity of the city's retention of apartments. It is recognized that relocation burdens from governmental projects fall most heavily on law income minority families.[65] Such programs as the Federal Highway projects[66] displace large numbers of lower income minority families,[67] but are under no affirmative duty to provide replacement housing. Even when families can be given relocation benefits and must be provided housing, it is recognized that many displacees receive little or no assistance from the displacing agencies.[68]

All such displaced families, primarily low income minority families, are forced to look for replacement housing on a limited market. New York City, although not being the displacing agency per se, often participates in the funding of these projects[69] and indirectly controls many relocation

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63. See National Association of Housing and Redevelopment Officials, Centralized Relocation: A New Municipal Service (Pub. No. N533, April, 1969). The Association estimates that more than 100,000 people are displaced yearly by governmental action. Id. at 3.

64. Id. at 3-4.

65. National Commission on Urban Problems, supra note 38, at 167.

66. Pursuant to the Federal Highway Act, 23 U.S.C. §§ 101-141 (Supp. V. 1970), amending 42 U.S.C. §§ 101-134 (1964). See particularly 23 U.S.C. § 133 (Supp. V. 1970).

67. See National Commission on Urban Problems, supra note 38, at 91-92, for a discussion of past weaknesses in highway relocation.

68. Hearings on the Federal Role in Urban Affairs Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't Operations, 89th Cong., 2d Sess., pt. 1, 123-24 (1964).

69. Cities with urban renewal projects will generally pay for one-third of most costs. See 42 U.S.C. § 1453(a)(2)(A). (1964). For cities with a population of less than 50,000, one-fourth of net cost is generally required. See 42 U.S.C. § 1453(a)(2)(B) (Supp. 1970).

procedures.[70] Thus, not only does the city participate in displacement of low income minority families, but also retains a number of potentially habitable units which could provide housing for governmental displacees.

By contributing to the reduction of the housing stock for low income minority families through its participation in the displacement process and in the retention of housing units, the city forces the displaced family to look for housing on a market where the black or Puerto Rican family is faced with increased rentals, unfair housing practices,[71] and a growing pattern of apartheid.[72] Whether or not a minority family has been displaced, all non-white families must confront this limited market. Although New York City may not intentionally discriminate against such citizens, its participation in the discriminatory process should not be separated from private discrimination. Arrington v. City of Fairfield, Ala.,[73] has recognized a city can be implicated in discriminatory actions when displaced black citizens are forced to look for housing on a racially restrictive market. Similarly, New York City and other municipalities linked to discriminatory practices,[74] should not be able to escape responsibility for actions which discriminate against minority families, even if the city does not intentionally do so.[75]

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70. The local public agency under urban renewal regulations is required to determine relocation needs and to administer satisfactory relocation services for displaced families. 42 U.S.C. § 1455(c)(1) - (2)(Supp. V. 1970)

71. Regional Plan News, Housing Opportunities: An Analysis of New York City and its Northern and Eastern Suburbs for the New York State Urban Development Corporation 7 (No. 91, 1969).

72. Id. at 2.

73. 414 F.2d 687 (5th Cir. 1969).

74. Galtreaux v. Chicago Housing Authority, 296 F.Supp. 907 (N.D. Ill. 1969), illustrates a clearer participation of city and local officials in discriminatory housing practices.

75. In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), where displaced blacks were faced with a limited housing market, the court declared:

> ...the fact that the discrimination is not inherent in the administration of the program, but is, in the words of the District Court, "accidental to the plan," surely does not excuse the planners ....

Id. at 931.

The state interest in keeping apartment units vacant which could be used to house low income minority families must be regarded as largely economic. New York City wishes to avoid the expense of repairs, maintenance, and administration of rented units. But even the expense issue has been questioned in the light of astronomical rents being paid to house welfare families in seriously substandard welfare hotels.[76] Economic objections are further diminished when it is considered that one half of such units are now partially occupied. In these partially rented buildings, the city has a duty to supply necessary utilities in its capacity as landlord.[77] Where it is economically feasible to repair and re-rent vacant units in partially rented buildings, the city should have a duty to repair and re-rent to low income minority families. Otherwise, units are left vacant for an unspecified number of years and for an unspecified purpose, creating both a health hazard and a reduction in the housing stock for low income minority families.

The city's allegedly economic and administrative reasons for keeping such units vacant must be weighed against the injury to low income minority families deprived of housing in determining whether a violation of equal protection of the laws exists. A rational state interest should not suffice to sustain the city's discriminatory action. Instead, the appraisal of conflicting interests should require an analysis requiring rigid scrutiny[78] of the state

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76. The New York Urban Coalition has proposed a plan to rehabilitate vacant housing units to house welfare families who are now housed at high rents in hotels. The Urban Coalition has estimated that such a plan would save the city $3.4 million in the first year alone. N.Y. Times, Nov. 25, 1970, at 1, cols. 6-7.

77. Even where the city has not yet acquired legal title to abandoned units, the city would have a duty to provide needed utilities. See Masszonia v. Washington, 315 F.Supp. 529 (D.D.C. 1970). Masszonia held:

> Where hundreds of residents, already living a marginal existence in substandard housing, face a cut-off of water, gas, and electricity ... with the attendant danger to health, safety, and property that will accrue, the municipality has a duty to exercise its inherent power.

Id. at 533.

78. Korematsu v. United States, 332 U.S. 214, 216 (1944).

interest because racial overtones are involved. Furthermore, minority classification is combined with the deprivation of housing, which has been called a basic civil right.[79] Levy v. Louisiana has stated that the court will be "extremely sensitive when it comes to basic civil rights."[80] When a compelling state interest test is determined to be necessary[81] to justify continued vacancy of potentially habitable units, the interest of the low income minority family without housing should prevail.

Re-renting of units to these families would not have to be permanent, nor would repair of the worst units be required. Instead, only the renting of those units where repair was economically feasible, and for which the city has no determined purpose, should be required. When renting of these units is found to be no longer necessary because of a termination of the housing crisis, or if the city does have immediate plans for the buildings, tenancy could be terminated after adequate notice and with proper safeguards for the tenants.

This argument has sought to prove that when a municipality during a housing crisis retains a large portion of the housing stock which would normally be used by low income minority families, a denial of the equal protection of the laws occurs when such vacant units are not rented. When such a denial is proved, the city should be forced to rent certain portions of its housing stock to those citizens deprived of housing because of its actions. Only in this manner can the invidious discrimination be rectified, and the denial of equal protection of the laws be remedied.

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79. To support the argument that housing is a basic civil right, the Supreme Court has stated that there is a basic civil right of citizens to "acquire, enjoy, own and dispose of property." Shelly v. Kraemer, 334 U.S. 1, 10 (1948). Moreover, housing as a basic civil right is protected by 42 U.S.C. § 1982 (1964). See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); and Buchanan v. Warley, 245 U.S. 60 (1917).

80. Levy v. Louisiana, supra note 46, at 71.

81. Shapiro v. Thompson, supra note 51.

C. "Quasi-public" and private ownership of vacant units

An extension of the equal protection argument developed above would naturally first be dependent upon its acceptability where governmental agencies are clearly involved. If acceptable in the case where there is ownership of vacant units by a governmental agency, an application to other situations will depend on whether other types of ownership can be considered to be "state action."[82] The extent of involvement of the state in keeping the units off the market and the interpretation given to the state action doctrine will be crucial in the acceptability of an equal protection argument. Burton v. Wilmington Parking Authority most explicitly summarizes the test for state action used by most courts:

> Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.[83]

In some instances state action will be more obvious than in others, particularly in the areas where "quasi-public" ownership of vacant units is involved. This classification would include ownership by large corporations which serve a public use and which are extensively controlled by governmental regulations. Such a categorization would include large utility companies which characteristically own a large number of housing units. Often these apartment buildings are held for the purpose of future demolition so that conversion for purpose of future business use is possible.[84] When ownership of vacant units by these semi-public corporations is so intermingled with state and public interests that private interests are overrided, then a determination

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82. See Black, Foreword to The Supreme Court, 1966 Term. 81 Harv. L. Rev. 69 (1967).

83. 366 U.S. 715, 722 (1961).

84. An example of this situation presently exists where New York Telephone Company is now seeking to evict tenants from the apartment buildings in Chinatown which it has recently purchased. After demolition of the buildings, the construction of a "switching facility" is intended in order to comply with federal directives. To build this facility, however, a zoning change from residential use is required. Presumably, the sum total of these factors would lead to the conclusion that a "state action" exists. For difficulties encountered in the vacating of these buildings, see New York Telephone Co. v. Mason, supra note 22.

that the retention of these vacant units is a state action discriminating against a class of citizens is possible.[85]

In the case of privately owned vacant apartment units, where an argument that rent control regulations have been violated is not possible,[86] it is unlikely that an equal protection argument can be formulated. State action is remote, if at all existent. To prove sufficient state involvement, such things as governmental liens on the property, tax abatements, "below market interest rate loans, FHA guarantees of market-rate loans, supplementation of tenants' rents or owners' mortgage interest..., provision of utilities through government subsidy,"[87] and related connections would have to be shown. Although such a broad application of the Fourteenth Amendment is presently unlikely, such factors may lead to the gradual incorporation of Fourteenth Amendment guarantees to the private housing sector.

CONCLUSION

This article has sought to develop various legal tools for the purpose of returning to the housing market a portion of those vacant apartments now withdrawn from the housing stock. The reopening of these vacant units will by no means serve as a solution to the housing crisis, but it would offer a constructive method for providing housing to those now in need of shelter until adequate housing is provided for the entire population. As long as such a need exists, rationales for stop-gap solutions such as those developed in this article will continue to be mandatory.

G.A.C.

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85. The involvement of the State need [not] be either exclusive or direct. In a variety of situations the court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several cooperative forces leading to the constitutional violation.

United States v. Guest, 383 U.S. 745, 755-56 (1966).

86. For a development of this argument, see text accompanying notes 10-26 supra.

87. Michelman, The Advent of a Right to Housing: A Current Appraisal, 5 Harv. Civ. Lib. - Civ. Rights L. Rev. 207, 218 (1970).