

RENT CONTROL: POLICY AND PRACTICE

by

Carol Jane Spack

B.A., Harvard University, 1976

SUBMITTED TO THE DEPARTMENT OF URBAN STUDIES
AND PLANNING IN PARTIAL FULFILLMENT OF THE

REQUIREMENTS OF THE

DEGREE OF

MASTER OF CITY PLANNING

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

September, 1981

© Carol J. Spack 1981

The author hereby grants to M.I.T. permission to reproduce and to distribute copies of this thesis document in whole or in part.

Signature of the Author

Department of Urban Studies and Planning
September, 1981

Certified by

Prof. Langley C. Keyes
Thesis Supervisor

Accepted by

Langley C. Keyes'
Chairman, Department Graduate Committee

Rotch
MASSACHUSETTS INSTITUTE
OF TECHNOLOGY

NOV 12 1981

LIBRARIES

RENT CONTROL: POLICY AND PRACTICE

By

CAROL JANE SPACK

Submitted to the Department of Urban Studies on June 16, 1981
in partial fulfillment of the requirements for the Degree of
Master of City Planning

ABSTRACT

A case study of the Brookline, Massachusetts Department of Rent Control from an institutional analysis point of view reveals that to an overwhelming degree rent control policy and practice are set by an organization's system of administrative review. The case covers the period 1970 to 1980, a decade of growing inflation during which many of the nation's municipalities adopted what is known as Moderate Rent Control, a policy designed to pass costs along to tenants and to guarantee landlords a "fair" rate of return which can be adjusted due to changes in economic circumstances. In Brookline, Moderate Rent Control was accompanied by a highly articulated system of due process administrative review, capable of handling individual rent adjustment petitions in great detail from both the landlord's and his tenants' point of view.

Analysis of the Brookline case is preceded by a theoretical discussion of where in its legal history rent control developed many of its present day due process features. / Sherman, Niles, and Zussman, leading cases on due process issues and administrative review, decided by the Massachusetts courts in 1975, 1976, and 1977 respectively, locate final authority with local rent control boards for making rent adjustment decisions and for providing adequate due process protection to the regulated. These cases point the way for analysis of Brookline's system of administrative review, selected to illustrate how a "best case" of Moderate Rent Control administration behaves over time.

The conclusion of the thesis is that a highly articulated, due process system of administrative review contains inherent conflicts which frustrate the achievement of Moderate Rent Control policy goals. The time consuming nature of the process of administrative review creates delay, case overload, and backlog. The ultimate organizational response is dysfunction, symptoms of which are inability to deliver timely rent adjustment decisions and economically valuable rent adjustments to landlords. The organization is caught in a position of having to continually "catch up." The most likely remedy for the problems caused by a due process system of administrative review are changes in the system itself. The thesis proposes ways to streamline an ample due process system, such as Brookline's, and the consequences for subsequent rent control policy and practice.

Thesis Supervisor: Professor Langley C. Keyes

Title: Professor of Urban Studies

To Biff, Pipe, GCS, AS and forever more.

Acknowledgements

To Professor Langley C. Keyes

To Professor Lynn Sagalyn, MIT

To Roger Lipson, Director-Counsel, Brookline Rent Control Department

My extensive thanks to you all for your unswerving generosity of time and spirit in advising this thesis whose merits reflect your concern and criticism.

CJS

TABLE OF CONTENTS

INTRODUCTION	6
NOTES	12
CHAPTER ONE	
A LEGAL HISTORY OF RENT CONTROL	13
I. First Generation Rent Controls and the Supreme Court	16
II. The Transition Period for First Generation Rent Control ..	23
III. Second Generation Rent Control and Massachusetts State Court Decisions	27
Summary	43
Conclusion	43
NOTES	44
CHAPTER TWO	
THE DUE PROCESS MODEL AND MODERATE RENT CONTROL	47
Part 1: A Policy Model of Moderate Rent Control	52
I. Legal and Political Legitimacy	53
II. Substantive Regulatory Policy	57
III. Procedural and Administrative Rules	63
Part 2: The Due Process Model	66
I. The Due Process Model Proper	74
II. The Minimum Due Process Model	79
Conflicts in a Due Process Model of Administrative Review	83
The Role of Information Gathering	84
The Role of Time	87
The Role of Expertise	92
Conclusion	95
NOTES	98
CHAPTER THREE	
MODERATE RENT CONTROL IN BROOKLINE AND THE DUE PROCESS MODEL ...	101
Policy Considerations in the Start-up Years 1970 to 1974	103
Policy Considerations in the Middle Years 1975 to 1978	109
Policy Considerations 1979 to the Present	118
The Brookline Rent Control Board and the Due Process Model	127
Shortcomings of the Due Process Model Proper	130
Conclusion	139
NOTES	142
CHAPTER FOUR	
POSSIBILITIES AND CONCLUSIONS	143
NOTES	154
Tables 1. - 17.	155
BIBLIOGRAPHY	175

INTRODUCTION

The Problem

Rent control is a highly controversial topic whose merits are frequently argued as if it were a dichotomous issue in which only irreconcilable pro or con positions exist. My initial motivation for this thesis was curiosity over whether one might examine rent control, a by now familiar form of price regulation of the private housing market¹, without being drawn ineluctably towards one or the other pole, i.e. rent control or no rent control. The task of examining rent control regulation was viewed as compelling because rent control represents the only instance of price regulation of private housing in the United States. In one form or another, we have tolerated it for over seventy years.

The Approach

This thesis takes an organizational analysis approach to rent control, attempting to steer a nonaligned course towards its research goal and not take sides in a "rent control-no rent control" debate. By 'analysis' we shall mean the following²:

"the resolution or separation of the reference system (that which is modelled) into its parts to illustrate their nature and interrelationships and to determine general principles of behavior."

Organizational analysis will involve developing a model of a typical rent control administration. By 'model' we shall mean a synthesis, a putting together of these general principles observed in the reference system.³

One of the most pronounced general principles in a contemporary rent control organization is the principle of procedural and substantive fairness, what is known as "due process." The meaning of the principle of due process as it applies to administrative review derives from the legal definition of due process. Substantive due process refers to protection by law to persons from arbitrary and unreasonable action; procedural due process concerns the rights of parties affected by rules to be notified and to be heard.⁴ Hence our model of rent control administrative review will focus on those procedures designed to protect and preserve substantive and procedural due process rights of the regulated. We shall call it the Due Process Model.

We shall also develop a model of contemporary rent control policy. Rent control policy since 1970 has been a legal framework for moderating the rate of rental housing price increase in an inflationary setting. This form of rent control attempts to set a "fair" rent by balancing landlord and tenant economic interests. Known as Moderate Rent Control,⁵ this policy acknowledges landlord entitlement to a profit and in support of that premise allows cost pass throughs to tenants and adjustments in the landlord's rate of return on his property. The goals of Moderate Rent Control as stated in our rent control policy model are complemented by a due process system of administrative review, which procedurally balances landlord and tenant interests.

Defining a "fair" rent and administering procedural rules of due process administrative review to achieve procedural "fairness" are the time consuming heart of the principal set of responsibil-

ities of a rent control agency. All disputes about substantive or procedural "fairness" must be resolved via the Due Process model. Participants in a Due Process organizational model accept that achievement of procedural fairness guarantees a "fair" decision. To this extent, if the Due Process model is observed, all disputing parties are compelled by the model to be satisfied of the equity of the decision at hand. It is perhaps one of the ironies of the Due Process model that has the ability to "compel" acceptance: both parties understand that any decision will represent a compromise between their respective positions, and therefore they recognize the Due Process model guarantees a predictable compromise, the balancing of landlord and tenant economic interests. This compromise is preferable to both parties to a model which would require larger losses from either side.

We are indeed suggesting that the Due Process model and the Moderate Rent Control model complement one another in that they both strive for substantive and procedural fairness. Earlier we noted that a formal model is not a theory, but rather, a synthesis. Nonetheless, a single theory, such as the notion of fairness embodied in both Moderate Rent control and Due Process models may be used "by many different kinds of models."⁶

A model of the due process features of administrative practice applies to many kinds of regulatory agencies. Indeed, the due process model of administrative behavior is deeply rooted in our legal tradition. At all levels of judicial review, the due process standard has been consistently applied to all forms of government

regulation of private enterprise. Rent control is no exception. The legal due process requirements of moderate rent control to a large part determine the features we find in both the Due Process model and the Moderate Rent Control model.

Thus, Chapter One of this thesis will prepare the groundwork for understanding the legal due process issues of rent control policy and administrative procedure. This groundwork is preparation for development in Chapters Two and Three of the Due Process model and the Moderate Rent Control policy model. The legal history of rent control enables us to unearth major policy elements of a rent control model, quite apart from due process concerns or from contemporary housing market behavior theories. A legal history of rent control reveals that rent control predates the modern state.⁷

Chapter Two will develop our model of rent control administration, the Due Process model. Our model of both a typical rent control agency and of moderate rent control will be analyzed for their contribution to a definition of substantive and procedural "fairness." Analysis will suggest that the Moderate Rent Control policy model predictably implies the Due Process administrative model.

Chapter Three will present a typical, and by that we mean a generally successful, rent control agency administering moderate rent control. Our subject will be the Brookline, Massachusetts Rent Control Department and Rent Control Board. We shall focus on how the Rent Control Board makes "fair" rent adjustment decisions. In many ways Brookline's Rent Control Department reflects Weber's notion of the "pure type of legal authority with employment of a

bureaucratic administrative staff."⁸ For Brookline's Rent Control Department, in its almost eleven years of operation, displays the features which Weber confidently suggests recommend a bureaucratic form of administration⁹: high degrees of efficiency, precision, stability, strict discipline in adhering to administrative rules, and reliability. One of the outstanding features, according to Weber, of a well functioning bureaucratic administration is its "particularly high degree of calculability of results for the head of the organization and for those acting in relation to it."¹⁰ By most reports, the Brookline Rent Control Board and the administrative department measure up to these Weberian criteria. In this regard, we might say that Brookline represents a "best" case. In the course of discussion we shall also refer to the experiences of the Boston, Massachusetts Rent Control Department and Rent Control Board. Boston's experiences provide a counterpoint to those in Brookline, and provide examples of a stripped down Due Process model which is struggling under the administrative pressures created by due process concerns in making rent adjustment decisions.

Chapter Four is predictive. An argument will be made for the inherent tendencies of the Due Process model to overload, that is, to create such a volume of case work for the rent control department and rent control board, that backlogs and inefficiency result. We shall discuss the affects of overload on Weber's bureaucratic standards, noted above. In suggesting ways in which the Due Process model might be altered to reduce overload we shall be making the final claim that the Due Process model might be replaced.

If the Due Process model is replaced by an administrative model which better handles caseload, the provocative question arises: What effect will this have on substantive rent control policy? Our last claim is that as the Due Process model gives way under administrative pressures for change, such as politically mandated budget cuts, and overload, a model of rent control policy other than the current Moderate Rent Control policy model will accompany the administrative model which takes its place.

NOTES

1. At its peak since reintroduction in 1970, rent control has been enacted in 232 localities. Lett, Rent Control, p.72-73.
2. Greenberger, et al., Models in the Policy Process, p.49 .
3. ibid., p.49 .
4. Black's Law Dictionary, 5th edition.
5. Gilderbloom, Moderate Rent Control.
6. Greenberger, et al., p. 49.
7. Willis, "A Short History of Rent Control."
8. Weber, The Theory of Social and Economic Organizations, p.329 .
9. ibid., p. 337.
10. ibid., p. 337.

Chapter One: A LEGAL HISTORY OF RENT CONTROL

1

A LEGAL HISTORY OF RENT CONTROL

Understanding the legal requisites of rent control provides a basis for any analysis of rent control policy because these legal requisites are necessary limits within which policy has been drawn. This chapter will present a brief history of rent control in order to sketch these limits for the reader to illustrate how the limits are in some instances dynamic.

The legal history of rent control is the history of court decisions on particular rent control laws. Thus, the organization of the chapter will respect the hierarchy of the courts: U.S. Supreme Court decisions will be reviewed first, for they set the final standards of judicial review of rent control. Massachusetts Supreme, Superior, Appeals, and Municipal court decisions will also be reviewed, especially for their contribution to administrative issues of rent control. In fact, state court decisions provide the only guidance to rent control administrative review questions, as the last U.S. Supreme Court decision on rent control was in 1948¹ and it was a landmark decision on the question of entitlement to a fair return.

The focus of Chapter One is on the development of substantive and procedural elements of rent control due to court decisions. The history is selective therefore, and places considerable emphasis on the relationship of these decisions to our Due Process model of rent control administration and the Moderate Rent Control policy model.

Origins of Rent Control Laws

It is surprising how far back in history one has to look to find the origins of rent control laws.² The Roman Pope Paul IV with the 1555 bull of Cum Nimis Absurdum put in force prohibitions against the Jews of owning property, engaging in commerce, and most significantly, living among Christians. Authorities in each city under papal rule were ordered to set aside one quarter to be walled about to which all Jews were to be confined. This is the origin of the ghetto. Jews were forced to be tenants, and Christian landlords engaged in gross profiteering due to their monopoly. In 1562, Pope Pius IV lifted some of the prohibitions against the Jews, and ordered the Papal Chamberlain to fix rents after which they could not be increased. Pope Clement VIII, in 1604 issued new rent controls which deprived owners of houses in the ghetto of the right to increase rents or to evict. Tenants from 1604 on gained the right to remain in their homes in perpetuo. These later controls occurred after the Pope had banished all Jews in the Papal state except from Rome, Ancona, and Avignon. Rent controls were a response to overcrowding and tenant hardship which occurred in these three cities. This historical beginning is consistent with later grounds for invoking rent control: monopoly ownership, overcrowding, and the desire of the state to "protect" a class of citizens who rent housing. Emergency housing conditions created by wartime emergency stimulated rent controls in succeeding centuries throughout the European continent.

Rent Control in the United States

In the United States the history of rent control begins with the twentieth century. Rent control can be said to have evolved from a First Generation³ which began with World War I, through an intermediate stage which was largely dictated by federal policy in the Federal Housing and Rent Acts commencing in 1947 and concluding in 1950, and thence into a Second Generation⁴ which began in 1970 and continues with much local variation and discretion today. The standards of judicial review of rent control have evolved as well as the policy itself.

I. First Generation Rent Controls and the Supreme Court

The first instance of general⁵ rent control in the United States came in 1919, towards the end of World War I as the nation's industrial centers were straining to meet wartime production needs. These rent controls, which we shall call "First Generation" rent control policy, were in essence price freezes: they imposed freeze dates, price ceilings, and eviction controls upon landlords. These first sets of controls were initiated by local citizens committees acting without the power of legal enforcement. The voluntary efforts focused political attention upon widespread rent gouging and profiteering by private landlords in the nation's industrial centers. The behavior of landlords was causing disruption in local labor pools, as workers migrated from one industrial center to another in search of work and affordable housing. High labor turnover rates had begun to be regarded by government and industry alike as a threat to the

national welfare. In fact, the federal Bureau of Industrial Housing and Transportation had supported formation of local citizens' committees to review landlord-tenant disputes, in pursuance of its efforts to coordinate industry and resources for the war effort. At least eighty communities developed voluntary citizens committees to review rent and eviction disputes.

Formal, that is, legal First Generation rent control measures were enacted in the industrial northeast, by New York and the District of Columbia. Landlords immediately challenged these price controls in court, alleging that they deprived property owners of economic substantive due process. Landlords invoked the Due Process clauses of the United States Constitution, the Fifth and Fourteenth Amendments.

The Due Process clauses of the United States Constitution are embodied in the Fifth Amendment which pertains to the federal government and the Fourteenth Amendment which protects persons from state actions. Substantive due process rights imply protection to persons from arbitrary and unreasonable action. Procedural due process rights involve the rights of parties affected by rules to be heard and to be notified.⁶ Within these general notions of due process, however, exist the potential for court interpretation of what literally constitutes due process rights. The court's doctrine of economic substantive due process represents an initial reaction to government regulation of private, formerly unregulated enterprise.

Economic substantive due process was a concept which prevailed at the turn of the century, just prior to the birth of First Generation rent controls. Landlords asserted that freedom of contract, which

included the freedom to set rents and to evict was a component of economic substantive due process. They claimed that state intervention in the form of regulation of rents interfered arbitrarily, unreasonably and contrary to constitutionally protected due process rights to enjoy private property and to conduct business. Earlier economic substantive due process claims involved the regulation of industries which the courts identified as legitimately regulated because of an existing monopoly and a public interest. Court respect for property rights rested on the premise that a legislature does not have unlimited power to regulate prices. Legal historians have noted that the post-Civil War rise of industrial capitalism "was characterized by a strong business pressure on the courts to limit government regulation"⁷ and that the Fourteenth Amendment became a rallying point for those resisting government regulation of the growing industrial economy. Hence, court approval of regulation was infrequent. The doctrine of economic substantive due process protected most private enterprise from government regulation.

There was one notable exception to Supreme Court rejection of legislative attempts to regulate private industry, and that was Justice Holmes' 1905 dissent in Lochner v. New York. The majority opinion struck down as unconstitutional a New York statute to limit the work week of bakers, claiming that the law had failed the reasonable relationship test: there was no relationship, the majority opined, between the quality of bread or of worker health, and the number of hours worked! In the absence of that relationship between a policy and its goal, the court held that regulation violated

due process rights. In his celebrated dissent, Justice Holmes wrote⁸:

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics...a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire."

Nonetheless, rent control challenges were based on the then prevailing view that the constitution entitled property owners to enjoyment of their property, without the interference of government regulation, i.e. economic substantive due process: that no public interest was at stake.

Yet in early challenges to the constitutionality of New York and District of Columbia rent control laws the Supreme Court developed another doctrine, known as the exceptional circumstances doctrine. The majority opinion pointed out that in some exceptional circumstances use of the police power to protect the public interest was justified. The Supreme Court decided that early New York and District of Columbia rent controls were constitutional based on the exceptional circumstances doctrine: it made no reference to Lochner in its opinions. They defined World War I as the exceptional circumstance which justified imposition of price regulation on private housing. Rent control was therefore upheld as constitutional.

World War I was relied upon as the exceptional circumstance which established the constitutionality of other rent controls statutes, as well. The war emergency provided the legal requisite for validation of the rent control law. In subsequent Supreme Court decisions, the definition of a war emergency insofar as it created a housing emergency was further developed. Thus the court clarified its position that the successful imposition of rent controls relied upon a dire emergency.

A series of U.S. Supreme Court opinions known as the "Rent Laws" followed from April, 1921 through April, 1924. The Court elaborated its exceptional circumstance standard for valid rent control to include the legislative proviso that rent controls would be a temporary response to a war generated housing emergency. This was a statement of the Court's housing emergency requirement for valid rent control.

At the state level, however, the New York Supreme Court was willing to go further than the exceptional circumstance grounds for approving rent control. Justice Pound wrote in 1921 that, "Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property."⁹ He reasoned that the police power could be used to regulate business in the public interest and that this did not violate private property rights. He was in fact rebutting the economic substantive due process claim. The U.S. Supreme Court, however, was willing to approve New York's rent control only on the basis of an exceptional circumstance and of its temporary nature. The U.S. Supreme Court had not yet rejected the concept of economic substantive due process.

Justice Holmes of the N.Y. Supreme Court argued in his minority consenting opinion that housing was a "necessity of life" and that "all of the elements of a public interest justifying some degree of public control are present."¹⁰ This statement was a milestone. The doctrine of economic substantive due process had been chipped.

Although World War I ended in 1919, municipalities continued as late as 1924 to claim a war generated housing emergency as the

legal basis for enacting rent control. In Chastleton v. Sinclair the U.S. Supreme Court made it clear that it would challenge legislative judgement and would now scrutinize legislative findings of housing emergency conditions whenever necessary. Thus landlords challenging rent control had acquired another claim against rent control: that the legislative statement of emergency was inaccurate. From 1924 until 1934, during the Taft Court, rent control faced an unsympathetic Supreme Court. Decisions were handed down which firmly restated the doctrine of economic substantive due process, during what has been called the "high tide of economic substantive due process."¹¹

In 1934 the landmark Nebbia v. New York firmly introduced the reasonable relationship test to court scrutiny of rent control. Subsequent challenges to the constitutional validity of rent control based on economic due process were rejected, the court instead using the reasonable relationship test.¹² The U.S. Supreme Court tested rent control laws on the basis of their reasonably responding to their goal, the relief of a war generated housing emergency. Because the Court was loathe to interfere with legislative judgement, as long as it could be argued that rent controls bore a "reasonable relationship" to the goal of relieving the housing crisis, the Court would approve them. The claim of economic substantive due process technically met its end here.

The next logical place for opponents to attack rent control was in the accuracy of legislative statements of a war generated housing emergency. Certainly by 1934, World War I had become history. But before this challenge could be considered by the U.S. Supreme Court,

World War II erupted. Rent controls were revived nationally, this time at the federal level under the authority of the 1942 Emergency Price Control Act.

The preceding year, 1941, FDR had instructed the Office of Price Administration (OPA) to develop programs with the objective of stabilizing rents nationwide. OPA organized over 210 communities in creating fair rent committees¹³, similar to those of World War I, without legal power of enforcement. But the 1942 Emergency Price Control Act introduced vigor into rent control. The federal law designated "defense rental areas," and by 1945 among cities with a population over 100,000 only Scranton, Pennsylvania failed to put in place rent control.¹⁴ All local controls were supplanted by the OPA rules. New York City enacted rent control to supplement new OPA rules. The rent controls were price ceilings but did not include intricate formulas for making adjustments.

The last challenge to rent control to reach the U.S. Supreme Court came in 1948 with Woods v. Cloyd B. Miller Co. The Court upheld the constitutionality of federal review of federal rent controls. Question had again been raised about the constitutionality of public intervention in private housing markets and entitlement of landlords to an equitable return on their investment. Landlords were complaining of their inability under federal rent controls to earn a fair rate of return on their property, a denial of their due process rights.

Substantial Congressional discussion occurred on whether price ceilings of First Generation type rent controls ought not be replaced with a system whereby a "fair" return on a starting base was guaran-

teed.¹⁵ From locality to locality, OPA standards for passing through costs and operating expenses differed, the only constant threshold being that landlord return had to be set high enough to avoid confiscation. The U.S. Supreme Court had ruled in 1948 that landlords must not as a rule be forced out of business due to rent control levels of return that were confiscatory. Yet rent control was upheld in 1948. The national debate raged over the distinction between a legal return as set out in Woods as the legal minimum rate necessary to stay in operation, even if some landlords were injured by it; and landlords' accustomed market levels of economic return.¹⁶

II. The Transition Period for First Generation Rent Control, 1947-1950.

By 1947 rental housing was one of the few segments of the national economy still subject to price regulations.¹⁷ With the enactment in 1947 of the federal Housing and Rent Act, however, federal controls were gradually terminated and authority transferred to state and local rent control agencies. President Truman signed the Act reluctantly¹⁸, criticizing it for affording tenants too little protection: rent control had received strong challenges in Congress from landlord interests and the Act was a response to that pressure. The Act contained numerous exemptions from rent control. New construction was exempted, hotels, and housing not rented between 1945 and 1947, this last an attempt to bring back housing which had been kept off of the market by landlords who refused to submit to rent controls. This number was estimated by the OPA to be from 500,000 to 1,000,000 units!

Luxury accommodations were also exempted from federal rent controls.

The federal Housing Expeditor was empowered to adjust "fair rents" to levels of comparable units elsewhere, and to grant 15% per year adjustments. This 15% increase was contingent upon the landlord entering into a two year lease with his tenant, through 1948. The Act did not only concern setting rent increases. It also affected the role of the courts in judicial review of rent control. During the Price Control Act, only the Emergency Court of Appeals had been empowered to hear complaints about the legality of regulations issued and administered under the EPC Act. Rent control was in 1947 only again eligible for regular judicial scrutiny. The 1947 Housing and Rent Act expired February 29, 1948.

As we have noted, the Supreme Court did uphold the validity of rent control in two challenges which followed the provisions of the 1947 Act. But Congress was relinquishing its major, protective role, as it issued legislation in 1948 and in 1949 to continue the transfer of rent control authority to lower levels of government. Sentiments in Congress ran high against rent control. The Property Owners Council of Nashville, Tennessee gave some of the more colorful comments inserted in the Congressional Record by Representative Rich of Pennsylvania¹⁹. The Property Owners Council denounced rent control: "Because it is arbitrary and unprincipled and unbusinesslike. Because it makes demagogues out of politicians and parasites out of tenants. Because it gives more money to the tenants to buy whiskey, to gamble, and to throw to the wind."¹⁹

The Concept of Fair Net Operating Income

But Congress persevered and introduced a new formula for determining rents, to be used by local boards in making their decisions. The formula could be used at the discretion of local boards to replace existing price ceilings and intricate adjustment criteria for passing through some costs, etc. In 1949 the new federal adjustment formula was defined as a Fair Net Operating Income (FNOI) formula. A FNOI was defined as a return equal to a percentage of gross rent receipts. Prior to this formula, state and local rent control boards had been using an assessed capital value formula as the criterion for adjusting rents above the price ceiling. Landlords were given a percentage return on what the board determined the capital value of the property to be.

The capital value method had been unwieldy and inconsistent, as differences in opinion over value abounded, and because properties continued to change value with vagaries in housing market behavior. Congress was attempting with the FNOI formula to resolve questions landlords frequently raised in court, as in Woods, over what constituted a fair return, where the legal threshold of confiscation was set, and how to determine an economic standard of return. Landlords charged that the arbitrariness of local board behavior deprived them unjustly of private property and violated their due process rights.

Rent controls continued into the early 1950's with this FNOI formula as well as with the capital value method. State and local legislation continued to include boilerplate declarations of a

housing emergency due to the exigencies of war, to avoid due process challenges. The Korean conflict was cited as the relevant war. Court challenges to rent control at the state level continued on the basis of rent control depriving landlords of a fair return. The Massachusetts Supreme Court summarily accepted the findings of the Massachusetts legislature which tied the extension of rent control to the continuation of a housing crisis caused by war, thus accepting the war emergency standard in justifying the use of the police power to regulate rents.²⁰ Other state courts followed suit. The judgements of local rent control hearing boards in their determinations of FNOI were acceptable to the courts. Due process challenges to rent control on the basis of the regulations' being arbitrary, unreasonable, or unrelated to a policy goal made no headway in knocking out the law. Furthermore, the U.S. Supreme Court refused to hear rent control cases.

In Brookline, Massachusetts a local rent control statute was drafted under Massachusetts St. 1953, c.434, enacted in 1953 as a replacement to federal law, and designed to terminate in 1955. The object of c.434 in its own language was "to relieve the shortage of residential household accommodations...and by gradually relieving the emergency" to contribute to a normal housing market.²¹ Upon its termination in 1955 as planned, a tenant sued the Brookline Rent Control Board²² claiming that her landlord had raised rents beyond her ability to pay and that she was owed protection from the Brookline Rent Control Board. The court found for the Rent Control Board, accepting Brookline's decision to terminate rent control, stating unequivocally that c. 434's purpose "is not to create vested rights."²³

In all municipalities except for New York City, rent control lapsed with the expiration of federal rent control laws from the mid-fifties until the end of the sixties. In New York, under special adjustments, exemptions, and extensions of the law, rent control had continued unabated from 1919. Buildings all over the city fell under different rent rates due to controls. Landlords were receiving inconsistent and inadequate levels of return to operate successfully. This was also true at the state level. But the experiences of New York City are especially unique. Yet despite their uniqueness, the disastrous New York experience hangs like a spectre over rent control's reputation.

III. Second Generation Rent Control and Massachusetts State Courts Decisions

The first break with the legislative tradition of basing rent control on a war related housing emergency came in 1969 with Brookline, Massachusetts' local rent control initiative, which declared a housing crisis as its emergency condition. Although the Massachusetts Supreme Court rejected Brookline's initiative on the grounds that the town lacked local authority to invoke the police power, and thereby invoke rent control²⁴, the following year the court let stand state enabling legislation which also sounded an alarm over a housing crisis grounded in lack of low and moderate income housing and hardship to tenants due to an overheated market.²⁵ Boston enacted rent control the following year, as well as the metropolitan municipalities Brookline, Cambridge, Somerville, and Lynn, Massachusetts.

A second suit brought a year later by Marshal House, Inc. against the Brookline Rent Board²⁶ lays out the basic challenges to this era of rent controls, and highlights those features of rent control beginning in the 1970's which distinguishes it as "Second Generation"²⁷ rent control.

Second Generation rent control is primarily concerned with moderating peaks in an "over-heated" housing market with the presumption that the market can and will, in the near future, return to normal, i.e., market equilibrium in which tenants can negotiate rents with landlords. The principal feature is the FNOI concept and pass through of costs to tenants.

Although most of our attention is focused on Massachusetts law, standard sections in Second Generation rent control legislation are:

1. EMERGENCY DECLARATION:

A "boilerplate" declaration of emergency which identifies the basis upon which the state is exercising its police power, a basis first challenged by the doctrine of economic substantive due process, later this challenge being modified although not definitively laid to rest.

2. EXEMPTIONS:

Exemptions of certain structures, such as owner occupied dwellings or luxury housing. At most, approximately 50% of the housing stock falls under the jurisdiction of a typical rent control statute.

3. ROLLBACKS:

Rent rollbacks to a date prior to the proposed legislation for the purpose of setting a base, "fair market rent." Increases are computed on this base, which is presumed to give the landlord a fair net operating income. The rollback date is designed to avoid incorporating post-enactment inflated rents in the base.

4. FAIR NET OPERATING INCOME(FNOI) MECHANISM:

A FNOI mechanism or guidelines for setting a "fair" rent. The FNOI refers not to market rates of economic return, but to an agency determined legal rate of return. A "fair" rent is one which, derived from the FNOI mechanism, represents a balance of landlord and tenant economic interests.

5. EVICTION CONTROLS:

Eviction controls to protect tenants against landlords evicting them to avoid rent control rules and to raise rents. Often the legal maximum rent is unchangeable regardless of whether the landlord has a new tenant. Tenants are protected against harassment.

6. ADMINISTRATIVE RULES:

Rules governing rent control administration, such as the establishment of a hearing board to hear landlord and tenant complaints, a staff to compute rent increases, methods of funding the agency, etc. Much discretion exists in this section, especially in Massachusetts law. The rules follow the paradigm of state administrative procedure and thereby meet due process standards of judicial review. These rules form the core of what we are calling the Due Process model. (See Introduction, p.2)

The Marshall House case will illustrate typical legal challenges to points 1.-5. above of Second Generation rent control. Point 6. will be discussed separately. Let us take the legal challenges in Marshall in the order of the generic features listed above.

1. EMERGENCY DECLARATION:

In its emergency preamble, St. 1970, c.842 stated that the purpose of the Massachusetts act was "to alleviate the severe shortage of rental housing in the commonwealth" and that "a serious public emergency exists with respect to housing" especially in cities or towns with a population over 50,000. Brookline, in its own St. 1970, c.843 which authorizes the town of Brookline to adopt rent control, stresses

in its declaration of emergency "abnormally high rents... the expanding student population...a substantial elderly population" and other features, which are not specified in St. 1970, c.842. The court sanctioned Brookline's specific emergency features as well as its inclusion of all dwellings under rent control, noting that it was " a constitutionally sound path to solve the town's unique situation."²⁷

Nationwide, beginning in 1969, there was a resurgence of rent control initiatives against what one legal expert calls a "backdrop of uncertainty as to the vitality of the emergency standard and the absence of any clear judicial definition of what constituted a housing emergency."²⁹ A variety of emergency standards now exist in rent control legislation, all inserted to safeguard the legislation against due process challenges. Four elements of the emergency most frequently cited are: a housing shortage detrimental to the health, safety and general welfare of residents; excessive rent increases; and hardship to tenants. (See Table 1.) Four states refer to the vacancy rate as the trigger mechanism for rent control, in New York the level being set at 5%. No state actually documents housing price conditions, sets specific base rents, or otherwise documents the housing emergency empirically. Certainly no claims have been made based on tenant ability to pay.

2. EXEMPTIONS:

Municipalities were allowed under St. 1970, c. 842 sect. 3(b)(7) to exempt rental units for which rents exceed limits set by the municipality, provided that no more than 25% of the housing stock is exempted.

Both this exemption and the 50,000 population minimum for eligible towns were challenged as denying equal protection, but the court decided that the challenge was invalid, that rent control did require flexibility due to local differences. The court agreed that rent control did require local discretion, that discretion was both necessary and desirable.

3. ROLLBACKS:

The rollback provision of St. 1970, c.842 states that under rent control the first legally maximum rents shall be "that rent charged the occupant for the month six months prior to the acceptance" of the act by the municipality, in order to avoid incorporating inflated rents into the maximum initial base rent. The court rejected³⁰ claims that this would "violate the constitutional guarantees of equal protection of the law and due process of law" because the effective rollback date would vary in accepting municipalities. Again, the court stressed local differences existed and therefore with it the need for legislative flexibility and local discretion.

4. FAIR NET OPERATING INCOME (FNOI) MECHANISM:

St. 1970, c. 842 required that individual or general rent level adjustments "may be made in accepting municipalities so as to yield landlords a 'fair net operating income'." It contained other provisions empowering accepting localities to administer their own rent control "fairly to both landlords and tenants." Landlords challenged these sections as denying them equal protection and due process of law. The guidelines were indeed very general.

The justices pointed out that these predictable attacks on St. 1970, c.842's term "fair net operating income" and on the rollback provision are³¹

"levied on the face of the statute and by-law involved. None of the plaintiffs has introduced any evidence that the operation of either will necessarily be confiscatory with respect to him individually or with respect to a general class of landlords... Any landlord in the future who feels that they are being applied to him in a way which deprives him of a fair return on his investment is free to pursue his grievance in the courts after having exhausted the procedures provided in both c.842 and art. XXX for adjustment of rents and judicial review of orders of the board or administrator¹²."

The court would not take challenges on the mere face of the statute's FNOI procedure. It demanded unsatisfactory landlord regulatory experience as evidence of a complaint. The court said that the landlord must first submit a claim to the rent control board. Only afterwards could he appeal on due process grounds to the state court. The court reiterated its reliance on local hearing board jurisdiction and on the validity of local rent control board adjustment procedure as the source of due process protection (to landlords and tenants) by stating at footnote 12 (above),

"There is no constitutional infirmity in the fact...that the extensive procedures for adjustment follow and do not precede such an application."

The burden of proof falls squarely on the landlord in proving to the rent board, first, that it has deprived him of a "fair return."

The language of St. 1970, c.842 and 843 in regard to the adjustment of maximum rents makes a single interpretation difficult. Six relevant factors in determining a rent which yields the landlord a fair net operating income are spelled out, "among others," in c.842.

These six factors to be considered "among others" are: changes in property tax; unavoidable increases or decreases in operating and maintenance expenses; capital improvement of the unit; changes in living space, services, furniture, etc. ; substantial deterioration of the unit other than as a result of ordinary wear and tear; and failure to perform ordinary repair.

Brookline's c.843, Section 3 also uses the term "fair net operating income" as its standard of adjustment but employs different language:

"that income which will yield a return, after all reasonable operating expenses, on the fair market value of the property equal to the debt service rate generally available from institutional first mortgage lenders or such other rate of return as the board, on the basis of evidence presented before it, deems more appropriate to the circumstances of the case."

Referring to their initial review of c.842³², the court reiterated that rents should be set high enough "so as to assure to landlords a reasonable return on their investment." This section of c.842 has been the greatest source of confusion and disagreement between courts, landlords, and in some cases, rent board directors and their staff over what is "reasonable" and what is a "fair return."

Yet the court stood behind the principle that "every presumption is to be indulged in favor of the validity of a legislative enactment."³³ This view takes in exemptions contained in c.842 and c.843, as well as the means for arriving at the board's determination of a FNOI, "as long as there are possible findings which the Legislature could reasonably have made in the legitimate exercise of the police power its acts will be upheld."³⁴

Underscoring the negotiator role of the rent control board in arriving at its own means for determining a FNOI and for making individual determinations, the court wrote³⁵:

"The effect of all these provisions is to empower municipalities to administer their own rent control according to a mechanism which is carefully designed to insure fairness to both landlords and tenants."

In sanguine fashion, the judges opined³⁶:

"The flexibility which c.842 allows to each community to mold the term "fair net operating income" to accord with its peculiar local needs is a desirable feature of the act."

The combination of the presumption of validity given to legislative enactments and confidence in agency administrative discretion are a powerful judicial bulwark to the local agency in making FNOI determinations. These rulings keep most decisions within the agency domain, rather than allowing them to migrate into the courtroom.

5. EVICITION CONTROLS:

Marshal House did not directly challenge eviction controls. The court, however, expressed its support for them in maintaining the efficacy of rent controls to protect tenants in an overheated housing market.

6. ADMINISTRATIVE RULES:

Not surprisingly, landlords sued over dissatisfaction with rent board decisions, questioning the criteria used by the rent control board in arriving at the FNOI in their particular case. In 1975, an important decision was handed down on the subject of administrative

review. The decision focused attention on the due process mechanisms of the Brookline Rent Control Board. The decision also illumined the court's evolving view that fair decisions on FNOI disputes were strongly linked to administrative practice, even more than on empirical economic standards for resolving the dispute over what constitutes a "fair net operating income." This bifurcation in views of landlords and the Massachusetts Supreme Court mirrors the 1940's debate over the difference between an economic versus a legal fair rate of return, although in the 1940's the legal rate imposed a price ceiling.

In Sherman³⁷ decided in 1975 in favor of the Brookline Rent Control Board on the question of its authority to hold a hearing on a determination of FNOI, evaluate the evidence, and then decide, without the decision being reversible upon judicial review. The plaintiff had asked the court for a hearing of his case de novo, effectively requesting a rehearing before the courts of what had been heard before the Rent Control Board. The court rejected the request, emphasizing that the role of the court was to "review the record made before the Board."

The court "digressed" to examine the process of rent adjustment envisaged in c.842 so as to contribute to its interpretation locally. First, the court focused on sect. 8(a) which requires local boards to furnish a "trial-type" procedure, with adequate notice or hearing if requested.³⁸ The Board, it explained, is required to follow the State Administrative Procedures Act³⁹ on adjudicatory proceedings before agencies. Especially important, it noted, are the rights of the

parties to "call, examine, and cross-examine witnesses and introduce other evidence, and to have an official record maintained."⁴⁰ These are the basic elements of what we are calling the Due Process model. (See Introduction, p.7)

The court addressed the claim of ambiguity in the FNOI mechanism, which the plaintiff claimed clouded what was specifically meant by a "fair return." Again giving substantial discretion and authority to local rent boards, the court wrote⁴¹

"The setting of maximum rents may indeed be expected to involve a "mathematical" process, but the foregoing shows that there are discretionary elements, to which may be added the discretion allowed a board by sect. 7(d) to refuse any rent increase, or any decrease,"

Returning to the question of administrative review, the bench defined what today remains the prevailing doctrine of the court's role in reviewing local rent adjustment decisions. It wrote⁴²:

"the court's proper role is not to take evidence afresh and decide for itself what rent is to be fixed, but is rather to decide whether the board's decision was supported by the facts before it and was legally justified." (emphasis added)

Landlord and tenant due process rights thus derive protection from local administrative process. The court accepted the exceptions to the rules of administrative procedure to which rent control c. 842 was treated. The opinion presciently noted, "Very likely the exceptions were intended to relieve a board of a burden in the many routine cases where there would be no thought of possible review."⁴³ Furthermore, the court noted that in rent cases put to the court for final review, the agency might offer reasons on the record underlying its decisions, although the court did not require such an ex-

planation. The purpose of the board supplying a written explanation of its decision,"even if not required by c.30A, subsidiary facts upon which it relies(sic) tend to ensure administrative justice and to encourage public confidence in the administrative process."⁴⁴ In Sherman the Massachusetts court took the position which, while acknowledging the impossibility of strict duplication in a local rent control board of state administrative procedure because of the threat of overloading the rent board, insisted on keeping the full intensity of appeal and review within the arena of the rent board itself. This intensity posed its own challenges to local boards, even though the court was supportive in its tending in a direction which granted local, administrative review of rent decisions.

In 1976 Massachusetts enabling legislation c. 842 expired and it was up to the discretion of localities to renew rent control. Brookline adopted Article 38 under Town authority as its rent control bylaw from 1975 on. Brookline drafted its own administrative regulations, which "directly affects the spirit and nature of interpretation and enforcement of the legislative mandate for rent control."⁴⁵

The most significant state level court decisions on administrative review of rent control are Zussman⁴⁶ and Niles⁴⁷ decided in 1976 and 1977, respectively. They focus on administrative rules and discretion. Both of these cases reinforce interpreting c.842's phrase "fair return" in the context of administrative rules for a procedurally "fair" process.

Zussman appealed the Brookline Rent Control Board for an increase in rents on his twenty-six units, purchased in 1972 for \$ 700,000 with 100% financing at 9%. He stated that his intentions were to convert them to condominiums. The Board granted an increase which represented a 6.8% return. As 6.8% was less than his 9% debt service he appealed the Brookline Board's decision in the courts.

A Superior Court judge found that the Board's rate was confiscatory, and that 10% was indeed a reasonable rate. He remanded the case to the Board to compute allowable rents based on a 10% return. The tenants appealed to the Massachusetts Appeals court. The Appeals Court remanded the case to the Superior Court for review according to Sherman. Again the Superior Court reviewed the case, the judge agreeing that 6.8% was confiscatory on the facts of the case but also holding that there was no evidence to support a finding of "a constitutional entitlement to a 10% rate of return"⁴⁸ even given evidence to support its being reasonable. In explanation of its decision, the court referred to the Sherman opinion as its standard:

"We reaffirm that decision today and specifically hold that a landlord who asserts that confiscation of his property has resulted from a decision under St. 1970, c. 842 sect. 8(a), is not entitled to a trial de novo."

The Court did not reject the due process right to judicial review in rent control administrative review. But it closely defined the role of the courts in this review process. The opinion reiterated that the "effect of this opinion is to limit the power of the reviewing court in substituting its own evidentiary hearing for that already conducted by the rent control board."⁴⁹

Thus the local rent board, in this instance Brookline, was assured of the authority and finality of its rent adjustment decisions.

The Massachusetts Supreme Court also revealed its bias in Zussman. The opinion chastised the landlord for paying so high a price for the building⁵⁰:

"the plaintiff purchased the property with the intention of converting it to condominiums. This factor may have made him willing to pay a higher price for the building. In any case, the protection against confiscatory rates applies only to those who conduct their operations in a reasonably efficient manner."

In a gesture in support of rent control and the Brookline Board, the opinion continues,⁵¹

"Where the actual purchase price exceeds the fair market value of the units as apartments, the rent control board would be abdicating its duty if it granted an increase in rates to cover the excess cost."

Caveat emptor!

Niles, decided in 1977, involved a claim against the Boston Rent Control Board in regard to its method of arriving at a FNOI. In Niles the court addressed itself to administrative discretion as it related to an agency following its own regulations. Boston Rent Control Regulation 6 sets out the FNOI mechanism for adjusting rents. Regulation 6 is essentially a cost pass through mechanism. It presumes that rents charged for December, 1971 which are the legal maximum rents based on 1970 rollback date market rents, "yielded more or less than a fair net operating income."⁵² The court noted in its description of the facts that⁵³

"In addition to the calculation under Reg.6, the administrator began the practice, following a decision by the Housing Court of the City of Boston requiring a fair return on a fair market value, of also performing an analysis based on that standard

as a check on the other calculation, on the theory that a fair return on fair market value is required by c.842's requirement of a fair net operating income. The practice of using such a criterion has not been incorporated into any regulation." (emphasis added)

This case is specifically concerned with an agency following its stated rules of procedural fairness in determining a "fair" rent.

The plaintiff charged that a November, 1975 and August, 1975 rent adjustment did not allow him a FNOI. The court issued two opinions, one in reference to each Boston Rent Control Board decision.

The court examined the claim that the November, 1975 rent adjustment was unfair by looking at the standards of judicial review of rent adjustments by local boards. Niles had argued that he was entitled to a fair return on market value. The court disagreed, citing Sherman and referring to the language of c.842:

"Statute 1970, c.842,s.7 requires that rents be established at levels which yield to landlords a "fair net operating income." This is different than the landlord's contention here that, 'St. 1970, c.842,and perhaps the Federal and State Constitution, requires that owners be permitted a reasonable return on the fair market value of their property.' "

The court cited Marshal House and Zussman in pointing out that the constitutionally approved interpretation of c.842 required that rents be set "So as to assure to landlords a reasonable return on investment."⁵⁴ and that where investment "exceeded fair market value, rents based on fair market value were not confiscatory."⁵⁵ The opinion reiterated⁵⁶ that Federal case law⁵⁷ does not establish that,

"a fair return on the fair market value of property is required by the United States Constitution. To the contrary...maximum rents which were in general fair and equitable but which in

individual cases might prevent a landlord from earning a fair return on the fair market value of the property was constitutional.

The circularity of basing rents on the fair market value was pointed out⁵⁸. The court noted that if rents are based on the fair market value of the property, and this value is based on the rents received, the rent setting process is circular. They cited the discussion of circularity in a New Jersey case⁵⁹. There the court explained how relying upon fair market value frustrated the objectives of rent control, by incorporating the inflated price of the "failure ridden" housing market. The New Jersey opinion said that reference to the fair market value of a property involves the rent board in an erroneous judgement of what constitutes a confiscatory rent, because the reference to fair market value made the process circular, as fair market value is a function of gross rent.

The New Jersey court compared rent regulation to utility rate setting, and made note of Justice Brandeis' distinction in utility rate setting matters. He distinguished between public rate setting and setting the exchange value of property. He reasoned that establishment of a fair return in either case served different functions: "the thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise." New Jersey courts allowed landlords a return on capital "prudently invested" and not on the exchange value of the invested capital, i.e. fair market value.

The court in Niles rejected his claim that the legal maximum rent of November, 1975 was not a FNOI. It pointed out that Boston

Regulation 6,s.4 provides a mechanism for overcoming the presumption that December, 1971 rollback date rents produced a FNOI. Niles did not attempt to do this, nor establish that subsequent changes made the 1971 "base year" return unfair. Thus, in the court's view, Niles failed to show that the 1975 adjustment - which relied upon 1971 rates of return - was not a fair return.

More importantly from an administrative point of view, however, was the court's statement on the Boston Administrator's August, 1975 decision. In August, the Administrator had relied upon a fair market value method of determining the FNOI. He claimed that it was an "interpretation of Reg.6 and as such does not require formal amendment to be incorporated into the regulations." The Court disagreed. It said that the Administrator did not put this "gloss" on Regulation 6 from the inception of the regulation, but only after the Boston Housing Court's decision in M.E. Goldberg. Hence, the bottom line of judicial review became the following⁶⁰:

"Where an administrative agency changes its interpretation of a statute or regulation based on a court decision which is later held to be incorrect, its interpretation is not considered as having persuasive force."

This leaves the Massachusetts court doctrine of administrative review as follows. As long as the agency has observed its own rules in reviewing the evidence put before it by the petitioner in making its decisions, that decision will stand before the court. The court will not provide a forum for a new hearing, in place of the initial rent board hearing. It will not consider evidence anew and prepare a new record. The court will review the record established by the local board.

Summary

The Massachusetts Supreme Court in Sherman, Zussman, and Niles noted the relationship between a process which obeyed rules of administrative procedure in compliance with due process standards of review and of a "fair" decision. A "fair" decision on FNOI was seen to be one which followed the agency rules, barring, of course, the landlord's successful claim that the agency decision made it impossible for "an efficient operator to stay in business or derive any profit whatever."⁶¹ A procedurally fair process was seen to yield an equitable rent. As we have observed from the language of c. 842 and c.843 substantial local rent control board discretion typifies the determination of what constitutes a FNOI.

CONCLUSION

Thus the legal history of rent control, from First Generation price ceilings to Second Generation FNOI rent regulation bring our attention to the internal workings of a local rent control agency and its board. The law has evolved, and the standards of judicial review of rent control, such that a local rent control board has considerable authority and flexibility in all but its basic rules of administrative practice. These, of course, are modelled on state laws of administration.

We need to look more closely at these administrative rules to discover how rent control is delivered. If the substantive issues of rent control have been settled in the courts, the procedural issues might yet offer a continuing target for suits and controversy. This suggestion reflects our observation that administrative rules have much to do with the nature of policy delivered.

NOTES

1. Bowles v. Willingham is the landmark U.S. Supreme Court case in which J. Douglas speaking for the majority set forth standards governing fair return on investment to landlords regulated by federal wartime rent controls: "The determinant of constitutionality for any return on investment formula is whether that formula is completely outside the range of reasonableness. Furthermore, no individual landlord subject to such a rent control system is constitutionally guaranteed any return at all on investment." This "fairness" standard stands today as the U.S. Supreme Court opinion in regard to rent control.
2. Willis, "A Short History of Rent Control," 36 Cornell L. Quarterly 54.
3. Baar, "The Last Stand of Economic Substantive Due Process," 7 Urban Lawyer 447.
4. Blumberg, "The Emergence of Second Generation Rent Control," 8 Clearinghouse Review 240.
5. Lett, Rent Control, p.1 . General rent controls apply to the entire housing market. Earlier limited rent control implemented at the state and federal level only protected servicemen and their families.
6. Black's Law Dictionary, 5th edition.
7. Baar, op.cit., p.448.
8. Baar, op.cit., p.448.
9. Baar, op.cit., p.447.
10. Baar, op.cit., p.447.
11. Baar, op.cit., p.448.
12. Andrade, "Towards a Definable Body of Legal Requisites for Rent Control," 10 UCD Law Review 273, p.277.
13. Willis, op.cit.
14. ibid.
15. Willis, " 'Fair Rents' Systems," 16 George Washington Law Review 104.
16. ibid.

NOTES

17. Willis, "A Short History of Rent Control," 36 Cornell L. Quarterly 54.
18. ibid.
19. 95 Congr. Rec. A 1469 (1949).
20. Blumberg et al., op.cit.
21. St. 1953, c.434.
22. 334 Mass. 132.
23. op. cit., p.135.
24. Marshal House, Inc. 260 N.E. 2d 200 (Mass. 1970).
25. Mass. Gen. Laws 842 (1970).
26. Marshal House, Inc., 358 Mass. 686.
27. Blumberg, et al., op. cit.
28. 358 Mass. 687.
29. Baar, op. cit., p.487.
30. 358 Mass. 700-702.
31. 358 Mass. 706.
32. Answer of the Justices, 356 Mass. 769.
33. 358 Mass. 694.
34. 358 Mass. 695.
35. 358 Mass. 702.
36. 358 Mass. 705.
37. 367 Mass. 1.
38. 367 Mass. 6.
39. Ch. 30A.
40. 367 Mass. 8.

NOTES

41. 367 Mass. 8.
42. 367 Mass. 1.
43. 367 Mass. 1.
44. 363 Mass. 883.
45. Blumberg, et al., op. cit.,p.245 .
46. 371 Mass. 632.
47. Mass. Appeals Ct., Advance Sheets, 3/23/78, p.240.
48. 371 Mass. 634.
49. 371 Mass. 637.
50. 371 Mass. 639.
51. 371 Mass. 639.
52. Mass. Appeals Ct.,op.cit.,p.252.
53. ibid.,p.243.
54. Id. at 730: 358 Mass. 686.
55. Mass. Appeals Ct.,op.cit.,p.250.
56. ibid.,p.250.
57. See Woods and Lochner discussion, Chapter One,p.22 and p.18 .
58. Mass. Appeals Ct., op.cit.,p.251.
59. 68 N.J. 604(1975).
60. Mass. Appeals Ct.,op.cit.,p.258-259.
61. ibid.,p. 254.

CHAPTER TWO: THE DUE PROCESS MODEL AND MODERATE
RENT CONTROL

2

THE DUE PROCESS MODEL AND MODERATE RENT CONTROL

The purpose of Chapter Two is to draw a model, by which we mean a generic statement, of Second Generation rent control. The model will serve as the basis for further discussion of the affects of procedural rules on the nature of rent control policy delivered. We are most concerned with how a Second Generation rent control administration makes "fair " rent decisions. We shall generate a rent control policy model based on observation of how the Brookline and Boston, Massachusetts rent control administrations employ their respective FNOI devices.

The second half of this chapter will be taken up with developing an administrative model, which we shall call the Due Process model. The Due Process model accompanies the policy model. The administrative model is again drawn from observations of the Brookline and Boston, Massachusetts rent control administrations. We shall discuss how the organizational model complements the policy model. Each defines features of the other.

Drawing upon our discussion from Chapter One, we shall again observe that legal due process requirements have to a great extent been responsible for the inclusion in both the Second Generation rent control policy model and the administrative model of basic principles of organizational behavior. The most noteworthy general principle, of course, is the principle of operating in such a way that the regulatory system delivers "fairness" to landlord and tenant.

Moderate Rent Control

Second Generation rent control policy's primary concern is determining a regulated but profitable rent in an ongoing process of rent adjustments by the local rent control board of private landlord rents. As we noted earlier, First Generation rent control was a system of price ceilings, with very little room for adjustment. Second Generation rent control's policy goal of controlling the rate of rent increase while at the same time guaranteeing a profitable rent, a "fair" rent, to the landlord has led to its being called¹ Moderate Rent Control. We shall refer to it as such. The name Moderate Rent Control is suggestive of two moderating roles embodied in the general policy. First, this form of rent control attempts to moderate the rate of price increase of rental housing; second, this policy plays a moderating role between the economic interests of landlords and tenants.

Moderate rent control has set itself a difficult task. For it attempts to balance landlord and tenant economic interests, which by definition conflict. Moderate rent control defines landlord interests as the requirement of a profit, what in its terminology is called a "fair return"². It defines tenant interests as the desire to stabilize rent expenditures for a given level of housing services. This desire is especially difficult to realize in inflationary periods, such as the present.

General Principles and Creating a Model

Our definition of a model is that it is synthesized from general principles of behavior, of an organization, of a policy, of whatever. Moderate rent control displays a small set of general principles, which we can easily identify.

A first principle is that the invisible hand is presumed to have set an equitable rent. This principle comes into play in that the base in year one upon which rent adjustments are made does rely upon historic market rents. This base is presumed to represent a fair net operating income, that is, to be equitable. The burden of proof that the base rent is not "fair" rests with either the landlord or the tenant, who must document special circumstances.

A second principle is that the moderate rent control agency can adjust this "fair" rent as needed **and reset** the level of fair net operating income established in the base year. The tool, either conceptual or mechanical for determining subsequent "fair" rents is the Fair Net Operating Income (FNOI) concept. The FNOI concept is applied on a case by case basis to make rent adjustments **after the base year to account** for economic changes since **the base year** and this is said to represent a "fair" rent.

We use italics around the word 'fair' to denote that this term has a special meaning. "Fair" denotes an equitable rent insofar as a moderate rent control agency is concerned, given its legislative underpinnings and mandate. We are not relying upon colloquial connotations of the word 'fair'. For given the

legislative imperative that a moderate rent control agency employ a Fair Net Operating Income concept, what else can one generate but a "fair" rent? Technically speaking, a "fair" represents a series of computations based on rent received in the base year; and it represents the shifting, legal outline of that middle ground between landlord and tenant interests.

A third general principle of moderate rent control derives from the FNOI concept. This third principle is that the landlord is entitled to pass through most of his operating costs to the tenant. These costs are composed of such items such as fuel, maintenance, and capital improvements; as well as of public charges, such as real estate taxes. A "fair" rent under a moderate rent control policy has built into it flexibility to rise with operating cost increases, due either to inflation or increased housing services.

We have spoken several times already of the "balancing role" between landlord and tenant economic interests that a moderate rent control policy serves. Certainly these three general principles which when synthesized constitute the core of a moderate rent control policy model determine where the fulcrum in the balancing mechanism is placed. The balancing mechanism is embodied in the moderate rent control policy model in two forms. The first is in a formal rule³, the legislative requirement that the rent control board use a fair net operating income method of setting rent increases, or decreases, at its discretion. The second form is in the due process requirements of the legislative enactment of rent control: the requirement that regulated parties are protected from arbitray

and unreasonable state action. Hence, the rent control laws include provisions for hearings at which either landlord or tenant can present evidence in support of his claim for a particular rent adjustment. This second form of balancing mechanism is embodied in both the rent control agency organizational structure: a rent control board provides a forum for trial-type hearings. And it is embodied in administrative rules, rules which either amplify or streamline the due process features of the rent setting process, i.e. full, open hearings versus closed door sessions; testimony from witnesses versus affidavits; audits of landlord expense records and inspections of dwellings, versus spot checks.

Thus we can make claim that the three general principles of a moderate rent control policy model tip the "balance" in the favor of landlord interests: he is, after all, guaranteed a "fair" return based on historic market rents. Yet the administrative rules which vary so much among administrations calibrate the scales, too. The balance can be altered by amplifying or streamlining due process procedural devices, such as the availability of full, open hearings. This theme we shall develop further in drawing the Due Process model of moderate rent control. But let us commence by drawing a moderate rent control policy model.

PART 1:

A Policy Model of Moderate Rent Control

A policy model of moderate rent control can be drawn in more than one way. Unlike zoning, for example, no universalizable model code exists for moderate rent control. Blumberg, a rent

control law expert⁴ suggests that this is so because lawmakers recognize the extreme local variety in housing conditions, political factors, and governmental capacity. He believes⁵ that universal application of a model moderate rent control law would be impossible for these local differences.

Our policy model, which is synthesized from existing laws and general principles, is therefore a modest one. The model will be derived primarily from Brookline and Boston rent control laws, and will be used as a basis for comparing the two sets of laws. Later, our Moderate Rent Control model will be coupled with an administrative model.

The Moderate Rent Control model will be composed of three components. These components group general principles which establish: the nature of legal and political legitimacy; the nature of substantive regulatory policy; and the nature of local procedural rules. As we noted earlier, "A formal model is not a theory, although it may represent or embody theory in its construction."⁶ The three components of our model reflect basic theories which motivate the model's behavior.

I. Legal and Political Legitimacy

As the twentieth century organizational theorist Max Weber instructs⁷, any system of authority, such as a rent control administration, must establish its legitimacy as an order such that those whom it attempts to exercise authority over respond according to the behavioral rules. In his seminal work, Weber

described four principal ways in which an order acquires legitimacy for those acting subject to it: (a) tradition; (b) affectual attitudes; (c) rational belief in its absolute value; (d) because it has been established in a manner which is recognized to be legal.⁸ Of course, our political order is recognized as legitimate because it has been established in a manner which is recognized to be legal. Rent control, as we have shown in Chapter One, as part of a legal order, must demonstrate its adherence to legal authority.

Legality itself, according to Weber's classification system, can be treated as a legitimate order in either of two ways⁹:

"on the one hand it may derive from a voluntary agreement of the interested parties...(or)...it may be imposed on the basis of what is held to be a legitimate authority over the relevant persons."

This distinction points to the challenge facing moderate rent control, which is an imposed legal order on a special class of citizens, private landlords. Rent control must justify singling out one class of citizens who have voluntarily accepted a larger legal order in the belief that it is rational and equitable to all citizens.

A moderate rent control policy model therefore naturally includes elements which describe its source of authority, the nature of that authority, and reasons for "relevant persons" to accept the imposed authority. The elements selected to establish an imposed legal authority have profound consequences for the regulated parties, here landlords and tenants. As Weber perceptively notes,¹⁰

"The legitimacy of a system of authority has far more than a merely 'ideal' significance, if only because it has very definite relations to the legitimacy of property."

Certainly landlords recognize the existence of a direct relationship between rent control's source of legitimacy, and the legitimacy of their property claims. Hence, too, a moderate rent control policy carefully fashions its claim to legal legitimacy knowing that the claim does affect the legitimacy of property, an established legal order as well. Our model of moderate rent control thus includes a particular theory of private property.

A statement of how a moderate rent control policy model would establish legal and political legitimacy among those regulated by it might look as follows:

LEGAL AND POLITICAL LEGITIMACY MODEL

- A. Housing emergency declaration in order to invoke the police power, and respect the larger legal order.
- B. Definition of the rent control administration as a neutral ground for resolving landlord and tenant rent "disputes" and for setting an equitable rent, here defined as a "fair" rent.
- C. Acknowledgement that landlords are entitled to a "fair return" which is defined in terms of market rates of return on capital.
- D. Definition of a "fair return" and a "fair" rent as the rent set by the marketplace, prior to imposition of rent control. This becomes the base upon which rent adjustments are then calculated.
- E. Calculation of rent adjustments at the request of landlords and tenants, and not only at the discretion of the rent control authority.
- F. Definition of legal and nonlegal rents, legal rents being only those established by the rent control authority which it calls "maximum legal rents" and which are also "fair" rents.

Principles A. through F. each play a role in establishing the legitimacy of an imposed legal authority. A. acknowledges the

larger legal order. B. defines the new imposed legal order as an arbiter of equity out of respect for established definitions of the legitimacy of property. C. confronts the sticky question of how an order imposes authority upon only property owners yet simultaneously asserts its legitimacy in a way destructive to the legitimacy of their property claim. The answer is this rent control reduces profit levels moderately, but within acceptable bounds. D. also acknowledges the dilemma of a legal order imposing two conflicting theories of the legitimacy of property claims, and attempts to moderate the conflict by compromise. E. assumes that participation in the rent adjustment process by the regulated, and especially landlords is a counter measure to the order's having been imposed. Participation offer landlords a chance to "state their case." F. is the ultimate assertion of the administration's legal authority. This principle establishes the rent control agency in a position just short of a market maker: yet it "legitimizes" the rents allowed to rise and fall on the swell of market behavior.

Indeed the nature of the legitimacy of property claims has changed for both landlords and tenants, under this component of the model. Tenants have acquired an indirect claim on property, a right represented by the law taking on their interests and regulating the rate of increase of rents to a maximum legal rent. However, as we noted in Chapter One¹¹, moderate rent control does not created vested rights. Landlords have lost some property, albeit temporarily. But many landlords accept the authority of rent control. We can only presume that its bite out of their profit margins is acceptable.

II. Substantive Regulatory Policy

Depending upon the kind of legal authority claimed, the mode of exercising authority differs. In an imposed legal order, laws must define equitable rules. Those responding to the rules see the rules as valid only insofar as they maintain an established notion of the legitimacy of property and hence equity. Our moderate rent control policy model must demonstrate the validity of its rules primarily to landlords. The most noteworthy principle is embodied in the rent adjustment rule, the FNOI concept. The established legitimacy of property is challenged by the FNOI concept.

A model of general principles of substantive policy could read as follows:

SUBSTANTIVE REGULATORY POLICY MODEL

- A. A trigger mechanism turns the rent control system "on," during the housing emergency, and "off" when the emergency dissipates.
- B. Definition of the regulatory field, i.e. partial or total regulation of the housing stock.
 - 1. Establishment of a threshold year, after which date new construction is exempt from rent controls. This is to encourage new construction to ease the housing crisis.
 - 2. Exemption of owner occupied dwellings, where rental does not occur.
 - 3. Exemptions, in some instances, of owner occupied two, three, or four unit structures in deference to the "non-professional" nature of most small real estate owners and to their numbers.
 - 4. Definition and exemption of certain classes of dwellings, such as "luxury" units which rent at the top of the market.
- C. Rent adjustment standards, embodying a FNOI concept. The FNOI concept can be expressed in guidelines (Version I); or as a mechanical formula, (Version II).

Version I: Guidelines (derived from Brookline Rent Control Regulations)

12

Standards for Rent Adjustment: 1970

The Board shall presume that rents for March 1970 were established at levels which yielded to owners a fair net operating income, and shall grant increases or decrease in rents if it finds that there have been since March of 1970: (1) property tax increases; (2) unavoidable operating expense increases; (3) capital improvements; (4) changes in housing services; (5) substantial deterioration of the unit; (6) failure to perform ordinary repair and maintenance.

The Board is empowered to adjust rents upward or downward among others, to yield a rate of return "on the basis of evidence presented before it, deems more appropriate to the circumstances of the case."

Net Operating Income Guidelines:¹³ 1976

(Note:^a Up until 1975 Brookline had employed a formula whereby net operating income was a return equal to 6-11% of property value as established on the rent rollback date. Property value was originally established by official assessments. Later, five standards were considered: the purchase price, if within 3 years; an appraiser's estimate; landlord testimony;¹⁴ a 5.5 gross income multiplier; 1.45 x assessed value.)

Section 6: (a) The rent board shall make such individual or general adjustments, either upward or downward, of the maximum rent for any controlled rental unit...as may be necessary to assure that rents for controlled units are established at levels which yield to landlords a fair net operating income for such units...(b) The following factors, among other relevant factors, which the board by regulation may define, shall be considered in determining whether a rental unit yields a fair net operating income: (1) through (6) above.

(Note:^b These guidelines afford discretion to rent control administrative staff. They can examine the quality of housing services provided, the nature of repairs and improvements, and the efficiency of a property operator in determining whether operating costs are legitimate. The level of costs will determine the net operating income. Informal calculations are made by the Rent Control Board, based on property value, using guidelines explained in the Note^a above, but since Niles cannot be used as the formal grounds for determining a FNOI. The FNOI determination is a composite, and can vary from case to case.)

Version II: Formula (derived from Boston Rent Control Regulations)

Standards for Rent Adjustment:¹⁵

The Administrator shall presume that rents charged for December 1971 yielded a fair net operating income for December 1971 and...shall use such rents in computing adjustments and establishing maximum rents... This presumption may be overcome by evidence tending to show that the rents charged for December 1971 yielded more or less than a fair net operating income for December 1971. The burden of proving that the rent yielded less than a fair net operating income shall be on the landlord and the burden of proving that the rent yielded more than a fair net operating income shall be on the tenant. 16

The board shall, by order or regulation as provided in section 6, make such individual or general adjustments, either upward or downward, of the maximum rent...shall observe the principle of maintaining maximum rents for housing accommodations at levels which will yield to landlords a fair net operating income...17

In determining whether the maximum rent for housing...yields a fair net operating income, the board shall consider the following among other relevant factors:

(Note: same as in Version I, p.53)

Net Operating Income Guidelines:¹⁸

Among factors that shall be considered relative in determining whether the rents charged for December 1971 ...yielded more or less than a fair net operating income from the building for December 1971 are:

- (1) the fact if proved, that the net operating income of the building for 1971, measured as a percentage of gross income was:
 - A. more than 50% or less than 35% in the case of any building the construction of which was completed on or after January 1, 1960.
 - B. more than 40% or less than 25% in the case of any other building containing more than six controlled rental units, or
 - C. more than 35% or less than 20% in the case of any other building containing six controlled rental units or less.
- (2) the fact, if proved, that 1971 property taxes, measured as a percentage of gross income were
 - A. less than 30%, or

Version II: Formula (derived from Boston Rent Regulations), continued

B. more than 35% to the extent that such taxes were not abated and are not currently subject to abatement.

(3) through (7) which require that the landlord prove that capital improvements were made which are not reflected in the rent, that tax increases and unavoidable expenses were incurred in 1971 that are not reflected in the rent, and "any other factors tending to show that gross inequity and extreme hardship will result to the landlord or to the tenants if the rents charged for December 1971." 20

The quantitative rules are strictly applied, making the rent adjustment process relatively mechanical. 21

D. Kinds of rent adjustments.

1. General annual adjustments: an automatic, annual rent increase granted by the agency to all landlords in compliance with the law. General adjustments are prepared by rent control staff based on average cost increases in categories such as fuel, etc. See Tables 3 and 12B for Brookline and Boston general adjustments, respectively.
2. Special, individual adjustments decided on a case by case basis at the initiation of the landlord or the tenant. Special adjustments may be instead of or in addition to general adjustments. See Tables 3 and 8 for Brookline. See Table 12B for Boston.
3. Hardship special adjustments, due to unforeseen circumstances.

E. Automatic cost pass throughs. As long as landlords properly document operating costs, taxes, etc. the board will pass these costs through to the tenant. Discretion is applied on how much of a cost increase is to be absorbed by tenants.

F. Legal authority to compel compliance with agency rules. Foremost among these rules is registration of property to establish the base year fair net operating income. Rent adjustment rules are the substantive thrust of moderate rent control. Rules covering property use itself, in the form of Brookline's condominium conversion moratorium, also occur.

G. Eviction controls, designed to protect tenants against harassment by landlords resentful of controlled rents and desirous of emptying the unit to avoid rent control.

With these rules, a moderate rent control policy model established the nature of substantive policy. Principles A. and B. are self-explanatory. The balancing principle established in rule C. shows a definite tilt in favor of the landlord, in that he is guaranteed a rate of return originally set by market forces. This rate of return is presumed to be "fair" by the agency and should be valid in the eyes of the landlord, if only because the level of return is one he himself set in an unregulated market. Should a landlord not agree that the return is "fair" a rule exists to permit him to

prove his case. The validity of the rule should be upheld by its allowing the "relevant person" to take advantage of its flexibility towards exceptional cases or errors. In Brookline, we see that the use of principle D., the general annual automatic adjustment, is yet another attempt to preserve the equity of the system by granting all landlords a general rent adjustment upwards, requiring no burden of "proof" on their part. The general adjustment is used as a tool for keeping pace with inflation. Rule E. reflects the moderate rent control policy's "moderating" nature in regard to balancing landlord and tenant economic interests. Rule E. does not permit a landlord to take advantage of a tight housing market by raising his rate of return, but does allow pass through of cost increases, due in part to inflation and basic price increases.

The last two rules, F. and G. are translations of the way in which a moderate rent control policy exercises its authority. Rule F. organizes the regulatory field by requiring property registration by the relevant parties, the "regulated" and by permitting non-registration of landlords exempt from rent controls. Eviction controls, rule G. are extended to tenants of "regulated" landlords, to protect them from harassment. Presumably, eviction controls are designed to preserve the place of tenants in the regulatory field, by offering them extra safeguards to ensure they will not be removed to unregulated housing. These two last principles select the two groups whose interests the moderate rent control policy balances. These are the two principle groups who must accept the rules as valid. Other classes of owners and tenants are outside of the system.

III. Procedural and Administrative Rules

The principle of administrative rules developed to guarantee our policy model's mode of exercising authority is a bureaucratic one. The theory of behavior of a rent control "order" must be a theory of the behavior of a bureaucracy and those it serves. Weber wrote that a "pure type" of legal authority with employment of a bureaucratic staff rested on acceptance of certain premises. First, that any legal norm can be established by agreement on grounds of expediency or rational values, or both. And second, that²²

"every body of law consists essentially in a consistent system of abstract rules which have normally been intentionally established...administration of law is held to consist in the application of these rules to particular cases; the administrative process (is)...pursuit of the interests which are specified in the governing order."

For Weber, the recommending feature of a bureaucracy was its efficiency and its predictability: "It thus makes possible a particularly high degree of calculability of results for the heads of the organization and for those acting in relation to it."²³ Moderate rent control administrative rules employ a bureaucracy. This fact implies that "fair" rent decisions should be predictable, both from the rent control agency's point of view and from that of landlords and tenants.

Our sketch of rules of administrative procedure for a moderate rent control policy model relies on the principles of efficiency and consistent application on a case by case basis of rules to particular cases: we will question if these principles are compatible in the following sections. Here we shall focus on rules of

procedure for making rent adjustment decisions. Procedural fairness in rent adjustment decisions is the second major administrative responsibility of a moderate rent control system, the first being to deliver substantively "fair" rent decisions.

Our model of valid rules of procedure for a rent control bureaucracy follows closely the examples of Brookline and Boston, who are themselves modelled upon the state administrative code.

ADMINISTRATIVE PROCEDURE MODEL

- A. Staffing rules, such as civil service or appointment by a director.
- B. Funding sources, such as city government or user fees.
- C. Enforcement mechanisms, e.g. penalties.
- D. Designation of rent adjustment authority. The locus of authority can be within the rent control staff or outside of it.

1. Rent adjustment authority within the administrative staff.

An Administrator is designated to hold rent adjustment authority. The Administrator becomes both judge and jury in making the determination of a "fair" rent. The Administrator is also responsible for making policy decisions, as in Niles where the Administrator had determined the guidelines for determining a "fair" return.

2. Rent adjustment authority outside of the administrative staff.

Administrative rules dictate the creation of an independent rent control hearing board (the Board). The Board is the locus of authority for making policy and rent adjustment decisions. Evidence, recommendations, and FNOI calculations are done by the administrative staff and handed over to the Board for final decisions. The administrative staff performs the day to day tasks of a rent control office, such as keeping records, gathering data, and preparing cases for the Board's review. The Board is only responsible for making rent adjustment and rent control policy decisions.

- E. Definition of the Rent Control Board. (D. 2.)
1. Appointment by an outside authority, such as the mayor or city council, of board members.
 2. Voluntary or paid service consisting of weekly meetings.
 3. Complete authority in making rent decisions, as well as in setting administrative policy, i.e. condominium regulation.
 4. A creed of procedural fairness as the guarantor of due process rights and of substantively equitable decisions.
 5. Political representation of the regulatory field. Hence, appointment of Board members includes equal numbers of landlord and tenant representatives, and a public interest member (equal numbers in Boston of all three). The public interest member, if representative of an odd vote, plays a role as the "swing" vote to avoid a political alignment of the Board with either landlord or tenants interests. In the case of an even numbered Board, the public interest members' role is still defined as a nonaligned one, to preserve the political independence of Board decision making.
- F. Hearings, which can be held at the discretion of an Administrator, or as a matter of course at the initiation of landlords or tenants before a Board.
- G. Rules of administrative procedure and rules of evidence as outlined by a state administrative law code, with exceptions as noted therein. 24.
- H. Designation of which duties are to be handled by the administrative staff with and without hearings.

With these rules a moderate rent control policy establishes both its organizational structure and the locus of authority for making its major decisions, what constitutes a "fair" rent. If rules designate an independent rent Board to hold hearings in the determination of a "fair" rent, the principle of due process, both substantive and procedural is established as what constitutes a procedurally "fair" administrative process. The process itself

establishes, to a great extent, the validity of rent decisions. If the rules designate an Administrator as the locus of authority for making rent adjustment and policy decisions, a streamlined version of administrative review is established. In either event, a solidly bureaucratic administrative system is established to handle the volumes of paperwork, filings, petitions, and data collection which wide price regulation of the private housing market entails. The bureaucracy strives for both efficiency in handling rent adjustment duties, and procedural fairness in reinforcing the validity of either Board or Administrator delivered decisions.

PART 2:

The Due Process Model

The theory behind administrative review in a court-like setting with rules of procedure similar although not identical to those of judicial review can broadly be called a due process theory of administrative review. It is a due process theory because its rules emphasize the importance of creating a forum for each party to make a case for or against a petition at hand. Cases are decided by a board composed of representatives of the political interests touched by a petition. The board makes final decisions much as a jury does in a judicial setting. Throughout the regulatory process, due process protections can exceed or adhere to the legal minimum. These administrative rules designed to protect the regulated from arbitrary state acts give the process its legitimacy and confer upon it a standard of procedurally grounded equity.

The underlying theory of a due process model of administrative review is that the rights of the regulated are best protected if the system measures itself against the standard of judicial review. Although this view which puts faith in the ability of a judicial standard of review to best protect individual rights is argued back and forth in the literature²⁵, it remains the prevailing view. Those disputing its wisdom would argue that professional or material advantage gives some parties an unchecked edge over their disadvantaged counterparts.²⁶ Others claim in its defense, that the judicial standard of review, and use of the courts themselves, is the only way to define and protect rights newly created and conferred by new-born public policies, which, this view contends, confer a new form of property upon beneficiaries.²⁷ And still others claim that non-judicial, discretionary resolution of conflict is to be preferred, because it is more efficient and therefore more effective at conflict resolution than the judicial system.²⁸

Those arguing in favor of a formal due process system point to the safeguards it offers against arbitrary state actions. Charles Reich offers a classic defense of full adjudicatory procedures in his writing, when he comments²⁹

"however cumbersome they may seem (adjudicatory procedures) have come to represent a fundamental standard of fairness in administrative process. They may be exaggerated and misused until they produce inordinate delay and expense, but they represent effective checks on the characteristic evils of proceedings in any large public or private organization: closed doors, Kafka-like uncertainty, difficulty in locating responsibility, and rigid adherence to a particular point of view. They are fundamental safeguards for those who must deal with government."

His view can be translated into many forms of regulatory systems.

We shall draw two due process models of administrative review, used by moderate rent control. One, which we shall name the Due Process Model Proper exceeds minimum legal due process requirements. Additional due process protection via appeals, hearings, audits, and staff inspections of buildings, etc. permit the regulated to more competently represent their particular interests, according to this model's theory. Competently representing their interests is the rationale for the regulated to exercise their due process rights , both substantive and procedural. These due process guarantees are intended to confer on all parties greater confidence in the equitableness of their treatment by the administrative system.

The second model is a due process model of administrative review which embraces the legal minimum. The second model, which we shall name the Minimum Due Process Model, settles at minimum levels of due process protections as outlined by the applicable state code of administrative procedure. Features required by the first model, such as hearings, audits, staff inspections, and a central role for Board members in preparing recommendations on each case, are optional in the Minimum Due Process Model.

The theoretical underpinning of both models, however, is identical. The underlying theory holds that the regulatory process better protects individual rights against arbitrary state acts by measuring itself against the standard of judicial review. There are, however, differences between the two models. The primary difference between the two models is the amount of information each requires be brought to bear on a case as a result of staff and regulated's participation.

The premise of a due process model of either standard is that information improves the quality of decisions. For a rent control system, this means information provided by both landlords and tenants and information culled by the administrative staff. Good information is thought to yield substantively improved decisions. Good information is more likely if three factors are present in the regulatory system: one, staff practice of exercising more than minimum due process protection for the regulated; two, timely use of information so that it stays relevant to the particular case; and three, willingness and ability of the regulated to participate in hearings to state their case. As Weber has noted of bureaucratic administrative practice:

"Bureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature which makes it specifically rational." 30

The system has been designed to improve the amount of information going into administrative review as a principal due process protection. Furthermore, these due process protections are intended to maintain the rationality of the process, and to minimize arbitrariness.

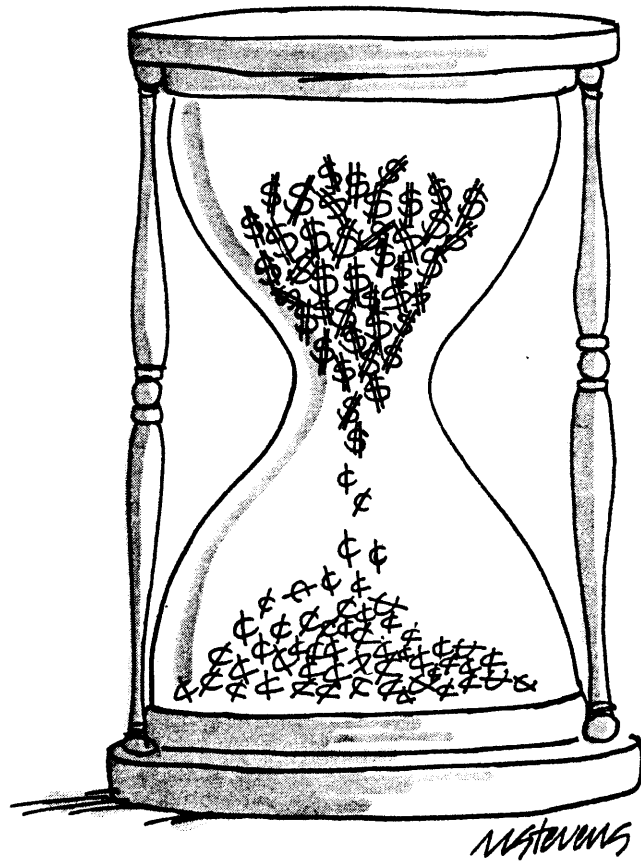
We shall present each model and discuss the due process features of administrative review in each one. We shall then discuss the relative abilities of each model, because of their particular due process features, to achieve the equity goals of moderate rent control. The conclusions of this analysis point to inherent conflicts in a due process system of administrative review which consequently frustrate the ability of system to achieve its policy goals. The conflicts arise from precisely those features designed

into the system to provide due process protections: one, more than minimum due process protections in order to gather better information from all sides; two, generous amounts of time devoted to each case; and three, ample opportunities for either side to participate in the process. Yet information gathering, time, and user expertise can play contrary roles as well as complementary ones in affording due process protections to the regulated.

In the course of discussion it will become clear that each model requires the process of administrative review to be a time consuming one. As due process protections are added to a minimum protection model, the process becomes more time consuming. The time factor itself has an effect on the regulated, costing landlords for whom time is money lost; and as a rule benefiting tenants, for whom time in the form of a delayed rent increase is money saved. Time becomes an automatic handicap to landlords.

As due process protections are added to a minimum due process model, the amount of time required of the staff to process an individual petition increases, too. Time has an impact on organizational efficiency in this instance, and usually tends towards slow-downs and development of a backlog. Additional due process responsibilities for staff can only lead to more work and slower case review. All parties are free to use the due process features, and tend to use them strategically. Policy goals can thereby be lost on the regulated.

The strategic use of due process features, or the opposite of this, inability to marshal these features in self-protection, can also vary with the addition of protections to a minimum model. Use affects policy.



New Yorker, May 2, 1981.

If landlords or tenants have different levels of ability in actually using the available due process protections, they do not have the same potential protection under administrative review. Again, a handicap is placed, usually on small landlords and on individual tenants. As additional due process protections are added to a minimum model, the differential between protections available and those actually used tends to increase. The balancing goal of moderate rent control policy can therefore be frustrated by just those due process features intended to deliver equity. The due process protections can not be themselves assure use and benefits to the regulated.

The potential for all three kinds of conflicts is inherent in a due process model of administrative review. We are comparing a procedurally full model with a minimum procedure model to highlight where the conflicts originate. A procedurally full model tends to display the consequences to both organizational effectiveness and to the delivery of equity to the regulated earlier than a minimum model. A model with extra due process protections shows symptoms of backlog, delay, and "jamming" of the system earlier because these features add time consuming steps to an already slow process with many participants. A system of review with additional due process protections is open to many more variables than a minimum model. As variables increase, the predictability of results decreases. Rationality of the system consequently suffers. And the administrative review's ability to maintain a single standard of equity may decline.

Due Process Models of Moderate Rent Control Administrative Review

The first model relies on features of administrative review for rent adjustment petitions in the Brookline, Massachusetts system. Careful, case by case review exceeds minimum legal requirements for due process protections for landlords and tenants. The second model relies on features of administrative review for rent adjustment petitions in the Boston, Massachusetts system. Case review is streamlined, involving only the due process protections required by Ch. 30A, the Massachusetts code of administrative procedure.

Both rent control systems handle a variety of types of individual petitions, for example eviction petitions, exemption requests, hardship appeals, as well as rent adjustment petitions. Because we are interested in the affects of the rent adjustment process on equity we shall focus on individual rent adjustment administrative review practices. How each system of review handles individual rent adjustment petitions illustrates the due process features designed into the system and how they affect the interests of landlords and tenants. Administrative review of individual rent adjustment petitions represents the "tip of the iceberg "³¹ by which we mean that underlying practices for dealing with rent adjustment petitions lie rules for reviewing all kinds of individual petitions. What can be said of the ability of due process features to protect the rights of landlords and tenants in an individual rent adjustment petition process can equally be said of an other kind of individual petition.

I. The Due Process Model Proper

- A. Individual petitions to the Rent Control Board may be initiated by either landlord or tenant, who bears the burden of proof of his claim. The petition process is the method of initiating the "right to be heard" characteristic of due process.
- B. All parties affected by a petition are notified by the Board that a petition affecting their interests has been filed and that they may respond and request a hearing. Hearings are routinely held.
- C. Petitions can be freely repeated.
- D. Information filed on a petition as a rule must be verified. Nothing is taken on face value. All documents are reviewed for veracity and applicability to the petition. Incompleteness of information short circuits the cycle of administrative review.
- E. Hearings, usually requested by staff, play a fact finding role intended to improve the quality of information entering the record. Information is tested by participants at hearings, who present information relevant to their interest in the case.
- F. A formal, written record is prepared by staff. The record is the central document of the petition. The record is reviewed by at least one Board member, who makes a recommendation to the Board. That Board member takes responsibility for discussing his recommendation with the Board at their regular meeting.
- G. At a regular meeting Board members, who have read the record, discuss the case and then vote. The decision is final. Their record, and the basis for the Board's decision cannot be re-created in a court of law de novo. The court doctrine of administrative review limits the court role to verifying that the Board decision was made according to the record, and consistent with administrative regulations in force at that time.

Each element of the Due Process Model Proper plays a role in defining particular theories of administrative behavior. Let us quickly run through elements A. through G.

Element A. defines the regulatory process as initiated by the regulated. All classes among the regulated are equally entitled to use the elements of review. And once either a landlord or a tenant files a rent adjustment petition, he must prove why the petition should be approved by the Rent Control Board. Proving his case represents exercising the due process "right to be heard."

Element B. bears the other major due process feature which is that all parties affected by a state action must be notified. It is important for the regulated to be notified that, for example a landlord is filing for a rent adjustment, so that the tenant can appear and praise or pillory his landlord to affect the Board decision. A tenant in this position might want to request a hearing to explain why it is that his landlord does not deserve a rent adjustment, bringing in such information as that the landlord does not make prompt repairs, or he does not keep the building safe.

Element B. illustrates the principle that good information will contribute to a better decision, and that good information is information acquired from many sources. The staff is relatively isolated from the conditions of a landlord-tenant relationship, and from what features of that relationship should be taken into account by the Board.

In C. we see the simple rule that a landlord or tenant can petition whenever he or she feels that the agency is not providing an equitable situation under rent controlled rents. The right to petition and "to be heard" does not decrease with use.

Element D. regarding staff verification of data submitted with a petition is a safeguard built into a procedurally full system. Administrative staff do not accept at face value that landlord bills, or even contractor affidavits stating that work was performed, are sufficient substantiation of a rent adjustment request. The staff takes central responsibility for individually checking each document, to ensure that the record will be accurate. A staff member

might conduct cost comparison studies to evaluate the appropriateness of charges. Staff might contact all contractors named on bills.

A final check on the accuracy of this information involves regular staff inspection of the premises named in the petition. Tenants can petition to have their units inspected during the staff visit, to provide more information for the record.

Information must be complete according to administrative rules. This usually means twelve months of cost substantiation. Completeness of information is as important as accuracy. Any expense that has been claimed on the rent adjustment petition must be fully substantiated. Expenses submitted for the record are expenses incurred in the preceding year. Hence, a petition filed on January 1, 1981 for that year would include documentation of costs for twelve months beginning January 1, 1980.

Element E. acknowledges the need for good information upon which to build a case either for or against the petition. A hearing permits both landlord and tenants to present their view of the case to a staff member, and to at least one Board member, who is presiding over preparation of the case prior to the Board's vote. Primarily, however, the hearing is a tool for the staff: information which is inaccessible to staff because they have only one contact with the building, whereas tenants actually live there can be produced in a hearing, can be challenged by the landlord, and further questioned by a staff member. The hearing is a vehicle for transporting higher quality information into the record than formal rules could possibly anticipate. Furthermore, the presence of both tenant and landlord

interests acts as a counterbalance to the large amounts of administrative discretion present in a due process system of review.

Element F., creation of a record, underscores the objective nature of the process. Objectifying the petition by creating a record is intended to make the regulatory process rational, equally accessible to all who review the evidence, and accountable for the decision. The record is public, and only information on the record is used to make a decision. Reliance on a formal record, and the prevailing doctrine of administrative review mean that the Board produced record is the central document of the petition. No other body may create a record, except the Board. The authority to prepare the record gives the administrative staff and the Board a two edged duty: the record must include as much as possible from both sides to be fair, because it is the principal opportunity for all parties to contribute to how their petition will be decided; but the Board has discretion over how much information is too much, how many hearings too many, etc.

Element F. includes another feature, the role assumed by the Board member in presenting the petition to the Board with his recommendation. The decision will not be a pro forma affair, but rather involves case by case, individually attended to consideration. The independence of the Board from administrative staff is intended to ensure that the decision will be made independently of staff responsible from preparing much of the record. Judge is separated from jury. Board members carry responsibility for setting the rent control policy of the agency, and in making weekly decisions in an independent, fully aired manner carry out their responsibility.

The Board meeting also establishes the legitimacy of the regulatory process in the eyes of the courts. Establishing the legitimacy of the process according to the larger legal order assists a due process form of regulatory behavior establish its legitimacy and ultimate authority among the regulated. Balancing possible charges by those under its regulation that the Rent Control Board represents a state, coercive authority, is the due process nature of administrative review which exceeds legal minimums in an attempt to avoid coercion and inequity. The opportunity to be heard is the cornerstone of the due process system.

All of these items taken together establish the administrative standard for procedural fairness. The due process features which exceed minimum legal requirements, such as the extensive fact gathering and verification, staff inspections of buildings, and multiple hearing opportunities all contribute to the standard. Such a standard, according the model's underlying theory, should ensure more equitable decisions. The process is the central mechanism for putting a check on the "fairness" of the decision.

II. The Minimum Due Process Model

- A. Individual petitions may be initiated by either landlord or tenant, who bears the burden of proof of the claim that the 1971 FNOI was either too high or too low; or that changed circumstances justify a rent adjustment to produce a FNOI consistent with the 1971 base year FNOI.
- B. All parties affected by a petition are notified by the agency that a petition affecting their interests has been filed and that they may respond and request a hearing. Hearings are not routinely called by the staff, but by landlord or tenant.

- C. Petitions can be freely repeated.
- D. Documentation must accompany a rent adjustment petition. Formal rules describe what constitutes a completely substantiated petition. Incomplete petitions short circuit the process.
- E. Fact finding is at the discretion of the staff handling the case. Completing the file's substantiation material is the primary task. Hearings, when requested, play a vital, outside fact gathering role otherwise not routinely available.
- F. A formal, written record is prepared by staff, consisting of complete cost substantiation data, notes from site inspection officers, and material, if any, provided at a hearing. The staff member writes up "Findings" and a "Recommendation" which is routinely accepted by the Board member officially assigned to the case.
- G. At day time meetings held at the administrative offices, the Board reviews staff "Recommendations" and usually votes approval. The decision is final. A new record and another hearing before the courts is not available, unless the Board did not vote according to the record before it and in a manner contrary to agency regulations.

Again, each element in the Minimum Due Process Model plays a role in defining particular theories of administrative behavior. We shall only discuss those features in the Minimum Due Process Model which differ from the Due Process Model Proper. Elements B. and C. are virtually identical in both models.

Element A. differs from its counterpart in that what must be proven in a petition, in order to obtain a rent adjustment, is that a fairly mechanical calculation on the part of the agency is no longer producing the correct rent level. Fewer discretionary elements can be brought to bear in this step than in the other, for what constitutes grounds for a rent adjustment is fairly specific.

Element D. formally acknowledges the need for complete information

so that the petition can be reviewed in an equitable light. However, complete information is closely defined by agency rules, and leaves little room for discretion on the part of staff to dig more deeply. As long as the landlord provides all items requested by the agency as evidence of cost substantiation, the process continues. Should a landlord or tenant request a hearing cost data can be further examined. Only at this stage can the fairly political nature of the petition be brought out, and the range of administrative discretion in asking for additional cost substantiation. In the other model, staff were looking for the reasonableness of information, as well as for accuracy. Furthermore, in the other model hearings are routinely called by a Board member or staff.

The formal written record, of element F. objectifies the process. However, the contribution of the staff member in writing up "Findings" and a "Recommendation" put administrative staff much closer to the role of prosecutor, judge and jury than in an independently decided process, as in the first model. We could say that the record reflects fewer dimensions in regard to the interests affected by the case. And, that the staff member more than the politically representative Board is making the decision. If this is true, the purpose served by "making a case" is less obvious or effective than in the first model. Ironically enough, although this model's rules are streamlined, and the FNOI device is mechanical, staff exercise more discretion for their role supersedes that of the Board.

Element G. reflects the secondary role played by the Board in actually "hearing" the case and in reviewing the facts. The Board

goes through a pro forma exercise. Not as much hangs on the Board meeting if staff recommendations are routinely accepted. The Board does not display an independent, policy setting role as it decides cases and sets precedents. Staff has taken responsibility for that. Only if a tenant or landlord has requested a hearing somewhere along the line, and has successfully brought new information into the record, will the Board have food for thought. The formal rules of the Minimum Due Process Model suggest that the case has not to as great an extent been argued, weighed, and sifted by the competing interests on the petition, nor scrutinized as closely by staff. Hence, the Board vote is a simpler task than its more active, and responsible counterpart. The role of the Board in this setting is sharply curtailed.

In concert with a moderate rent control policy, the goal of administrative review is to weigh, to balance in its best informed judgement the relative merits of a petition. A Board has the potential for being the epitome of that procedural balancing role given a broad enough set of responsibilities. Therefore, in practice and according to policies of administrative review, the Board in the Minimum Due Process Model falls short.

Conflicts in a Due Process Model of Administrative Review

In practice, each model requires different levels of information gathering, different minimum processing times, and implies different levels of responsibility incumbent on the regulated to enjoy the range of due process protections in either model's system of administrative review. The Due Process Model Proper, Model I, with more due process protections in its rules of administrative review in regard to information gathering and evaluation requires that staff take responsibility for making the record as complete as possible. As a result, Model I is more time consuming than the Minimum Due Process Model, Model II, and therefore the minimum case processing time is longer than in Model II. Furthermore, Model I is more time consuming because staff and Board review of information is more detailed. Lastly, Model I places primary responsibility on staff for making sure that the due process features of administrative review, the most outstanding feature of which is the hearing, are activated. In Model II, much responsibility for testing information on the record, for requiring hearings, and for putting the petition to debate among the interests affected by the case rest with the regulated and not the staff.

In each model, therefore, information gathering, time, and user expertise are variables whose behavior ultimately affects the nature of rent control policy delivered. These variables, as we noted earlier, have the capacity to frustrate equity.

Model I allows these variables greater play, and they therefore show how what began as a greater store of due process protections can dissipate to the disadvantage of both regulator and the regulated.

The Role of Information Gathering in Providing Due Process Protection

Administrative rules may dictate that certain pieces of information must be collected from a petitioner to substantiate his claim that a rent adjustment is deserved. For example, a year's worth of bills for operating expenses may be required of a landlord. We would call these rules explicit, and suggest that they severely limit the range of possible administrative discretion.

Administrative rules may also invoke large amounts of administrative discretion. Such rules may instruct a staff person to judge the "reasonableness" of a petitioning landlord's expenses. Rules may also direct that staff member to evaluate the "appropriateness" of bills submitted, i.e. were the documented costs legitimate ones insofar as a rent control agency is concerned. Appropriateness would be judged according to the contribution made by outlays to the level of housing services previously received by a tenant. For example, staff might consider whether condominium membership fees are a legitimate basis for a rent adjustment, or a pass through to the tenant. Questions about passing along debt service to a tenant are also likely to arise. The answers rely upon an exercise of administrative discretion, and are highly subjective judgements. In the more developed procedural model, discretion is transferred to the whole Board, who debates the issue. In our narrower model,

staff discretion (perhaps to omit debate) has greater play.

In either instance, with specific rules which omit administrative discretion on relevance of information, and at least formally strive for a simplified information file which is either complete or incomplete; or, with rules which grant substantial administrative discretion in actually evaluating the quality of information, due process law requires that a forum be available upon request to question information. The forum is a hearing at which landlord or tenant can question the completeness, accuracy, relevance, or adequacy of information gathered by administrative staff. Furthermore, landlords and tenants can contribute their own information to the record at hearings.

The obvious purpose of the hearing is to improve the overall quality of information on the record. Tenants might discover that work for which their landlord had submitted a bill had not in fact been performed in all units in the building for which he was seeking rent increases. On the other hand, a landlord could explain to staff why it was that he felt obligated to provide more heat in his building, even though staff research indicated that he exceeded fuel consumption for a building of his size. His reason might have to do with the age, health, or preferences of his tenants.

At such forums both interest groups can dispute the accuracy of information from their point of view. Due process opportunities encourage that debate to occur. The premise of a due process system of administrative review is that accuracy of information improves the equitableness of the final decision. It is the element of balance between interests in determining accuracy, or adequacy, etc.

that satisfies the mandate of moderate rent control, and of the desire for good information. Good information improves the quality of the record, as well.

Furthermore, hearings do provide procedural checks on administrative discretion, whether stimulated by formal rules or not. A decision to answer any of the questions asked on an earlier page about the appropriateness of cost pass throughs could go undetected if it were not for a mandatory hearing to discuss cost data. The Due Process Model Proper does include this hearing opportunity as a rule. The Minimum Due Process Model would rely upon a tenant interested party to request a hearing.

In sum, a due process model must address the question of quantity and quality of information. A model with more routine due process features, such as regular hearings and Board meetings for debate is most likely to answer both questions. High quality information is that which reflects the interests of all parties affected by the petition. As the goal of Moderate Rent Control is to balance what are viewed as conflicting interests, the presence of hearings and debate initiated by the agency strides closer to the goal than a model which places the burden on unfamiliar petitioners.

The Due Process Model Proper, as it affords on a regular basis more opportunities for landlords and tenants to place information on the record, affords greater due process protection in its system of administrative review. That is how the model works in theory.

The Role of Time in Providing Due Process Protection

But information gathering is time consuming. Beyond a certain point the process may be counterproductive. Although providing more information is thought to enhance due process protections, time can erode these advantages intended to benefit landlords and tenants. Minimizing the amount of time required to collect information for a rent adjustment petition is important in preserving the quality of the information upon which the Board's decision is based. Old information is often flawed.

The flaws develop sometimes simply because operating costs, such as fuel charges, have increased during case preparation due to supply and demand factors. Or, flaws can develop due to inflation. In periods of rapid inflation, such flaws develop quickly. Three months time may render inaccurate cost information on a case record. Inflation has plagued moderate rent control's effectiveness since 1975 . Flaws can also develop during lengthy information gathering steps because situations change: a tenant moves, the building changes hands, the landlord changes suppliers and gets a better deal.

Information gathering rules and required hearings may make the case record more complete, but if the record does not go before the Board in a reasonable period, the flawed information provides little due process benefit. Insofar as a rent adjustment petition represents a highly individual petition for which information is uniquely gathered, reviewed, and assigned any changes in detail

for whatever reason flaw the accuracy of the record. Tailoring an individual response to a petition with a record which no longer accurately represents either the landlord or tenant petition does not produce effective rent control policy. Extra opportunities for adding information to the record have, in this instance, not provided greater due process benefits.

A due process system of administrative review always makes filing a petition a lengthy process. Minimum filing times are determined under what we would describe as the "best of circumstances" which implies no case backlog, an efficient staff, and no impending barriers to timely administrative review, such as staff reductions. Yet as any of these negative factors enter the picture, processing time increases. Processing time is also likely to increase under a due process system of administrative review as the regulated take maximum advantage of their right to request hearings, continuances, and appeals. In short, strategies can be created around the time factor.

Because a procedurally full system of administrative review is an inherently time consuming one, delay from whatever source threatens the ability of the regulatory system to deliver decisions based upon accurate information. A delay has to add only a two month increment to the processing time, and a tolerable three month wait in a streamlined model for a landlord or tenant can become an intolerable six month endurance contest. For the Due Process Model Proper, a normal six month span can become eight months. Such time delay questions the ability of the regulatory process in matching administrative behavior with stated policy goals.

Numerous sources of administrative delay are internal. One frequently active source is staff turnover. Only an expert and well organized staff can handle a large caseload efficiently so that timely decisions are reached. The variable of staff expertise keeps an otherwise lengthy process within tolerable time limits for the client. But a staff populated with inexperienced staff due to frequent turnover cannot maintain efficient processing levels.

New administrative staff take longer to process rent adjustment petitions for a variety of reasons. First, new staff must familiarize themselves with agency regulations. Second, they must develop a rapport with regular clients and an understanding of their quirks. Third, new staff must develop individual strategies for handling routine delays, such as cancelled appointments and other official duties, which continually intrude on processing responsibilities of individual petitions.

The implication of slowed processing time is that a backlog can develop. If backlog develops new petitions must wait in line behind the backlog before processing can even begin. A backlog adds time to an already lengthy processing term. When a rent control agency using either model of administrative review develops backlog, the agency then places itself in the position of always needing to "catch up" with its work load. Policy goals of moderate rent control are challenged by organizational needs to "catch up" and gain control of workload. The agency's ability to achieve its policy goals and deliver equitable decisions is decreased proportionate to energy diverted to overcoming backlog. Backlog induces dysfunction.

Backlog penalizes both landlords and tenants. Backlog causes delay which impairs the quality of information going into the record. And as we noted, the time consuming nature of the process always threatens to induce flaws in the information on the record. The existence of backlog guarantees that this will be so.

Consider this simple example. A landlord who has filed a petition for a 10% rent increase who due to backlog is forced to wait from January 1, 1980 to January 1, 1981, a period of 12% inflation, has actually suffered an economic loss under rent control. The delay has cost him 12% increased operating costs for twelve months with no concomitant rent adjustment. Delay of twelve months in part due to backlog has also caused a 12% decline in the dollar value of his petitioned rent adjustment.

A tenant is not penalized in a monetary way, indeed some might claim that delay due to backlog is money saved for the tenant. But an example to illustrate the damage in due process protection afforded a tenant if backlog and dysfunction occur can easily be drawn, based on the accuracy of information discovered at a hearing. A landlord may claim that borrowing costs for capital improvements require a \$65 per month rent adjustment; eight months pass. The tenant questions the merit of the improvements. The Board approves the increase. And the following month interest rates fall. Should an appeal from the tenant take eight months more, the appeal route would not be attractive because of the possibility of future changes again. The time factor frustrates such an appeal.

Although a landlord penalized by the normal length of the review

process or by internal sources of delay such as staff turnover still believes that he has an equal chance to make his case and be heard, a landlord confronted with a three or four month backlog begins to realize that the deck is stacked against him. A tenant also aware of the existence of a sizeable backlog, would think twice about activating due process avenues of review. It is in this regard that the existence of due process protections alone does not insure that the benefit will accrue to anyone. Organizational dysfunction can produce a climate in which equity is not possible for any of the regulated. Organizational dysfunction begins to generate a reputation for the organization such that the regulated will not deal with it, regardless of due process protections on paper. Equity as a consequence suffers.

In conclusion, a due process model of rent control review must grapple with the negative impacts of time on the agency's ability to provide due process to landlords and tenants. Its ability to deliver equitable decisions, to maintain its legitimacy, and to survive are all a function of its capacity to minimize case review time. Although the Due Process Model Proper has the capacity to develop a highly detailed record reflective of the interests of all parties touched by a rent adjustment petition, if that information is not collected and acted upon in a timely manner its value is lost. A Minimum Due Process Model is less time consuming but nonetheless must grapple with time as a variable in its ability to provide due process to the regulated. Time is always a predictable handicap to landlords in both models.

The lengthy nature of either model's system of review is compounded by other factors. Organizational inefficiency will quickly add processing time to a case. If this occurs on a regular enough basis, backlog can develop. Backlog penalizes landlords, for whom time is money; and it penalizes tenants, whose record loses relevance. Backlog damages the regulated's perception of the agency's neutrality, as well. If backlog frustrates the willingness of the regulated to "use" the system, due process rights have effectively been lost. Ironically enough, the additional sources of time in the process are due process features designed to give rather than destroy due process protection. Yet the due process system of administrative review has inherent sources of conflict many of which flow from time having different impacts among the regulated.

The Role of Expertise in Providing Due Process Protection

Knowledge of how to initiate a petition and to take advantage of the due process features of either model of rent control is a key variable in either model's achieving its goals. Willingness to use the system based on a faith in its neutrality is also necessary if the system is to provide due process. Both due process models cannot function unless both expertise and willingness are present.

Tenants must learn how and when to enter the petition process. A tenant exercise of judgement on cost substantiation data can mean

that rents will not in the opinion of the Board deserve an increase. The Board may decide not to grant the whole requested increase. As tenants learn from staff how to participate and make themselves heard on the record, taking such a step becomes easier. Routine use of petitions, hearings, and testimony by tenants can make the process progress more quickly, too. Skill increases with use.

Alternately, increased skill among tenants in applying due process rules can lead to strategic use of these rules. Tenants may decide to deliberately slow down the review process in order to maintain their rents at current levels for as long as possible. As such strategic use of the system occurs, staff discretion is further tested, as a protracted process compromises the neutrality of the agency.

As tenants rarely have the means to hire professional help, such as an accountant or a lawyer, personal experience is their major source of expertise. The likelihood that a tenant will have information entered to the record, or that he will successfully question landlord cost substantiation data can only increase with experience at going through the petition process. Organizational theorists have developed elaborate observations about the 'players' in a regulatory 'game' and how they build skills.³²

The frequent conclusion of such discussions is that professional and repeat 'players' have a built in advantage over others.

In the example of rent control this would suggest that tenants have a heavier handicap than landlords in respect to skill, and the role of skill in making available due process protection.

Efforts to "jam" a due process model of administrative review increase with the availability of time consuming review steps. The Due Process Model Proper requires initial hearings, and encourages the use of hearings whenever a reasonable doubt exists about the reliability of information. Tenants may on principle request hearings at every available opportunity, may make appeals, cancel appointments, and cause delays at hearings so that they must run over to another date. Such tactics, a compensation perhaps for lack of professional expertise, push the burden of proof back onto the landlord and the staff that any rent increase is deserved. It is a simple fact that the longer a landlord's rent adjustment petition remains in the procedural pipeline, the longer the maximum legal rent rests unchanged. The Minimum Due Process Model requires more effort on the part of tenants to manipulate into this protracted, knotty position.

Landlords have expertise on their side, and more frequently the means to hire professional help on their rent adjustment petitions. However, we should not assume that the ability to hire professional help contributes to equity, for paying for help in obtaining a rent adjustment merely decreases the value and hence the "fairness" to the landlord of the adjustment. A due process model is designed so that petitioners do not have to "pay " to use the system. Due process rights are supposed to confer benefits, not exact costs. Yet the clock is always ticking, and all delays are costly, whatever their source. Expertise must be used as a defense against the time factor. Small landlords pay the highest price.

As these handicaps arise and affect the odds of one interest group manipulating due process features for strategic advantage, administrative discretion must be exercised to prevent the agency from becoming the tool of one interest group and thereby losing its legitimacy. Such handicaps are present with both due process models inherently, and vary by degree. The Due Process Model Proper places more responsibility with staff in offering additional due process features to the regulated, and especially to tenants. The Minimum Due Process Model assumes that either landlords or tenants will take the initiative to request hearings, and makes few overtures, even though as 'repeat players' landlords are likely to have greater expertise than tenants. Both models are susceptible to manipulation, however, by landlords and tenants to degrees which vary with the level of initiative required of inexperienced users. With a fall in its perceived neutrality due to protracted petition processing time and procedural fisticuffs, a rent control system loses its legitimacy. Landlords and tenants become unwilling to exercise formal due process protections, believing it to be futile. In this event, a model which exceeds the legal minimum delivers no greater benefit than a streamlined model does.

CONCLUSION

The central principles of due process administrative review are: a procedurally full system allows all parties to make a case on their own behalf; balanced information leads to more equitable decisions; and decisions based on an objective, rational

process guarantee procedural equity, the foundation of substantive equity. These principles imply an individually tailored case review. They imply a time consuming process. And they imply handicaps due to individual differences in ability to use an adversary process. In theory, a due process model is designed to include features which will protect the individual against arbitrary state behavior.

But information, time, and expertise of the regulated all play roles in determining whether or not a due process system of administrative review delivers adequate protection against arbitrary state actions. These factors can combine to work against equitable treatment by a rent control agency of landlords or tenants. These features are variables any due process model must address.

For Moderate Rent Control, the competitive nature of landlord and tenant interests makes maintenance of a due process model of either description a difficult task. Time and expertise handicap landlords and tenants differently despite agency goals of balancing these adversarial interests. The tendency of both models discussed and to a greater extent of the Due Process Model Proper, is towards a time weary, overburdened process easily manipulated by skilled users. Dysfunction is a predictable consequence of the kinds of backlog likely to develop due to such manipulation. Dysfunction due to backlog is also likely due merely to the time consuming nature of a due process system of administrative review.

For both Moderate Rent Control and a due process model of administrative review the balancing role sought by both is an

inherently unstable one. An agency defines its rent control goals in regulations, which define equity by setting in balance economic interests of landlords and tenants according to formulas or to general guidelines. Due process procedural mechanisms calibrate that balance. But inherent conflicts in a due process system, primary among them the handicaps distributed on all parties by time and regulatory expertise, inevitably tip that balance. A model with more numerous due process features cannot make the balance more stable. In fact, what we have discovered is that to the contrary, these additional features may make the balance less stable. The goals of Moderate Rent Control and the protections associated with a due process system of administrative review are elusive ones.

NOTES

1. Gilderbloom, Moderate Rent Control.
2. St. 1970, c.842 and St. 1970, c.843.
3. Brookline Bylaw Article XXXVIII, Section 6. and Boston Ordinances of 1975, Chapter 15, Section 5. and 6.
4. Blumberg et al., "The Emergency of Second Generation Rent Controls," 8 Clearinghouse Review 240 (1974-75).
Richard Blumberg writes frequently on rent control, and conducts research with the National Housing Law Project, Berkeley, California.
5. Blumberg, et al. op.cit., p.246.
6. Greenberger, et al., Models in the Policy Process, p.49.
7. Weber, The Theory of Social and Economic Organization.
8. ibid., p.130.
9. ibid., p.130.
10. ibid., p.325.
11. Chapter One, p. 26.
12. Brookline Rent Regulations, Regulation 10, 1970.
13. Article XXXVIII of the By-Laws of the Town of Brookline, Regulation 6, 1980.
14. Selesnick, Rent Control, p. 19.
15. Boston Rent Regulations (Issued under Chapter 842 of the Acts of 1970) and Ordinances of 1975, Chapter 15.
16. ibid., Reg. 6., section 5(a).
17. Ordinances of 1975, Chapter 15, Section 5(a).
18. ibid., 5(b).
19. Boston Rent Regulations, Section 5(b).
20. ibid., 5(b).
21. Interview with Cheryl Hoey, Boston Hearing Examiner.

NOTES

22. Weber, op. cit., p.329.
23. ibid., p. 329.
24. Massachusetts Gen. Laws, Chapter 30A.
25. Rubenstein, "Procedural Due Process and the Limits of the Adversary System," 11 Harvard Civil Rights L.Rev. 48(1976). Also see, Handler, "Controlling Official Behavior in Welfare Administration," in The Law of the Poor, Ten Broek, ed.
26. Bolton, "Legal Services and Landlord-Tenant Litigation: A Critical Analysis," 82 Yale Law Journal 1495 (1973).
27. Reich, "The New Property," 73 Yale Law Review, (1964)782.
28. Davis, Discretionary Justice: A Preliminary Inquiry. Also see, Gelhorn, When Americans Complain.
29. Charles Reich, op.cit., noted in Handler, "Controlling Official Behavior in Welfare Administration," op. cit.
30. Weber, op. cit., p.339.
31. Cherished phrase of Prof. Langley C. Keyes, MIT Department of Urban Studies.
32. Galanter, "Why the 'Haves' Come Out Ahead...", 19 Stanford Law Review, p.125. This article develops an argument that those affected by a regulatory system resemble 'players' who employ different strategies to "Come Out Ahead." There are different kinds of 'players' from individuals filing individual petitions, as in a rent control setting, to legal services, institutions, and special interest groups. Galanter also draws distinctions between kinds of rules which a 'player' must learn to use. The major rule types are behavioral rules in the society or in a particular culture, and formal, legal rules of due process. His argument stresses the handicaps certain groups bear in attempting to learn and employ due process rules. Usually individual, one time 'players' understand the rules least, and derive the smallest benefits from them, according to Galanter. Also, the Galanter piece goes into exhaustive detail on how 'players' build expertise and can use rules strategically. As a whole, the article takes issue with the classic due process argument for administrative review, as advanced by Reich in "The New Property," 73 Yale Law Review (1964) 782.

NOTES

32. The following is Galanter's diagram to explain why the "Haves" tend to come out ahead in a due process system.

WHY THE "HAVES" TEND TO COME OUT AHEAD

Element	Advantages	Enjoyed by
PARTIES	<ul style="list-style-type: none"> — ability to structure transaction — specialized expertise, economies of scale — long-term strategy — ability to play for rules — bargaining credibility — ability to invest in penetration 	<ul style="list-style-type: none"> — repeat players large, professional*)
LEGAL SERVICES	<ul style="list-style-type: none"> — skill, specialization, continuity 	<ul style="list-style-type: none"> — organized professional* wealthy
INSTITUTIONAL FACILITIES	<ul style="list-style-type: none"> — passivity — cost and delay barriers — favorable priorities 	<ul style="list-style-type: none"> — wealthy, experienced, organized holders, possessors — beneficiaries of existing rules — organized, attentive
RULES	<ul style="list-style-type: none"> — favorable rules — due process barriers 	<ul style="list-style-type: none"> — older, culturally dominant holders, possessors

* in the simple sense of "doing it for a living"

CHAPTER THREE: MODERATE RENT CONTROL IN BROOKLINE
AND THE DUE PROCESS MODEL

3

MODERATE RENT CONTROL IN BROOKLINE and
THE DUE PROCESS MODEL

Brookline, Massachusetts' rent control law relies upon a Moderate Rent Control Policy Model and the Due Process Model Proper system of administrative review. A synopsis of policy and administrative changes in Brookline from 1970 to the present will be presented to illustrate reliance on each of these models. Furthermore, we shall explore how the Brookline rent control system has responded to tendencies in the system to tip the balance between landlord and tenant economic interests such that the neutrality of the regulatory agency is in question. Some of these tendencies were hinted at in earlier sections, such as the possible conflict between thoroughness and administrative efficiency; that between administrative efficiency and equitable treatment of the regulated; and that between case by case review of individual petitions and organizational survival. Threats to organizational survival threaten delivery of a Moderate Rent Control policy.

The features of Brookline's rent control policy we are most interested in are those which reflect the nature of administrative review according to our Due Process Model Proper. Our history will be selective in favor of such features. In Brookline, all rent control policy is made by the Rent Control Board (the Board) with advice from the Director-Counsel. The Board holds special meetings to publicly discuss policy issues, as well.

Policy Considerations in the Start-up Years 1970 to 1974

Although Brookline was legally empowered to enact rent control in 1970, with the passage of state enabling legislation c. 842 and Brookline's own c.843, a law suit against the not as yet formed rent control agency enjoined the agency from enforcing any of its rules until the end of 1971. Despite the fact that the rent control system was not activated during 1970, landlords anxious about the effect of rent controls on their buildings immediately submitted rent adjustment petitions to the newly appointed Director. The Director had barely begun to assemble his staff, and draft administrative regulations, when petitions began flowing into his office. During the time that this suit against the rent control agency was pending and therefore prevented it from acting, a tremendous backlog of unattended cases and paperwork developed.

Brookline's rent control laws were cleared by the courts by February, 1971 when the agency could begin processing rent adjustment petitions. However, a by now assembled staff was confronted with year old rent adjustment petitions. What further complicated the picture of administratively inexperienced staff employing untested regulations upon a wary clientele was the sheer magnitude of their problem. In addition, the rent rollback date of six months prior to the September, 1970 imposition of rent controls set legal maximum rents at several levels. For those landlords who had entered into one to two year leases with tenants as was customary at that time, the rollback date caught them as the leases

expired during the six month rollback period. For these landlords, legal maximum rents were set at 1969 or 1968 levels. For others, the rollback date was March, 1970, although imposition of rent control was upheld for four months. Hence, confusion abounded among landlords over the rollback policy and over how initial, "base year" rents were going to be set. As the base year figure might differ among units owned by a single landlord, or between landlords as the rollback date affected them differently, so too would subsequent rent adjustments on this base vary. The system was roundly castigated for mismanagement and inequity.

The newly formed Board was faced from the outset with the challenge of adopting policies which would set equitable rent levels across all units. The number of eligible units for registration and adjustment as of the end of 1971 was 10,432¹, a sizeable caseload for an agency which in 1970 had three full time staff and which by 1971 had grown to nine, six of whom were completely new to the job.

The Board voted in July, 1971 to adopt a policy which would bring all units in line in regard to rent adjustment levels. The Board decided to adopt a policy of granting general, automatic rent adjustments for the year which did not require individual rent adjustment petitions and Board votes. The general adjustment, or GA as it is known, was a major time saving administrative tool. The GA was implemented to correct the imbalance in equity created by administrative inefficiencies during 1970 and early 1971.

In principle, a GA represents average costs for units in

specified classes, such as twenty unit structures or units in gas or oil heated structures. Market study data is used in determining the average which will satisfy cost requirements of efficient operators, perhaps giving them a small bonus; and penalize inefficient operators, in all likelihood small property owners, not taking into account their special circumstances or their reasons for exceeding average operating costs. A case by case review, on the other hand, can detect such differences.

In 1971 the GA was calculated based upon data collected by the Institute of Real Estate Management. This information was submitted to the real estate trade organization by members on a voluntary basis, hence it was not a representative sample. Yet the Board relied upon staff recommendations for a GA based upon this data. For the period 1971 through 1974 the annual GA averaged 8%. In later years, price indices such as the CPI were also consulted.

The 1971 GA designated three classes of units. Class I included all units eligible to receive an adjustment to bring rent levels up to 25% above January 1, 1968 levels; and those receiving the 15% maximum GA voted by the Board. Class II included units not eligible for an adjustment, because they had received adequate individual adjustments since 1970. Class III included units not properly registered with the agency. In all, 6,190 units received the GA representing 59% of all potentially eligible units.² (See Table 8)

Each year thereafter, the Board voted an automatic GA in order to make available a timely rent adjustment for landlords, and an

administratively efficient tool for setting an approximately "fair" rent. During the period 1971-1974 approximately 50% of registered units took advantage of the GA provision³ suggesting that it set rents at levels which allowed an economically adequate rate of return for landlords. (See Table 9) Increases averaged 8% per year for the four year time period, although the GA was actually doing duty for the years from 1968 to 1971, due to the effect of the rollback date. Hence, individual rent adjustment petitions were also filed by landlords seeking more than the annual GA.

These rent adjustment petitions were one of several kinds of individual petitions also handled by the administrative staff from 1972 to 1974. In addition to rent adjustment petitions, there were individual landlord petitions for capital improvement related rent adjustments, tenant rent adjustment petitions, exemptions, eviction for nonpayment petitions, and eviction for reasons other than nonpayment. In all, the caseload for those years was 720 cases in 1972; 929 cases in 1973; and 914 cases in 1974. Staff size during these same years grew with caseload from three full time administrative staff, with part time staff as needed to the eleven year peak of eleven full time administrative staff, and three part time. In 1972 the agency acquired a new Director-Counsel as well.⁴ (See Table 4)

Satisfaction with rent adjustment decisions was low. Landlords expressed their dissatisfaction in the form of law suits against the Board. Litigation involving rent adjustment reached its peak

in 1973 at 106 suits over individual rent adjustment decisions. This litigation was timeconsuming for the Director-Counsel, who in addition to regular administrative duties was forced to prepare for trial in all of these cases. For the four year period the Director-Counsel had to go into court over 700 times! Only with the decision of Sherman in 1975 which held that if the Board decided upon the record before it which had been created by the administrative staff the court would not provide a new hearing and a new record. The court said that it would only provide review of the Board's record, to verify that the decision had been based upon the record and according to c.843. Thereafter, litigation over individual rent adjustments declined to what are now single digit numbers. (See Table 10)

From 1972 on the Board voted time saving procedures in the area of rent adjustments in addition to an annual GA. The Board acknowledged that lengthy individual rent adjustment petition processing time continued to corrode the value of rent adjustments. The Board could see that the moderate rent control policy agenda of the administrative system was not being adequately met. But rather than tamper with their administrative model as a whole, which exceeded minimum legal due process protection for both landlords and tenants, the Board created small, parallel routes of administrative review. These routes were designed to afford opportunities to landlords to keep pace with operating expenses without having to go through a lengthy process of administrative review. These shorter routes were implemented with the intent

of contributing to administrative efficiency.

The principal example of an early 1970's efficiency device passed by the Board is what was called the Short Form Capital Improvements petition. The Short Form was designed to allow quick approval of rent adjustment requests due to capital improvement related expenses. The Board granted a rent adjustment as long as the landlord properly documented his capital improvement costs. The advantage of filing for a Short Form Capital Improvement adjustment was that the Board voted a higher rate of return on the unamortized cost of improvements after the initial year than it would have allowed under a GA, or in all likelihood under a regular rent adjustment petition. The first year of the Short Form, the rate of return was 10%. The 10% rate considerably exceeded the annual GA for the period 1971-1974, it was quick, and it therefore offered major financial incentives to landlords to file.

The Short Form Capital Improvements petition was initially designed as an incentive to landlords to maintain their property, as well as an efficient administrative tool for the agency. The Short Form avoided a lengthy individual petition process and administrative review to minimize case overload. Quick processing time avoided penalizing landlords economically due to time delay, as the individual rent adjustment petition was doing. And as we noted, time delays represented money lost to landlords, who were absorbing costs until the date of approval by the Board of their petition. Even the GA forced landlords to absorb costs for the year.

In fact, the Board continued the policy of a Short Form until 1979. During the use of the Capital Improvement Short Form, the rate of return was raised to keep pace with capital costs. The rate rose from 10% to 12% two years later, and by 1976 to a 15% annual rate of return on the unamortized cost of capital improvements exceeding \$ 2,500.

Policy Considerations in the Middle Years, 1975 to 1978

During the middle years of rent control administration, the Director-Counsel began to be concerned that the data upon which the GA was being calculated was not closely enough related to the actual costs of Brookline landlords. He also sought a more representative sample of cost data. Nonetheless, in the interest of organization efficiency, the Director-Counsel sought to maintain use of a GA. Hence, staff cost data collection responsibilities were redirected to gathering actual Brookline cost information. This information would therefore reflect the exact nature of Brookline's housing stock, which consists of larger, brick buildings, medium sized brick buildings, and four to six unit wooden structures. Also, the heating systems of these structures varied by age and by type, some using the more costly oil, and others using gas heat.

In order to increase the precision of the GA, new classes of units were designed, to take into account size differences in structures, the type of heat provided, the extent of landlord provided services, and the levels of municipal charges.

The Director was attempting with these refinements in how the GA was to be applied to different kinds of units to move it in the direction of the individual rent adjustment petition, insofar as the individual petition was decided on the basis of individual circumstances. Once again, however, the consideration over how many GA classifications to create was bounded by the interest of organization efficiency. After all, the whole purpose of relying upon the GA from the administration's point of view was for achieving greater processing speed. Should the agency adopt too many GA classifications, computing the GA would cease to be a simple, or timely process.

In 1975 the annual GA rate was 11.4%. It included fuel adjustment provisions and pass through of real estate taxes to tenants. In 1975 the general adjustment was retroactive in effect and included 1974, the annual average rate therefore for 1974 and 1975 being 5.7%. For 1976 the GA was 5.7% and again included a fuel adjustment and pass through of taxes to tenants. In 1977 the GA was 5.0%, and in 1978 4.1%. Both years included an adjustment for fuel cost increases, and a tax pass through. The Board's decision to allow pass through of these costs is one of the major features of moderate rent control. However, the GA as an average figure allowed an estimated average pass through, and therefore may have benefited efficient operators and penalized inefficient ones. (See Table 3)

Perhaps the GA policy contributed to a small decline in staff caseload from 1974 to 1975. The number of total cases handled

by staff fell from 914 to 829, although staff size remained at eleven. In 1976, caseload seemed to reflect a plateau, settling at 846 on a staff of the same size full time, but with two part time staff lost. In 1977 caseload again declined from 1974 levels, this time to 786. But in 1978 it began another climb to 860 and the staff remained the same size as in 1976. For the years 1972 to 1978 the caseload had grown 29.1%, or approximately at a 5% annual rate. Yet the actual annual rates were erratic, and caused administrative problems. There was no way of preparing in advance for what was already an increasing case backlog, for staff could not be increased. (See Table 4) An increased budget appropriation was needed for that.

In 1977-78 cases were distributed by type such that the most numerous categories were evictions for nonpayment, evictions except for nonpayment, and landlord capital improvement petitions. In the eviction category, 254 cases were for nonpayment and 182 for other reasons. In the Landlord capital improvement category cases numbered 101, and for regular landlord rent adjustment petitions 50, for a total landlord petition category total of 151. Tenant rent adjustment petitions totalled 153. Tenants were very active that year in questioning the legitimacy of rent levels. It is to the credit of the administrative process that it encouraged more tenant petitions in that year than landlord petitions. Tenants must clearly have perceived the system of review open enough such that the effort of filing an individual petition would be both possible and fruitful.

During these years the Board functioned against a backdrop of general political support among Town Meeting members and their constituencies for rent control. When state enabling legislation was due to expire in 1975, the Town Meeting voted almost unanimously to adopt Article XXXVIII of the Town Bylaws to become effective December, 1975. Article XXXVIII was Brookline's rent control bylaw.

The Town Meeting made a second significant decision in 1978 when at a Special Town Meeting a moratorium on issuance by the Rent Control Board of certificates of eviction for condominium conversion was voted. The moratorium became effective September, 1978 and was to last for twelve months. The concern of the Special Town Meeting is illustrated by the 1978 caseload figures we just reviewed, which showed totals of 430 eviction cases. We may assume that at least 180 of these were for condominium conversion purposes, and possibly more than the 180 obvious cases. The Board and the agency were therefore set upon a powderkeg. The Town Meeting had taken a radical position on condominium conversion, one not dared elsewhere in Massachusetts. The moratorium put the Board in the position of regulating property use, and not merely rent rates. The moratorium continued into 1979.

Landlords at this juncture in the history of Brookline's rent control were faced in 1978 with several choices under rent control. They could accept the GA, which was less than half of the inflation rate and the cost of borrowing capital. They could opt for an individual rent adjustment petition, although the tradeoff was between trying for a rate higher than the GA but risking a long delay

and ultimately receiving less than the automatic GA. They could undertake capital improvements and file for a rent adjustment with the Short Form, by 1978 being eligible for a 15% rate of return.

As we have said, the GA represented an average cost adjustment attuned more to the housing market than to individual situations. We remarked that it might as an average confer a bonus on efficient operators. Certainly the GA guaranteed a timely adjustment, and to landlords time represents money saved or lost. A look at how one major professional management corporation behaved and how one long time, individual major real estate owner in Brookline behaved sheds some light on the most economically attractive routes.

The professional real estate management corporation is Niles Company, Inc. which manages the 720 unit Westbrook Village, two thirds of which sits in Brookline, and one third in Boston and all of which as of 1970 came under rent control. The units in Brookline and Boston are identical one, two and three bedroom apartments. We can assume that Niles can afford to hire professionals to assist in any of its individual rent adjustment petitions, thereby arguing for their ability to prepare a convincing petition. On the other hand, as they are a large corporation, we would assume that Westbrook Village enjoyed certain economies of scale, such as in heating, maintenance and repair costs making the GA an attractive option with major benefits.

In fact, Niles chose to accept the GA in 1975, 1976 and 1978. It had also accepted the GA in 1971, 1972 and 1973. Petitions for individual rent adjustment were filed in 1976, when Niles received

both a GA and an individual adjustment. The Board as a rule does not allow two adjustments in one year, or both a GA and an individual adjustment: however, it did make this exception. Niles also filed a successful petition in 1977, rather than taking the GA.

Niles' behavior bears out the suspicion that the GA does in fact offer major economic advantages to efficient landlords. In Niles' case we may very well suspect that the average cost adjustment represented by the GA did compensate them at levels both adequate to meet operating costs and to provide a desirable rate of return. That Niles opted for the GA also suggests, because the nominal GA rate was so low relative to inflation, that the GA saved enough on filing time to make the effective rate higher. Niles accepted the 1978 GA of 4.1% at a time of double digit inflation!

In 1976, when Niles received the GA and filed an individual petition, rents on lower priced units increased 13.5%, from \$222 to \$ 252, other units reflecting the same rate of increase. Yet in 1977, another petition year, rents only increased on those same units to \$ 265, a rate of 5%, identical to the 1977 GA rate. After 1977, Niles continued to take the GA. Perhaps we can infer two things from their experience with the two available forms of rent adjustment. First, that gaining an economic advantage with an individual petition was difficult, even for so expert a user of the system who had extensive professional expertise at its disposal. And second, time delays further jeopardized the pos-

sibility of gaining from an individual petition, whereas the GA was a predictable, timely alternative. From 1970 to 1981, Niles has only filed three individual petitions and taken the rest as GA's. Over a ten year period, this means roughly that they earned a 9% per year average increase in rents from the Brookline Rent Control Board. See Tables 15, 16 , 17 for ten year rent data for Niles.

Our second example is that of Mr. George Buehler, for several years a landlord interest representative on the Board. He began his Board membership in 1972. Mr. Buehler owns, according to his estimates, over 100,000 square feet of residential rental property in Brookline which he fully intends to maintain as rentals: that is his principal business to which he is committed over the long term.

Because he was an early Board member, and joined in the same year as the agency's second Director-Counsel, he participated in drawing up new rules, and became familiar with all Board policies. He learned then, he said, that "It's difficult to separate politics from rent control." From Board meetings, he could observe how political interests viewed petitions and that there would rarely be an easy consensus on a rent control decision. From both sides of the table, he would describe the hearing process as a difficult one, for landlords were required to make public all of their records: although a diligent user of the individual petition, he said that "the hearing experience is a horrible one."

Mr Buehler had spent six years prior to 1972 learning the ropes of FHA, another regulatory structure which required petitions for

rent adjustments, and submission to a regulatory agency on rent setting decisions which in the private market are landlord decisions. He credits his six year experience with FHA for providing the regulatory experience needed to successfully navigate Brookline's rent control process. He also said that the experiences with FHA conditioned his expectations of what would be possible when dealing with a regulatory agency.

Each year Mr. Buehler, "gritted his teeth and always went for the individual adjustment" as he describes his efforts. He also took great advantage of the Short Form Capital Improvements process. He viewed the Short Form as a tremendous incentive to file. Because he was so accustomed to the steps one had to go through from his FHA experiences and presumably from his time on the Board as well, he geared up for providing all of the necessary cost material. Mr. Buehler commented that for him filing an individual petition was fairly straightforward. He was critical of the low capitalization rates relied upon by the middle years Boards to determine a "fair return" and compared himself wryly now to "a mortgage in a thrift institution, holding a 5% note."

Mr. Buehler noted that for financial reasons the individual petition was to his advantage, rather than the GA, and that the Short Form helped him remain in an economically sound position during the middle years. However, he expressed dismay over the Board's application of its FNOI concept, which he implied was so vague as to leave the question of determining a "fair rent" open to political forces and to unpredictability. He said that

from his point of view as a former Board member and as a landlord, the flexibility made good administrative sense, but that in his view what existed in Brookline was not the difference between the Napoleonic Code and flexibility, but between flexibility and virtually no consistent guidelines at all.

From his experiences we could conclude, therefore, that he relied upon his own extensive regulatory experience to overcome both the potential time loss and the unpredictability of the individual rent adjustment process. Unlike Niles, who seemed to value the time saved in a GA on an adjustment and on going through the hearing process, the individual petition for Mr. Buehler represented the straightest route to higher rents. His experiences may suggest that personal relations with the Board were also a major condition on which his decision hinged. This familiarity reduced the risk by some degree. One can also assume that over ten years Mr. Buehler also gained in experience on how to most expeditiously use the regulatory system to his advantage. He would not characterize his present position as an economically easy one, but credits his own aggressive use of individual petitions with putting him in the best possible position under rent control.

From 1975 to 1978 still over half of all landlords took the GA. Processing time of individual petitions approached a minimum of six months. Among all of Brookline's major landlords we have seen how two chose to navigate the system. The two experiences suggest that only the most experienced regulatory user could get

satisfactory results from the individual petition process. We emphasize the value of experience, both with the individuals on the Board and with the nature of regulatory agencies themselves, rather than the ability to hire professional help.

Policy Considerations 1979 to the Present

The Board continued its policy of voting an annual GA by approving a 1979 GA of 3.6% for oil heated buildings only. The following year, 1980, the Board approved a GA of 6.5% for oil heated buildings, and of 4.4% for gas heated buildings and included a tax pass through provision. For 1981 the Board adopted a GA of 7.2% for oil heated buildings and 3.5% for gas, with no tax provision. These GA's are all less than the double digit inflation rates which have persisted since 1979. For gas heated buildings, the rates are also historically low for the Board.

As of 1981 the Director-Counsel believes that the GA has been further refined to match actual housing costs for particular kinds of units. He believes that it has come a great distance from 1972 when it was calculated on industry provided data to the present when staff conduct extensive research. The GA has been continually refined to address particular kinds of units, distinguished by the kinds of heat, size of the building, and the extent of landlord provided services, as well as by the date of a unit's most recent individual rent adjustment, except for capital improvement related adjustments. Up to five classes of

units have been designated for general adjustments, and three classes for fuel general adjustments. Designation of further classes is limited by a desire to retain the quick, efficient nature of a GA. The ten year trend of the GA concept has been to provide refined market data on which to calculate adjustments. This goal contrasts with that of the individual petition, which is decided on a case by case basis. Yet the GA as it is refined, becomes a more precise tool even though units receive adjustments en masse.

The Board took on several new policy responsibilities beginning in 1979. Two of these followed on the 1978 vote of a Special Town Meeting to declare a moratorium on condominium conversion. The Town Meeting designated the Rent Control Board to handle individual petition processes related to condominium conversion, which began in 1979. The Board required a petition for a certificate of eviction by developers of condominiums from formerly rental units under rent control. Developers and owners of condominiums were also required to file for removal permits, to obtain permission to remove the unit from the rental housing stock. Eviction protection was given to tenants living in cooperatives not under rent control under a new town bylaw and hearing responsibility fell to the Rent Control Board. These new duties were assigned to the Board by Town Meeting: the Board had no choice. The assignment was seen as a natural one by Town Meeting members because the Board had an entire regulatory framework in place. Yet the duties were not conventional rent control duties which refer to rental units.

Most importantly, 1979 was a turning point for the rent control system because even though duties and caseload continued to reach new highs, the Town Meeting voted to reduce administrative staff for fiscal year 1979. A staff cutback at a time of growing administrative responsibility augured backlog and administrative overload.

This overload did not dissuade the Board, however, from voting in 1979 to stop the Short Form Capital Improvement petition. The Board had become increasingly sensitive by 1979 to claims from tenants that the Short Form was causing "economic eviction" due to Board approved rent increases for capital improvements. Some tenant interests claimed that the Short Form was being used by landlords merely to make money. Others claimed that landlords were upgrading their properties at the expense of tenants, and contrary to the spirit of rent control. Yet others charged that the capital improvements being done were nonessential to the tenant's housing services, and were merely a ruse for obtaining an unwarranted rent increase.

In 1979 the Board abandoned the Short Form in favor of a Long Form. The Long Form resembled the regular individual rent adjustment petition process. On the Long Form, the landlord was required to go through more steps of administrative review, and at the end he was not guaranteed as high a rate of return, as on the Short Form. Tenants acquired more opportunities to challenge the Long Form capital improvement

rent adjustment petition. The Long Form admitted more political forces into the decision, as well. The Board took this step despite the loss in administrative efficiency. The Board was responding to political pressures and its perception of the mandate of moderate rent control.

In 1980, however, the Board did vote for an administratively streamlined procedure to encourage landlord investment in energy saving capital improvements. The Board adopted a Short Form Energy Improvement petition, on the example of the Short Form Capital Improvement petition. The Short Form for converting from oil to gas, or for insulating, or for installing storm windows was seen as an incentive to landlords to weatherize their buildings. These improvements would keep the cost of providing heat down, and would therefore keep landlord operating costs or tenant fuel bills down. Hence, the Board reasoned, rent levels could be contained more effectively. The connection between the Energy Improvement Short Form and an economic benefit to tenants was clearly drawn. The Energy Improvement Short Form offered a 15% rate of return.

The response of landlords, such as Mr. Buehler, has been to take advantage of the Short Form. Although for some of them the cost of borrowing capital for these improvements exceeds 15%, they nonetheless find economic advantages to doing the improvements and filing. It is not clear whether these improvements are only being taken for their contribution to cash flow **under rent control**. Such improvements enhance the **fair market value of the buildings under anticipated decontrol**.

The overall response of landlords since 1979 has been to continue to file in increasing numbers for individual rent adjustments, eviction permits, removal permits, regular evictions, and conversion permits, among others. In 1979 a full time staff of ten took on the entire caseload which included many time consuming steps. Data has to be gathered, an audit on cost substantiation material conducted, hearings held, memoranda prepared, and a full record of the case studied and voted upon by the Board.

In 1980 the staff acquired one clerk and typist to help process the multitudes of correspondance and documentation associated with individual petitions. But effective July 1, 1981 staff will be reduced by three. For fiscal year 1982, due to cutbacks stimulated by Proposition 2½, full time staff will be cut back to eight. The size of the voluntary Board will continue at seven, consisting of two tenant interest representatives, two landlord interest representatives, and three "public interest" representatives.

A look at the size of the caseload will suggest how serious the burden has become, and how much more serious a problem it will create for a smaller administrative staff, with only two safety valves, the GA and the energy related Short Form.

In 1979 caseload exceeded 1978 levels and reached an all time high of 1,083. In 1980 for the calendar year, caseload totalled 916. For January 1981, the most recent caseload data available, the number of petitions filed was 137 for one month. This one month figure for 1981 is higher than one month figures for 1980 and earlier. If January figures are annualized for an albeit

generous estimate, 1981 caseload might look like 1,348. (See Tables 5 and 6)

The trend has continued to be one of increase. The most numerous application categories are landlord filed. These categories are: landlord petitions for rent adjustment and for capital improvement; landlord petitions for eviction for nonpayment and for reasons other than nonpayment; and in 1981, for the month of January, landlord petitions for removal permits and conversion permits.

Landlord annual rent adjustment petitions almost tripled from 1977 to 1980, growing from 50 to 148. Landlord capital improvement petitions dropped off markedly from 1977-78 when the Short Form was available and produced a caseload of 101 to 1979 Long Form levels of 54, and 1980 Long Form levels of 28. The rapid decline, which may include large numbers still in the pipeline from the end of 1978, suggests how much of a disincentive to file the longer form modelled on a system of full administrative review is. A lengthy, and uncertain process threatens negative economic impacts.

Landlord initiated eviction petitions have exceeded 200 for each year in the category of nonpayment. For three years, the petitions in the other than nonpayment category averaged 200.

Removal permit applications in 1980 were 89, although January 1981 showed 35 filed. Condominium conversion permits, new for 1981 were 20 for one month, suggesting that for the year they may easily exceed 100.

Because of the increases in kinds of petitions handled by

staff and by the Board, the amount of time required to process what are in absolute terms more petitions has increased greatly. All of the administrative steps required by a typical individual petition are necessary steps, there are no short cuts at present. Furthermore, handling individual petitions comes on top of other staff responsibilities, such as collecting data for the GA computations, attending Town Meetings, and attending many nightly Board meetings.

Table 15 outlines the typical steps in an individual rent adjustment petition. It may take ten days between filing time and the time a landlord has provided all of his cost substantiation data. Another week may be required to complete a staff audit of all of the cost material submitted by the landlord. The following week a staff member will conduct a personal inspection of the building, and any units in which tenants have requested inspection. A "Prehearing Memorandum" is prepared after the inspection. An "Audit Report" is prepared. And an "Inspection Report" is prepared. An "Analysis of Returns" compares a NOI using several criteria for determining NOI used by the Board. In the following two weeks a hearing is held, presided over by the same staff member and at least one Board member. It is informal and is taped. The tape is later transcribed into memorandum form and attached to the "Prehearing Memorandum." After the hearing a "Post Hearing Memorandum" is created, composed of the "Prehearing Memorandum" and testimony. It also contains recommendations to the Board by its member. A date is set for hearing the case at the next available slot in a Board Meeting program. The entire process takes at least

three months with no backlog. As of 1981, the process takes at least six months, and oftentimes longer.

The time factor alone may explain the willingness of most Brookline landlords to accept the GA, rather than risk an unfamiliar and detailed petition process in which all of their records become public information, and during which the value of their petitioned rent adjustment declines. Especially among small property owners, a six month delay in receiving an adjustment, after the year's costs have been absorbed, can spell disaster for profit margins are often small. It may well be that only well organized, experienced, large scale property owners can afford, literally to wait six months for a decision.

A cautious inference from tenant rent adjustment petition data shows a dramatic drop in the number of tenant initiated rent adjustment petitions that could perhaps be explained by relative tenant satisfaction with their "moderated" rents. Most rents in Brookline reflect the GA rate. In 1977-78 over 150 tenant initiated petitions were filed. In 1979 only 95 were filed. In 1980 a mere 68 were filed. Yet as we have just documented, growing landlord dissatisfaction with levels of return available under the GA and rent control itself have produced increases in the numbers of individual landlord petitions filed. Data for 1981 shows particularly high filing levels.

Our discussion so far has concerned itself with the affects of increases in filing responsibilities on the administrative staff. We have witnessed enormous case buildup, a developing

backlog, and increased pressure on the individual, case by case review of petitions system of review. The efficiency of the staff in preparing these cases for Board consideration has decreased. The measure of this decrease is the minimum six month processing time which a landlord must tolerate before being able to charge an increased legal maximum rent. Our example of a most efficient operator, Niles Management Company, Inc. indicates that the GA is the preferred route, especially as individual rent adjustment processing time has increased. An initial conclusion to be drawn here is that the slowdown caused by an administrative system of case by case review, instituted in the spirit of equity, has become too slow to accomplish its stated goal. The system has instead shifted the major burden of achieving equity between landlord and tenant to an administrative device called the GA, which conceptually is not designed for case by case review.

The case buildup also has consequences for the Board's ability to handle caseload. Although administrative staff prepare the case, it is the Board which must read the case record and vote on individual petitions. As the absolute caseload increases for the Board as well, we might suspect that the issue of equity between landlord and tenant also arises. If under an overloaded administrative system the burden has been born predominantly, perhaps until quite recently, by a case by case review mechanism, is something of equivalent effect occurring at the level of the Board?

The Brookline Rent Control Board and the Due Process Model

The seven member Rent Control Board has continued to hear an extraordinary number of cases annually, despite the fact that the Board is entirely voluntary and uses many weekday evenings of its members. The ratio of petitions filed to those heard is approximately two to one, for the past four years, (See Table 7). Yet even if a petition does not make it to a Board meeting for a vote, at least one Board member has taken initial responsibility for that case. The Board has for the past several years heard over 500 cases annually.

The Board plays a key role in not only filtering but also contributing to the quality of information going into an individual petition decision. The Board, and individually members assigned to a case, bring to bear their experiences from having handled other similar cases. Their large prior experience enables members to ask better questions about the accuracy of information, or about the adequacy of information filed by a particular landlord. Furthermore, they know many of the landlords both by reputation and through at least ten years of dealings with the rent control agency. This experience contributes to expertise.

The expertise is particularly valuable to tenants, who may receive additional protection against rent increases by virtue of it. Tenants are frequently unfamiliar with the hearing process, and welcome advocates where they hesitate to assert themselves.

A Board member may reiterate what the rules have already required to have been done, for example, notification of the tenant of the proposed rent adjustment amount. But the tenant may not have fully understood the meaning of the notice. At a hearing, an experienced Board member would know to verify that the tenant has in fact understood the meaning of the notices sent to his or her apartment.

A Board member may also explain in person to the tenant his rights to challenge the proposed increase, and the administrative means for so doing. These gestures often produce better information.

The quality of information used by a Board to make individual decisions, as well as the quality of information it uses to set rent control policy determines the Board's ability to make equitable decisions. We discussed the role of information in a due process system in Chapter Two and underscored that it was a central one.

The quality of information is primarily reflected in the case record itself. Even as individual cases multiply, the amount of information required by the agency's rules has not diminished. If anything, the due process opportunities afforded by the system mean that the amounts of information going into a case can grow almost without limit, until the Director-Counsel at his discretion imposes one.

Since Sherman, in 1975 and later confirmed by Niles and Zussman in 1977 the role of the record has been enhanced as the basis upon which Board decisions achieve legitimacy. With Sherman the courts said that the decision of the Board would stand

as long as the Board's decision was based upon its record and made according to its official regulations. A new trial and a new record before the courts would not be provided to landlords (or tenants), the court said. The court would only verify that the Board decision had been made on the record.

Each case before the Board must therefore be carefully read, and the basis for reaching a decision carefully designed according to administrative regulations in force. Otherwise, the Board decisions are open to legal challenge. As the legitimacy of the rent control laws in Brookline, and the agency itself, are on the line every time a rent adjustment case goes to litigation, so the Board must work diligently to make sound decisions.

As a rule the Board has continued to make sound, legitimate decisions. Litigation over rent adjustment decisions and over other forms of individual petitions have declined each year since 1977. The reduction in litigation is a testimony to both changes in the legal doctrine of administrative review and to the soundness of the "knowledge" upon which the Board has been making its decisions. The Board can in this sense be praised for the "fairness" of its administrative and policy process. The Board has adhered closely to Brookline's rent control law's standard of equity. The standard, as we have explained, is both substantive and procedural and exceeds minimum due process legal requirements.

Nonetheless, shortcomings in the system which may be inherent features of the system, are apparent. The Board may struggle more with these features as caseload increases. Most of these features

have to do with what we shall call gaps in information, or imperfections in information on the record. The three major kinds of imperfections we shall discuss are: the gap between "perfect knowledge" and available knowledge; the gap or shortfall in the process between the amount of due process protection available and that exercised, especially by tenants; and lastly, the gap between the stated standard of equity as embodied by the FNOI concept and that actually delivered due to time delay.

These three characteristic "gaps" in the Brookline rent control system which is so heavily modelled on a due process notion of administrative review ultimately impair the ability of the Board to maintain its role as a balancing arm between landlord and tenant interests. We are suggesting that these so called "gaps" are inherent in a due process type system of administrative review. Although these three characteristic tendencies of the system are now only symptoms of distress in an agency otherwise still able to cope with its regulatory tasks, they are increasing in intensity. As the gaps widen, the ability of the Board to deliver a "fair" rent will decline. So too will the Board's ability to set equitable rents. The size of caseload coupled with staff cutbacks is the principal factor aggravating these symptoms of distress.

Shortcomings of the Due Process Model Proper

The first shortcoming we observe in a procedurally full system is the gap between "perfect knowledge" upon which the Board bases an

equitable individual petition decision, and available knowledge. Of course, the claim of this thesis is that the Due Process Model Proper produces better information than its streamlined counterpart. But not surprisingly gaps exist. They exist inherently.

Many of the gaps occur because of the requirement that the Board make its decisions based on an objective record. Incomplete information can result if knowledge does not make it into the formal record. An example of this might be testimony made by a tenant to a member of the Board outside of a hearing, when a record is not kept. Or another example might be testimony given in a hearing, but later outside of the hearing contradicted by that same individual who does not understand that this confidence with a Board member will not alter the basis upon which the Board must decide. The problem typically arises because tenants are afraid to antagonize their landlords in a hearing for fear of reprisal. The landlord power to evict is credited by some as having a powerful impact upon tenant willingness to be too critical.⁵

The second characteristic shortcoming of the system derives from the willingness of landlords or tenants to actually use the due process features available in the system. The due process system of review can only work if activated by a party to an individual petition. The gap between due process protection available and that exercised may have several probable sources.

Let us create an example to illustrate the possibilities. Suppose a new landlord of a three unit structure alerts the Board of his plans to convert the basement of the building into a living

room for his own comfort. The building has formerly been absentee owned and therefore under rent control. The new owner has stated his intention of moving into the building, which would qualify it for exemption from rent control. The new owner seeks exemption approval from the Board. According to standard administrative procedure, notification of a petition seeking exemption is sent to the building's two existing tenants in the other two units. These tenants, as with many enjoying protection from rent control, are concerned that a long term benefit that they value may be at risk.

Suppose further in this case that one of the tenants has heard from neighbors that this landlord lives elsewhere, and that he has a history of converting properties into condominiums, which is his actual business. The tenant in our hypothetical case is elderly, and the new landlord a gentleman in his forties

In order for the elderly tenant to convey information about the new owner to administrative staff, and thence into the case record, the tenant must usually request a hearing. The request must be a formal one, in writing. The request for a hearing will be automatically granted, but the hearing date must be set according to the order in which the landlord exemption petition is being handled. As the administrative rule s.4 states, "Petitions and applications shall be numbered, docketed and processed in the order that they are received."⁶ Given a six month case backlog as of 1981, the hearing date will be at least six months in the future. On occasion, at its discretion, the Board will designate a hearing and a hearing date ahead of other petitions.

At the hearing several months later, the tenant must state his or her claim. If the claim is that the landlord has no intention of moving into the building - which may have already occurred because of the time lapse between the petition's filing date and the hearing date - the tenant must have the conviction that making this claim will not damage the landlord-tenant relationship. The tenant knows that if successful, the landlord will not be restrained by rent control in setting the rent, and that he will raise the rent. The tenant may suspect that the increase will be even greater because of his comments made in the hearing about the landlord's intentions.

The tenant may decide to proceed anyways. However, the claim must be substantiated. The tenant must have concrete proof that the landlord does not intend to make the unit his permanent home. It is particularly difficult to prove that the unit is not the landlord's principal residence if the landlord is currently living in the building. The burden of proof upon an inexperienced tenant is a heavy one.

Should the tenant overcome the risk of making a claim, he or she must nonetheless assume a further burden of substantiation. The tenant may prefer to state his or her belief to a Board member, without proof. Or, to state this belief outside of the hearing, in the expectation that this statement is adequate evidence against the exemption petition to insure its denial.

It of course is not adequate. The record will so far not contain any information to suggest to the Board that it should deny the exemption request. The Board must therefore grant the exemption.

Its only choice, should members have doubts about the case, is to call a new hearing on the case. Yet the issue of substantiation, a burden born by the inexperienced tenant, remains.

The lesson to be drawn from the example is that even if tenant safeguards exist in the formal administrative system of review, they are only as effective as they are used. Otherwise, the Board is helpless to step in to "construct" a record. Many factors outside of the Due Process Model affect the likelihood of tenants to use the due process mechanisms to produce an improved record. Should a tenant overcome ignorance or fear of the system, the tenant must nonetheless gather proof of his claim. An elderly retired, and perhaps nonprofessional tenant has a difficult and unfamiliar task. For either landlords or tenants not accustomed to the formalities of a system which works with documented evidence, a formal record, and formal rules⁷ applied by a Board, the process of participating is an unwieldy one. Most individuals are accustomed in their daily routine to informal relationships with authority, whereby a request is made person to person, at the moment desired, and a decision follows. That process is not objectified by a record, nor is it formal. The Board's process is a formal one and cannot include informal behavior instead of its formal rules, especially in regard to the record.

The third characteristic feature of the system is the tendency as petition processing time increases for a gap to develop between the stated standard of equity, and that actually delivered. Delayed processing impairs the value of

information on the record, puts landlords at an economic disadvantage, and dilutes the financial value of the decision reached by the Board after so many months.

In Brookline, the typical rent adjustment petition process as we described in detail earlier and in Table 15 takes at least six months. Processing time after audits have been conducted, hearings held, memoranda prepared, and a Board meeting date arranged is often longer than six months. One factor which continues to contribute to lengthening the processing time is the size of caseload. A second major factor is the growing case backlog. A third major factor is reduced staff capacity in the form of post-Proposition 2½ cuts, of earlier staff reductions, and of lowered staff expertise due to a relatively high turnover rate among hearing officers. An overarching factor which contributes to staff burden is Town Meeting's assignment of new policy and administrative duties to the staff and the Board. These factors combine and compound the problem of lengthening processing time.

In addition, a feature of the Board's GA and individual adjustment policy compounds the problem for landlords of time lag. Rent adjustments become effective for prospective rents only, not retroactively. When a landlord rent adjustment petition is filed on January 1, 1981 it will become effective only upon its approval. If approval comes in six to nine months, then at least 75% of the rent increase will only take effect in 1982. Yet the rent adjustment petition has been filed because 1980 income is not adequate for 1980 costs, and the petition asks the Board to grant an increase to meet 1980 costs. Hence, by 1982

the value of the rent adjustment has declined, as 1982 costs are predictably higher than 1980 costs. The information going into the decision has become antiquated, although it was initially outdated for prospective operating costs and necessary rent levels.

Let us take an example. Suppose in 1981, Niles Management Corporation files an individual rent adjustment petition with the Board. The petition is filed and docketed on January 2, 1981. At the Director's discretion, this case is placed ahead of others on the docket. A hearing date is set for March 2, 1981. At the hearing, Niles' cost substantiation data for 1980 are examined. Fuel costs we shall assume to have been \$ 500,000 for 1980. At the hearing, a tenant representative for Niles tenants points out that electricity for air conditioners has been made into an extra charge for some tenants. Niles is claiming utility charges of \$ 300,000 for 1980, and a necessary increase of 30% to cover such items as air conditioners. It claimed a need for a 35% increase in its fuel allowance. Both increases, Niles claims, are due to increased fuel costs to them, and are not due to increases in services provided.

The Board decides to continue the hearing to another date, which is set for March 16. On March 16 the Director-Counsel gives Niles (See Table 17) his opinion on the issue of air conditioners. A transcript of the hearing is prepared following the March 16 hearing, and remaining administrative steps are completed. The Board schedules the Niles petition for May 26. On May 26, the Board votes to allow Niles a 10% increase in

maximum legal rents. From petition filing date to a decision the process has taken six months, three months less than if the case had not been moved ahead on the calendar by Director discretion. During the first six months of 1981 assume a 15% inflation rate.

Niles can now increase rents 10% for the second half of 1981, and for 1982. If we make some rough estimates about the cost of delay and the impact of inflation on Niles' ability to earn a FNOI, it will be clear that the Board's stated standard of equity and the negative financial effect of a slow processing system are working out a new effective standard, to Niles' disadvantage.

The value of a 10% rent adjustment for twelve months of 1981 with 15% inflation is a 5% loss in terms of 1981 operating costs, at least. In fact, the 10% adjustment has been based on 1980 costs, and is geared for a FNOI on a 1980 balance sheet. Niles must wait until 1982 to obtain an adjustment based on 1981 actual expenses. But the increase is not effective for twelve months. Because of the six month processing period, Niles can only raise rents as of June 1. Therefore, we can hypothesize that the loss due to inflation is closer to 10%, at least. The loss due to the six month delay is in addition to the 10%.

As fuel charges have risen, the amount of a typical rent dollar attributable to these charges has reached approximately 45%, according to research done by the rent control agency administrative staff.⁸ A six month processing lag increases the likelihood of this percentage climbing above 50%. In addition, due to the Director-Counsel's opinion to Niles on providing for electricity

used by tenant air conditioners as a required landlord service, Niles' electricity charges could not be covered by an increase in the maximum legal rent if more tenants chose to install air conditioners. Fuel charges have pushed electricity charges up at a rate almost equal to their own, leaving Niles exposed to a potentially growing expense and little economic succor. (Table 14)

The Board's decision six months later to grant Niles a 10% rent adjustment falls below staff research's conclusion that at least a 10.97% increase is necessary to keep up with rising fuel costs.⁹ It falls short of keeping pace with inflation by 5% as of the filing date, and 10% as of the increase date. Niles has had to absorb these losses and can only hope to recoup them at their next individual petition. Yet backlog and delay will only have increased by 1982, making their chances of "catching up" highly unlikely. In fact, it is the decreasing ability to "catch up" due to time delay and continued inflation that makes the gap between a FNOI as determined in, for example 1974, and a FNOI determined in 1981 a growing one.

From Niles' point of view, the Board's behavior in 1981 shows a less equitable attitude towards Niles' needs than in the past. It is not the case that the Board is balancing tenant interests against those of the landlord, and striking a balance based on stated policy goals. Instead, the inability of the Board to grant a timely increase has put the landlord at a significant economic disadvantage relative to housing market behavior. The Board does not show a future capacity to correct this tilt in

the regulatory balance.

CONCLUSION

Over the past ten years, individual petitions have grown in variety and in the extent of their use creating an enormous caseload for the Brookline Rent Control Department's administrative staff and for the Board. As caseload grew through 1979, staff began to suffer cuts. Further cutbacks occurred in 1980, 1981 and 1982. A backlog of six months has been developing during these years, which guarantees a minimum petition processing time of six to nine months. We describe the agency as overloaded.

Two safety valves were used during the case buildup to relieve the staff of some forms of individual petitions. The GA had been put in place immediately in 1971 as an administrative tool for improving efficiency and procedural equity, and has been used continuously in that capacity, undergoing refinements to improve its accuracy for particular kinds of cases. A Short Form which did not require a lengthy petition allowed landlords to realize rent increases if they made capital improvements in excess of \$ 2,500. One version of the Short Form was eliminated in 1979 over ambivalence toward the effect of these increases on tenants; and another version for energy saving capital improvements took its place. Nonetheless, individual petitions continue to mount in number. Time lag and inflation have cut the benefits provided by many of the Board's individual petition routes, as well as by the GA.

Due process features in Brookline's system make the administrative task a time consuming one. Time spent on delivering full due process protections to landlords and tenants especially has eaten into organizational efficiency. Time spent by landlords awaiting Board rent adjustment decisions has eaten into the dollar value of their petitions and into the credibility of the rent control organization itself. A balancing of landlord and tenant economic interests by a due process model has inevitably broken down.

The due process system of administrative review tends to slow down naturally. Hearings, information verification, extensive documentation of petitions, and careful Board review of the formal record are inherently time consuming procedures. There is no way around any of these steps if full due process protections are to be delivered. The Board's efforts in the past to combat the tendency of its system to slow down was to design alternative routes in the system, such as the GA; or to add staff; or to enhance administrative capacity with recourse to computer services. But staff cut-backs, new policy duties for the Board and staff, and budget trimming occurred. Caseload increased. These efforts to reduce caseload are no longer adequate.

The major remedy that the Board had hoped for to reduce caseload duties was a shift from reliance on individual, case by case review to general annual adjustments. But fewer landlords are satisfied by the GA as of 1981, judging from the data which indicates increases in individually filed landlord petitions for rent adjustments, capital improvement adjustments, and conversion.

Furthermore, the intended efficiency in the GA due to use of a computer service will not be available to the Board for 1981 and 1982 due to staff shifts in the Town-wide computer service center. The shift in case burden the Board had hoped for is not occurring. The due process administrative model continues to drive the gears of an individualized, case by case review process. This is an inefficient situation. Unless individual processing of all documentation, individual inspections, regular hearings, extensive staff document preparation for the record, et al. are trimmed the system can only be expected to slow further, as caseload continues to grow.

Board actions to improve efficiency are necessary if Brookline's original moderate rent control policy is to be maintained. With the current delays in petition processing it is now impossible for the Board to deliver a FNOI to landlords who must wait a minimum of six months for a Board decision. The delay costs them both adequate revenues and losses due to uncompensated for past outlays. This was not the intent of moderate rent control policy. Its goals require passing along costs to the tenant as they occur; adjusting FNOI as needed due to inflationary pressures; and weighing landlord and tenant economic interests in a neutral, administrative setting, not in one which inherently handicaps the landlord due to organizational inefficiency.

Analysis of Brookline's rent control organization, a "best case," suggests that the due process model itself may require attention.

NOTES

1. Lett, Rent Control, p. 171.
2. ibid., p. 171.
3. ibid., p. 164.
4. Mr. Roger Lipson became the new Director-Counsel and continues in that position as of 1981.
5. Ms. Estelle Katz, Chairman, Brookline Rent Control Board.
6. Brookline Rent Control Regulations, s.4 .
7. Massachusetts Administrative Code, C. 30A.
8. Brookline Rent Control Department, "Costs of Rental Housing Operation 1978-1979," p.1.
9. ibid., p.1.

CHAPTER FOUR

POSSIBILITIES AND CONCLUSIONS

4

POSSIBILITIES AND CONCLUSIONS

"To be inefficient is to be ineffective."

Roger Lipson, Director-Counsel
Brookline Rent Control Department

Thus commented the director of Brookline's rent control organization in reference to the effect of overload, backlog, and what portends to be increased regulatory duties for his organization, itself the recent victim of Proposition 2½ forced staff reductions. Yet he is committed to the policy goals of moderate rent control, in particular that his agency preserve its legitimacy as a neutral ground in which to resolve landlord and tenant conflicts over what represents a "fair" rent. Inflation, spiralling interest rates, and high heating costs pose difficult choices for the Board in its deliberations over what represents legitimate cost pass throughs to tenants in setting an individually petitioned "fair" rent. These economic pressures nonetheless compound the organization's most pressing problem, which is dysfunction due to overload, backlog of cases, and resulting inefficiencies.

Among those factors contributing to workload, the detailed, case by case review dictated by the Due Process Model Proper is the only factor completely within organizational control. Working on the model of administrative review to reduce time consuming processing steps is the response most likely to succeed in im-

proving organizational efficiency. Streamlining the model is a major "possibility" although its effect will not be limited merely to improving organizational efficiency. Our conclusion is that such a change will also produce revisions in the levels at which the Board sets a "fair" rent, i.e. in regard to equity among the regulated.

Streamlining the Due Process Model Proper

To streamline the Due Process Model Proper requires a movement away from the standard of judicial review for administrative proceedings. It also requires that the level of detailed staff review of individual petitions change. Due process protections designed into the Brookline system above the legal minimum requirements are the first targets, and the choice of which features to eliminate rests with how to best save on staff time.

In the standard process of administrative review of rent adjustment petitions there are three steps which can be taken to relieve staff overload by cutting down on staff time devoted to individual petitions. The steps are eliminating individual audits of cost material, elimination of property inspections, and readjusting the FNOI level.

Step one, replacing individual audits of all landlord cost substantiation material with spot checks, or with rough comparison of landlord figures to agency determined maximums would save staff time at the beginning of a case. This step risks missing inaccurate or inflated cost data submitted by landlords, which if it is not caught by a relatively expert agency hearing examiner is unlikely

to be detected later in the case review process by a tenant. Step one also eliminates the rationale for tenant presence at cost audits, as staff review is not an individualized, case by case, item by item check.

The second step to save staff time is eliminating individual apartment inspections. Existing policy requires staff inspection of units for which rent adjustments have been requested, and special inspections of units upon tenant request. The intent of the inspection requirement was twofold. First, personal inspection would reveal if the landlord was in fact delivering the level of housing he was claiming expenses for. Second, personal inspection would uncover code violations, or inadequate landlord provided services, or simply inaccuracies on the record. In reviewing a rent adjustment petition the Board would therefore have information with which to gauge a tenant claim that the requested rent increase is undeserved. The staff inspections were also an instance of staff responsibility for improving the quality of information on the record and for fortifying tenant rights under available due process opportunities.

The third, and perhaps most economically significant policy step is adjustment of the FNOI mechanism for setting a "fair" rent as a time saving move. Adjustments might be made by reference to an index, such as the Consumer Price Index or an administratively compiled cost of living index. Such a reference would automatically incorporate the inflation rate into rent adjustments. Operating efficiencies available to some landlords, such as well insulated buildings, or economies of scale would confer a bonus, although not to tenants.

Automatic pass throughs triggered by Board set standards would protect currently exposed landlord economic interests, but offer little recourse to tenants. For example, capital costs might be used as a standard. If the prime moved to 20%, the Board might adopt a standard to allow a FNOI for landlords of 15%, or 18%, or even 20%. Step three would involve incorporating market research regularly into the FNOI calculation in a formulaic manner, rather than relying on the case history of FNOI for each case. The predictability of decisions would increase, as well as the uniformity of rents among landlords. Time could be saved immeasurably in this step which significantly cuts down on the role of hearings and Board meetings.

Tenant testimony would have less role in influencing Board determinations of a "fair" rent in this context, for mechanical cost pass through formulas would do most of the work. Adjustments would be made not based so much on landlord and tenant individual situations, but based on broad market behavior. Due process rights and protections for achieving greater equity in their housing would be lost to tenants. The balance set by the Board would tip in favor of the landlord.

Another form of streamlining the due process model of administrative review of individual rent adjustment petitions is adopting a short form rent petition, much as the Board has done for capital improvement related rent adjustments and for energy related capital improvement related rent adjustments. This fourth streamlining step increased staff efficiency in the two instances in which it was applied. A short form rent petition could offer time saving

steps for staff and landlords. A short form might eliminate the rule for twelve preceding months' cost data, and instead require prospective cost estimates for the coming year, which the Board would then review. The Board decision, even if delayed by several months, would still reflect current costs and would set a FNOI which kept up more closely with actual landlord expenses. This step represents a radical change away from placing the burden of proof squarely on landlords that they have borne such and such a cost and therefore deserve compensation in the form of higher controlled rents; and away from extensive staff preparation of the record, along with tenant and Board participation.

Adjusting the General Annual Adjustment Rate

Supplementary potential for siphoning off caseload due to individual petitions, and thus saving staff time, resides with the GA. The GA rate must be set high enough to satisfy most landlords to accomplish this goal. The average GA of 5% for the past five years has not been adequate to achieve this. The number of individual petitions filed by landlords to increase rents has increased. To reverse that trend and case overload as well the Board might consider setting the GA higher.

An upward adjustment in the annual GA to more closely approximate costs of borrowing capital, or of maintaining a building moves the GA mechanism away from individualized classes of adjustment, and back towards a general, market oriented adjustment. Efficient landlords could benefit over and above the general economic benefit afforded

them by a higher GA than historically granted. The GA is an efficient, timely, predictable adjustment, preferable to landlords of whom it requires no regulatory initiative, and no risk of delay. The tenant role in affecting whether his landlord receives a GA is nonexistent.

The attractiveness of the GA to the rent control organization is twofold. On the one hand, the GA can be used defensively to draw away individual petitions from overburdened staff. As important, the GA can on the other hand allow the organization to continue using its Due Process Model Proper, because individual petitions should decrease in number dramatically. With fewer individual petitions, and fewer incentives to go that route among landlords, the staff should be able to handle with the same degree of due process care what individual petitions are filed. Raising the GA and perhaps thereby offering efficient landlords some bonus, and maintaining the same exacting standards of administrative review to protect tenant interests, offers the best compromise now available to the threatened agency.

Redefining the Regulatory Field

On April 30, 1981 the Brookline Town Meeting voted to amend town bylaws to allow a condominium owner who has resided in his unit for at least two years to be exempt from rent control. The rationale was that condominium owner occupants closely resemble single family house owner occupants, who are exempt from rent control. In the heated debate rent control advocate Representative Bussinger argued that condominiums were not like single family houses, for they had recently belonged to Brookline's rental housing stock. As the purpose of rent

control was to preserve rental housing opportunities for people of low and moderate income, he viewed exemption of condominiums from rent control as a direct contradiction of Brookline's rent control mandate. He further argued that the rent control agency would find itself hard put to determine that a landlord who claimed he had been living in his condominium for two years and would now like to rent it was telling the truth. Businger predicted widespread abuse of the bylaw, in the form of individuals buying condominiums, living in them a short while, and then filing for exemption from rent control and renting the units out at market rates.

Director-Counsel Lipson of the Brookline agency disputed this claim. Responding to Businger's query, "Who is going to blow the whistle?" Mr. Lipson replied that, "When the slightest doubt is raised, the Board holds a hearing." He noted that this has always been Board policy, and shall continue. Tenant due process rights have not been curtailed. He did not foresee trouble with the new bylaw.

But the new exemption illustrates how definition of the regulatory field itself can be used to address organizational problems, such as case overload. Since Brookline's 1979 condominium conversion moratorium and new permit system, landlords have applied in increasing numbers for conversion permits. But the condominiums, if rented, were subject to rent control. Therefore, the speculative market in condominiums as rental property was dampened by rent control. But caseload data shows conversion permits are rising annually, and with them the likelihood of condominiums being used as rental income property. By removing the growing number of Brookline condominiums from the regulatory

umbrella, the Board has averted hearing numerous cases, and the staff will be relieved of numerous, time consuming administrative steps for rent adjustment petitions. The new bylaw also eliminates the possibility of future caseload growth due to condominium rentals as a class.

Using a bylaw such as the April 30 condominium exemption is a defensive use of rules defining the regulatory field. Future duties cannot arise, and perhaps this step will help the organization "catch up," at least from additional administrative tasks generated by Town Meeting. The agency and Board did not initiate the bylaw, but both will benefit from it in terms of organizational efficiency. Much like the option of redefining the due process model, redefining the regulatory field is one of the few possible choices available to the organization for improving its efficiency.

CONCLUSION

Moderate rent control policy can be altered by all three kinds of changes and administrative efficiency will improve: streamlining the Due Process Model Proper, raising the GA, and redefining the regulatory field. Each type of change reflects a different tool for affecting organizational behavior, policy and practice. By (1) changing the rules of administrative review, or (2) altering substantive policy, or (3) legally redefining the regulatory field a rent control agency can redistribute its caseload, improve administrative efficiency, and redefine the equity relationship of landlords and tenants.

This thesis has argued that aspects of due process models of administrative review provide opportunities for the most far reaching

change, as a due process system of administrative review is a major source of policy, and of both landlord and tenant property rights under rent control. Moderate rent control policy and practice change most significantly with changes made to the due process model in force. As a Massachusetts judge wrote in the 1950's, tenant rights to rent control protection are not vested rights.¹ Therefore, it is at the discretion of a rent control agency to fortify or reduce either landlord or tenant rights. In choosing a particular due process model of administrative review, Brookline chose to fortify tenant rights. These due process protections gave tenants a toehold on residential property rights, formerly enjoyed exclusively by their landlords. But ten years of the Due Process Model proper has contributed to such a heavy caseload, and to such time consuming duties for each case, that the organization has moved far from its original balancing goals, and now struggles with organizational dysfunction.

In the past, the organization has rejected mechanical formulae to resolve such debates within the Board over who should pay such costs as condominium ownership fees, debt service, higher taxes due to reassessment, and fuel costs considered apart from conservation efforts. The political nature of the problem was encouraged to come to the fore on each case. The balancing of interests of landlords and tenants was also encouraged, with many hearing opportunities, staff inspections, and crosschecks.

But the balance attempted by Moderate Rent Control is an unstable one. The role played by the Due Process Model Proper in achieving that balance in the rights and levels of equity of landlords and tenants

has not been compatible with rent control policy goals, nor with organization survival. Inherent conflicts in a due process model, especially in respect to the different handicaps imposed by time on landlords and tenants as two distinct classes; and in respect to the physical limitations of administrative staff in handling ever increasing individual cases have produced the incompatibility.

The most likely possibilities available to Brookline's rent control organization to improve its efficiency involve trimming due process features in the system of administrative review. Although trimming these features will reset the balance between landlord and tenant economic interests, it will also reduce staff workload. Tenants will find themselves paying closer and closer to a market rent under rent control, which runs the risk of becoming a minor price fixing agency, for adjustments will be based on general market criteria. Landlords will begin to realize timely, and perhaps generous adjustments by the Board to their FNOI levels, again due to the Board reliance on more generalized, less scrutinized data, and due to fewer reviews of the competing interests.

The rent control organization is in a fortunate position because it does have choices. A due process model is a flexible device and can be gradually manipulated to improve organizational behavior. The range of impacts for both the organization and the regulated which we have sketched illustrate how inextricably moderate rent control policy and practice are bound by a due process model. Rules of administrative procedure are central in defining regulatory equity, in defining a "fair" rent, and in insuring organizational survival.

NOTES

1. See Ch.1, p.26.

TABLES

TABLE 1.

Source: 7 Urban Lawyer 490
(1975).

Grounds for Invoking Rent Control.

	Alaska	California, Berkeley	District of Columbia	Florida, Miami Beach #1	Florida, Miami Beach #2	Maine	Maryland	Massachusetts	New Jersey, Ft. Lee	New York, Emergency Housing Rental Control	New York, Rent Stabilization	New York, Emergency Tenant Protection
1. Housing Shortage	X	X	X	X	X	X	X	X	O	X	X	X
2. Rent Increases	O	X	X	O	X	X	O	X	X	X	X	X
3. Overcrowding	O	O	X	O	O	O	O	O	O	O	O	O
4. Serious Threat to Public Health, Safety & General Welfare	X	X	X	O	X	X	O	X	X	X	X	X
5. Evictions	O	O	X	O	O	O	O	O	O	O	X	O
6. Population Growth	X	O	O	O	O	O	O	O	O	O	O	X
7. Economic Conditions	X	O	O	X	O	O	X	X	O	O	X	X
8. Vacancy Rate	X	X	O	O	O	O	O	O	O	O	X	X
9. Disruption of Free Housing Market	X	O	O	O	O	O	O	O	O	X	X	X
10. Tenant Hardship	O	X	O	O	X	O	O	O	X	X	X	X
11. Environmental Crisis	O	O	O	O	O	O	X	O	O	O	O	O
12. Housing Demolition	O	O	O	O	O	O	X	O	O	O	O	O
13. Housing Deterioration	O	O	O	O	O	O	O	X	O	O	O	X
14. New Construction	O	O	O	O	O	O	O	X	O	O	X	O
15. Cost of New Construction	O	O	O	O	O	O	O	X	O	O	O	X
16. War	O	O	O	O	O	O	O	X	O	X	X	X
17. Reduced Federal Subsidies	O	O	O	O	O	O	O	O	O	O	O	X

X = used this ground as a basis for the emergency.

O = did not use this ground as a basis for the emergency.

YEAR ADOPTED	Nature of policy responsibility
1980 -	<p>Landlord short form energy improvement petition for energy capital improvements, such as conversion from oil to gas, etc. The Board added a 15% rate of interest onto the cost of the job.</p> <p>Removal Permit requirement of condominium developers to apply for permission to remove a unit from the rental stock.</p> <p>Removal Permit also required (Article 39) for conversion of non-controlled multi-family housing units.</p> <p>Eviction protections extended to residents of cooperatives renting cooperative units. Effective September, 1980.</p> <p>Brookline Housing Conversion Board</p> <p>GA adopted: 7.2% for oil heated buildings; 3.5% for gas heat</p> <p>Filing fees of \$5 per petition or application plus \$1 per unit covered by the petition or application initiated.</p>
1979 -	<p>Parking fee per month increased \$5 adopted</p> <p>Emergency fuel general adjustment of 3.6% applicable to oil heated buildings only.</p> <p>GA voted. First year in which two GA's voted (6.5%, oil; 4.4% gas)</p> <p>Regulation 26, a revised depreciation schedule, related improvements such as solar heating devices.</p> <p>Short form capital improvement landlord petition abolished. Interest rate allowable on improvements exceeding \$ 2,500 reduced from 15% to 12%.</p> <p>Board voted to conduct all of its business in open session.</p> <p>Board voted a policy of allowing one representative of the tenants to be present at a staff audit of a landlord petition for rent adjustment.</p> <p>Board voted to require owner occupants of condominiums currently listed as rent-controlled units to apply for an exemption from rent control.</p> <p>Rent Control Board expanded from 7 to 9, two public interest members being added to reduce the caseload which has increased.</p>

Table 2 continued Brookline Rent Control Board: Policy Additions

YEAR ADOPTED	Nature of Policy Responsibility
1978-	<p>Staff reduced for FY 1979, although caseload increased from calendar year 1977 to 1978, especially in regard to landlord petitions for capital improvement related rent increases.</p> <p>Special Town Meeting votes to restrict of eviction by the Rent Control Board in condominium conversion situations for a period of up to 12 months. Effective September, 1978.</p> <p>Special Town Meeting votes to declare a moratorium on issuance of certificates of eviction in condominium conversion situations. Effective January, 1979.</p> <p>GA issued of 4.1%.</p> <p>Data processing functions transferred out of the Rent Control Department to a newly created Information Services Department.</p>
1977 -	<p>Computer registration techniques adopted.</p> <p>GA announced of 5%.</p> <p>Capital improvement policy for improvements financed with low interest loans reduced the annual rate of return on unamortized costs of the improvement from 15% to 6% with 3% financing.</p>
1976 -	<p>Town begins year under its own rent control bylaw, Article XXXVIII.</p> <p>Capital improvement policy allows 15% annual rate of return on the unamortized cost of capital improvements exceeding \$ 2,500.</p> <p>GA voted of 5.7%</p> <p>Staff increases by several members.</p>
1975 -	<p>Selectman's Revenue and Rent Control Study Committee issues its findings that rent control is not causing a shift in property tax burden from one class of property owners to another. It recommends that the Assessors and the Rent Control Board coordinate their efforts in working towards common goals. Rent Control Board votes to schedule hearings on properties referred to it by the Assessor as filing for an abatement but not a rent adjustment within the previous 12 months.</p>

Table 2 continued

Brookline Rent Control Board:

YEAR ADOPTED	Nature of Policy Responsibility
1975 -	<p data-bbox="418 453 1479 548">Capital improvement annual rate of return increased to 10% on average unamortized cost of the capital improvement over its depreciable life.</p> <p data-bbox="418 583 1430 781">TOWN ADOPTS ITS OWN RENT CONTROL BYLAW TO REPLACE THE STATE CHAPTER 842 WHICH WAS DUE TO EXPIRE THAT YEAR. UNDER THE AUTHORITY OF CHAPTER 843 (BROOKLINE RENT CONTROL ENABLING ACT) THE SPECIAL TOWN MEETING BY AN ALMOST UNANIMOUS VOTE VOTED TO ADOPT ARTICLE XXXVIII OF THE TOWN BYLAWS. IT BECAME EFFECTIVE DECEMBER 31, 1975.</p>

Table 3 :

Brookline Rent Control Agency Adjustments
1970 through 1981

			GA	%	Fuel Adj	Pass Tax Through		
1970	Registration							
1971			Yes ²					
1972			Yes	2.6				
1973			Yes	3.0				
1974			No					
1975			Yes	1.4				
1976			Yes	5.7				
1977			Yes	5				
1978			Yes	4.1				
1979			Yes	6.5 oil 4.4 gas	Yes ¹			
1980			Yes	6.5				
1981			Yes	7.2 for 3.5 for	oil heated buildings gas heated buildings			
<p>1. 3.6% increase over May 1, 1979 rent for fuel cost increase March 1978-May, 1979, oil. (29.6% fuel cost increase times 12% fuel to rent ratio).</p> <p>2. See Table 8 for description of adjustment method.</p>								

Table: 4

Brookline Rent Control Agency: Staff Load Data, 1970 through 1981. Totals represent cases filed.

Source: Brookline Town Annual Report

FY	#Cases		# Change	% Change	Staff Changes
1982					8 permanent full time.
1981	1,348 ^e		+432 ^e	+47 ^e	Staff reduction of 3, eff. 7/1/81.
1980 ²	916 ^c		-51 ^c	- 5 ^c	Added one clerk & typist, 8/1/80.
1979 ¹	1,083	(967 ^c)	+223	+26	10 permanent full time
1978 ¹	860 ^c		+ 74	+ 9	same as 1976.
1977	786		-60	- 7	same as 1976.
1976	846		+17	+ 2	2 part time staff lost.
1975	829		-85	- 9	same as 1973.
1974	914		- 6	-0.6	same as 1973.
1973	920		+200	+27.7	11 permanent full time; 3 part time Additional staff authorized.
1972	720				Roger Lipson becomes Director-Counsel
1971	NA: 6,106 units received rent adjustment notices.				9 permanent full time
1970	Registration.				Starting staff 3 full time, and part time as needed.
<p>1. Data collection switched over from a fiscal to a calendar year. This calculation reflects a comparison of calendar year figures to fiscal 1979 figures. A calendar year to calendar year calculation yields: +107, +12% in caseload.</p> <p>c. Calendar year data.</p> <p>e. Estimate based on January, 1981 month data, annualized. See Table .</p> <p>2. Computation based on a calendar year 1979 to calendar year 1980 would show a 5% decrease. However, Fiscal year data 1979 to calendar year 1980 shows a bigger decline in caseload: -167, -15%.</p>					

Table: 5

Brookline Rent Control Agency: Calendar Year 1979 and 1980
Staff Load Report, selected data with 1981 annualized data.
Totals represent number filed.

Source: Brookline Rent Control Agency

CASES: By Type	1977- 1978 ^c	1979	1980	1981 ^a	1981 ^b
<u>Petitions</u>					
Landlord Total	151	188	176	17	204
Cap. Improvements	101	54	28		
Rent Adjustments	50	134	148		
Tenant	153	95	68	3	36
<u>Evictions</u>					
Nonpayment	254	300	239	17	204
Except Nonpayment	182	272	148	32	384
<u>Advisory Opinions</u>	29	16	17	0	0
<u>Removal Permits</u>	NA	NA	89	35	480
<u>Conversion Permits</u>	NA	NA	NA	20	240
TOTALS:	920	1,059	913		1,348 ^b

a. One month only, available. See Table

b. If January figures are annualized.

c. Fiscal Year rather than calendar year.

Table: 6

Brookline Rent Control Board, 1981, January only,
Cases Filed.

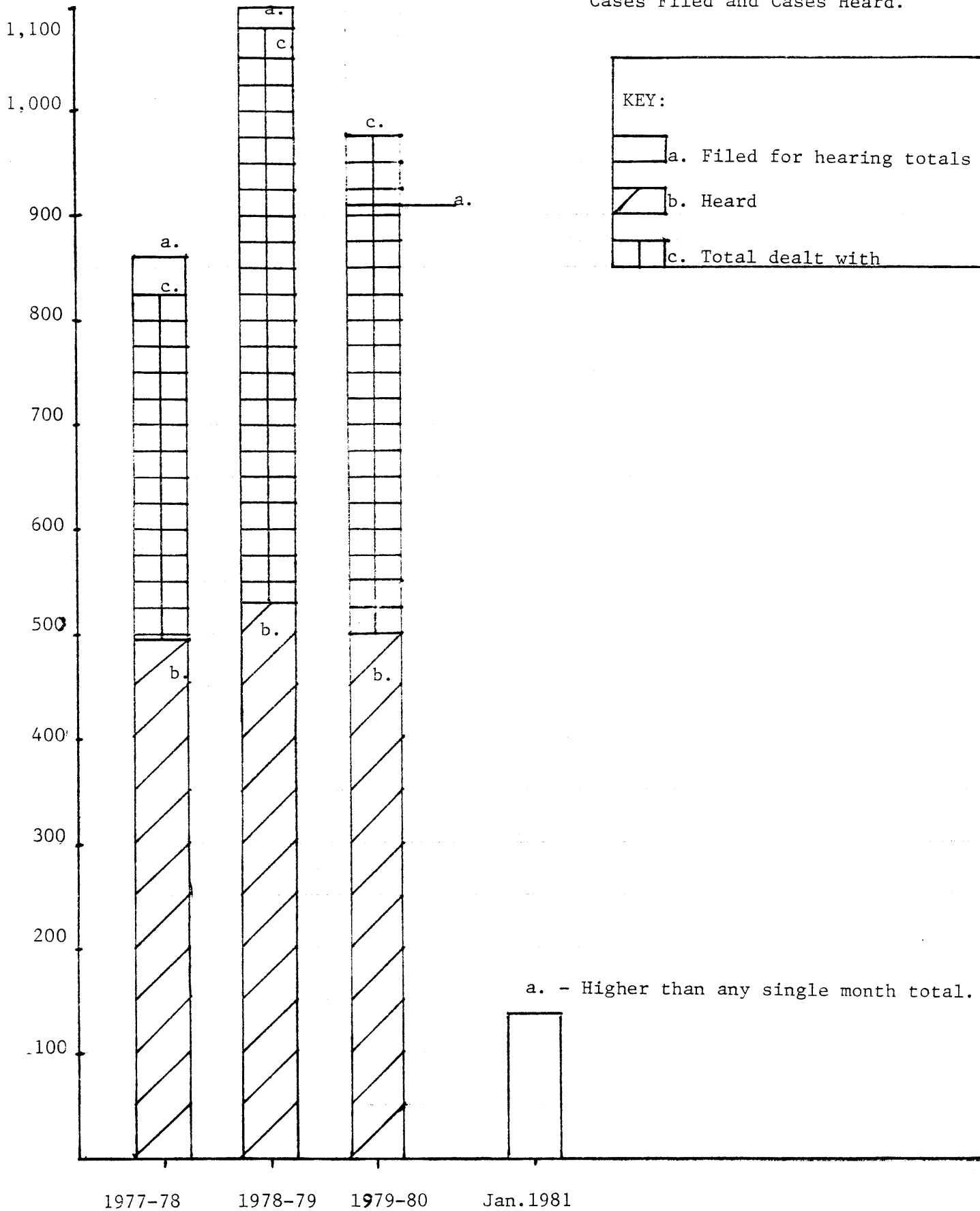
Source: Brookline Rent Control Agency

CASES: By Type	# Filed
Petitions	
Landlord	17
Tenant	3
Board initiated	0
Reallocation	0
Exemptions	11
Evictions	
Nonpayment	17
Except nonpayment	32
Advisory Opinions	0
Parking Hearings	2
Removal Permits	35
Conversion Permits	20
TOTAL: (for January, 1981)	<hr/> 137 ^a

a : The 137 cases filed during January of 1981 represent more cases filed for a one month period than in any month in 1980.

Table: 7

Brookline Rent Control Board: Annual Totals, Caseload 1977-81, Cases Filed and Cases Heard.



a. - Higher than any single month total.

Table: 8 Brookline Rent Control Board: 1971 General Adjustment-
Distribution of units by eligibility for maximum initial
General Adjustment.

Source: Lett, Rent Control, p.171
Brookline Rent Control Board

Category	Number of Units
Class I	6,190
Class II	916
Class III	2,805

Definitions of Class Categories:

Class I : Includes all units receiving an adjustment to bring rent levels up to 25% above January 1, 1968 levels (the rollback date); and units receiving the 15% maximum adjustment.

Class II: Includes units which received no adjustment.

Class III: Includes units which had not filed the required information by the initial agency deadline.

Total Units Eligible for 1971 GA	# Units Receiving GA	%
10,432	6,190	59.33

Table: 9 Brookline Rent Control Board : Rent Increases
Granted, 1971-1974, by building size.

Source: Lett, Rent Control, p.164

Building Size in # Units:	20+	5-19	1-4	All
Row 1				
Weighted Average				
Percent Increase Granted	7.6	7.8	9.5	8.4
Row 2				
Number of Structures in Sample				
Receiving an Increase	10	22	19	51
Row 3				
Number of Units in Sample Re-				
ceiving an Increase	295	196	58	549
Row 4				
Percent of All Units Receiving				
an Increase	53.7	35.7	10.6	100
Row 5				
Total Units in City Receiving				
Increase ¹ (Total Adjusted x Row \$)	3,013	2,003	592	5,610
Row 6				
Percent of Total Registered Units				
Receiving Adjustment	59.8	38.1	59.2	49.6
Total Registered Units by Type	5,037	5,263	1,000	11,300

1. The total units adjusted figure was derived by multiplying the average units per structure (10.30) from CUPR sample. This figure was confirmed as accurate by the Brookline Rent Control Board.

Table: 10

Brookline Rent Control Agency: Litigation Load
1970 through 1980.

Source: Roger Lipson
Dir. Brookline RC Agency

	Rent Adj. Lawsuits	Eviction Writs ¹							
1970		209							
1971		144							
1972	77	103							
1973	106	83							
1975	83								
1976	44								
1977*	23								
1978	33								
1979	insig.								
1980	insig.								

* Note: Niles decided, which confirmed the principle of judicial review.

1. Source: Selesnick, Rent Control.

Table: 11

Brookline Rent Control Agency: Summary of
Litigation, 1973.Source: Selesnick, Rent Control, p.55

	# Active	# Disposed of	# Pending
<hr/> Brookline Municipal Court			
Rent adjustment appeals by Landlord	50(39)	21(11)	29(28)
Rent adjustment appeals by Tenant	3(3)	1(1)	2(2)
Eviction appeals	10(7)	7(6)	3(1)
Exemption appeals	2(3)	0(1)	2(2)
Miscellaneous appeals	3(0)	2(0)	1(0)
Other	9(3)	6(1)	2(2)
Due Process	0(7)	0(7)	0(0)
<hr/> Superior Court			
Rent adjustment appeals by Landlord	14(2)	5(0)	9(2)
Equity bills seeking injunctive relief	7(7)	2(4)	5(6)
Eviction appeals	2(2)	0(1)	2(1)
Exemption appeals	3(3)	1(0)	2(2)
Other	1(1)	1(1)	0(0)
<hr/> Appeals Court			
Rent adjustment appeals by Landlord	1(0)	0(0)	1(0)
<hr/> Supreme Judicial Court			
	1(1)	1(0)	0(0)
<hr/> Federal District Court			
	1(0)	1(0)	0(0)

Note: 1972 followed the same pattern, with due process litigation accounting for a slightly higher percentage of the total caseload. Rent adjustment appeals represent the bulk of the caseload for 1972 and 1973.

Table: 12

Comparison of Brookline Rent Control Agency to
Boston Rent Control Agency: Processing Time for
Rent Adjustments, 1981.

Source: (Based on Staff Member estimates)

BOSTON		Days							
1.	Petition:								
		10	-	Landlord substantiates evidence on costs.					
		12	-	Tenant may challenge data. Memorandum prepared.					
		14	-	Hearing scheduled. Findings prepared by staff.					
		7	-	Hearing.					
		7	-	Rent Control Board decision					
	Total:	60-90							
2.	GA:								
		7	-	Landlord must verify Rent Control Agency data or most recent maximum legal rent.					
		7	-	Landlord must be registered to be eligible.					
		14	-	Agency processing of verified forms.					
	Total:	30							
BROOKLINE		Days							
1.	Petition:								
		10	-	Landlord substantiates 12 month costs.					
				Hearing officer performs audit.					
		7	-	Hearing officer inspects units in building.					
		7	-	"Prehearing Memorandum" prepared; "Audit Report" is prepared; "Inspection Report" prepared; "Analysis of Returns" compares several criteria for determining net income figure and fair return					
		14	-	Hearing (if requested), presided over by hearing officer and one board member; informal; taped; transcribed into memorandum form, and attached to "Prehearing Memorandum"					
		7	-	"Post Hearing Memorandum" composed of "Pre-hearing Memorandum" and testimony. Recommendation made to full Rent Control Board, by Board member					
		7	-	Board Meeting to decide rent adjustment petition					
	Total:	30 - 90 days							

Table: 13

Westbrook Village: 1980 Data

Source: Boston Rent Control Agency file

		Controlled	Decontrolled
Total Number of Units:	approximately 780		
Brookline (2/3)	521	521	0
Boston (1/3)	259	184	75 (28.9%)

Addresses include both Brookline and Boston. The Westbrook Village complex consists of identical one, two, and three bedroom units. It is managed by the Niles Company, Inc. and has been for the period 1970 through 1980.

Table: 14 Westbrook Village: Brookline
 Brookline Rent Control Agency File

Correspondance: Brookline Rent Control Agency to Niles Company, Inc.

Aug. 9, 1979 Re: Air Conditioning as a landlord provided service

Facts: Installation of air conditioning is not a landlord provided service. The Brookline Rent Control Board's 1975 and 1976 decisions do not include air conditioning as a required service in their determination of current maximum rents.

Excerpts from Registration statements do clearly show that electricity is Letter writ- a service provided and is included in the maximum rents. ten by agency

Director, "Neither the registration statements nor the Board decisions Roger Lipson: limit the provision of electricity to exclude power for tenant installed air conditioners." Roger Lipson, Director

"The practice in effect at the time of the 1976 decision would control what service is included in the maximum rents today. It is my understanding that tenants were allowed at that time to install their own air-conditioner units without objection by the landlord."

"If that was the case, then the option of tenant air conitioner installation must be a service included in the current maximum rents. To force a tenant to remove an air conditioner in place would certainly decrease the value of an apartment from the tenant's perspective. Likewise, to refuse to permit a new installation by a tenant would diminish the value of that tenant's apartment in comparison with other units where air conditioners were already in place."

Table: 15

Westbrook Village: Brookline Units, 1968-1980.
 Typical Rents and annual maximum legal rents,
 for five different rent categories.

Source: Brookline Rent Control Agency

	Address	1968	1970	1971(GA)	1972(GA)	1973(GA)	1974(P)	1975(GA)	1976(P)	1976(GA)
	Thornton Rd. #	\$	\$	\$	\$	\$	\$	\$	\$	\$
1.	51	147	167	192	197	203	219	222	248	252
2.	17	165	178	205	211	217	227	230	256	260
3.	19	185	200	230	236	243	261	265	296	301
4.	65	205	220	253	260	268	261	265	296	301
5.	31	240	255	293	301	310	333	338	377	383

	1977(P)	1978(GA)	1979(FA)	1980(GA)	Total Incr./m. 1968- 1980	Total Incr./m. 1970- 1980	Average Annual Incr./m. 10 yrs.	Average Annual Incr./m. 10 yrs.		
	\$	\$	\$	\$	\$	%	%	\$		
1.	265	276	286	305	158	1.07	10.7	15.80		
2.	273	284	294	313	148	.89	8.9	14.80		
3.	316	329	341	363	178	.96	9.6	17.80		
4.	316	329	341	363	158	.77	7.7	15.80		
5.	402	418	433	461	221	.92	9.2	22.10		

(GA) = General Adjustment, automatically granted. Annual rate differs. See Table .
 (P) = Individual Petition, acted on by the Rent Control Board in a hearing.
 (FA) = Fuel Adjustment, automatically granted. Rate depends on fuel type used.
 See Table for amounts.

Table: 16

Westbrook Village: 1979 and 1980 controlled rents.
 Brookline and Boston units identical. Rents reflect
 five most frequent amounts in the spectrum charged.

LINE	1979	1980	Increase	Increase	Units				
					Decontrolled:	#			
n- Dr.	\$	\$	\$	%	1979	1980			
	286	305	19	.066	0	0			
	304	324	20	.065	0	0			
	321	342	21	.065	0	0			
	350	373	23	.065	0	0			
	433	461	28	.064	0	0			
N n- Dr.					14				
	234	263	29	.123					
	256	283	27	.105					
	275	304	29	.105					
	296	327	31	.104					
	361	399	38	.105					

Source: Brookline and Boston Rent Control Agency files.

Agency

BIBLIOGRAPHY

Bibliography

- Allan, G. J. "Some Perspectives on the Operation of the Rent Repeal Act 1973." 8 Victoria University of Wellington Law Review 421 (1977).
- Andrade, S. R. and R. F. Curran. "Towards a Definable Body of Legal Requisites for Rent Control." 10 UCD Law Review 273.
- Baar, K. K. and Keating, W. D. "The Last Stand of Economic Substantive Due Process." 7 Urban Lawyer 447 (1975).
- Bickel, Alexander M. The Morality of Consent. New Haven: Yale University Press, 1975.
- Blau, Peter M. The Dynamics of Bureaucracy. Chicago: University of Chicago Press, 1955.
- Block, W. and Olsen, E., eds. Rent Control: Myths and Realities, International Evidence of the Effects of Rent Control in Six Countries. The Fraser Institute, 1981.
- Blumberg, R. E., Robbins, B. Q. and Baar, K. K. "The Emergence of Second Generation Rent Controls." 8 Clearinghouse Review 240 (1974-75).
- Bolton, J. R. and Holzer, S. T. "Legal Services and Landlord-Tenant Litigation: A Critical Analysis." 82 Yale Law Journal 1495 (1973).
- Davis, Kenneth C. Discretionary Justice: A Preliminary Inquiry. Baton Rouge: Louisiana State University Press, 1970.
- Denman, D. R. The Place of Property: A New Recognition of the Function and Form of Property Rights in Land. London: Geographical Publications Ltd., 1978.
- Edelman, Murray. "Interest Representation and Policy Choice in Labor Law Administration." Labor Law Journal 9 (1958), pp. 218-226.
- . The Symbolic Uses of Politics. Urbana: University of Illinois Press, 1964.
- Frame, A. and Harris, P. "Formal Rules and Informal Practices: a Study of the New Zealand Rent Appeals Boards." New Zealand Universities Law Review, vol. 17, no. 3 (19), pp. 213-236.
- Friedman, L. M. "Legal Rules and the Process of Social Change." 19 Stanford Law Review 786.
- Galanter, M. "Why the "Haves" Come Out Ahead: Speculations of the Limits of Legal Change." 9 Law and Society Review 95 (1974).
- Gellhorn, Walter. When Americans Complain: Governmental Grievance Procedures. Cambridge: Harvard University Press, 1966.

- Gilderbloom, J. Moderate Rent Control, The Experience of U.S. Cities, Public Policy Report No. 3. Washington, D. C.: Conference on Alternative, State and Local Policies, May, 1980.
- Goldowitz, M. "Preparing for the Possibility of National Rent Control." 13 Clearinghouse Review 268 (1979).
- Greenberger, Martin, Crenson, Matthew A. and Crissey, Brian L. Models in the Policy Process. New York: Russell Sage Foundation, 1976, p. 49.
- Handler, Joel F. "Controlling Official Behavior in Welfare Administration." In The Law of the Poor. Edited by Jacobus Ten Broek and the editors of California Law Review. San Francisco: Chandler Publishing Co., 1966.
- Hirschman, Albert O. Exit, Voice, and Loyalty: Response to Decline in Firms, Organizations, and States. Cambridge: Harvard University Press, 1970.
- Klein, J. H. "The Politics of Housing Dispute Resolution: An Academic Perspective." 17 Urban Law Annual 353.
- Koeppel, A. and Kramer, H. Z. "Property Tax Assessment: Contract Rent Is Fair Market Rent, Or Is It?" 2 Real Estate Law Journal 561 (1973-74).
- Lett, M. R. Rent Control Concepts, Realities and Mechanisms. New Brunswick: Rutgers University, 1976.
- Levy, M. S. "Adjusting the Economic Relationship of Landlord and Tenant -- Rent Alteration Remedies." 11 Urban Law Annual 155 (1976).
- Lincoln Institute of Land Policy. Proceedings of Conference on Rent Control: Its Effect on Housing Availability and Assessed Values. Cambridge: Lincoln Institute Monograph # 77-1, October 25-26, 1976.
- Lipsky, Michael. Protest in City Politics: Rent Strikes, Housing and the Power of the Poor. Chicago: Rand McNally & Company, 1970.
- Perrow, Charles. Organizational Analysis: A Sociological View. Belmont, California: Brooks/Cole Publishing Company, 1970.
- Price, James L. Organizational Effectiveness: An Inventory of Propositions. Homewood, Illinois: Richard D. Irwin, Inc., 1968.
- Reich, Charles. "The New Property." 73 Yale Law Review (1964), 782.
- Robson, P. and Watchman, P. "Determining Fair Rents." 128 New Law Journal 1209 (1978).
- Rubenstein, L. S. "Procedural Due Process and the Limits of the Adversary System." 11 Harvard Civil Rights Law Review 48 (1976).

- Schwartz, J. B. "Phase II Rent Stabilization." 4 Urban Lawyer 417 (1972).
- Selesnick, H. L. Rent Control. Lexington: Lexington Books, D. C. Heath and Company, 1976.
- Travis, A. C. "Residential Rehabilitation and Rent Control: The Massachusetts Priority." 11 Urban Law Annual 319 (1976).
- Weber, Max. The Theory of Social and Economic Organization. Edited by Talcot Parsons. London: The Free Press, 1964.
- Willis, J. W. "A Short History of Rent Control Laws." 36 Cornell Law Quarterly (1950-51) 54.
- . "'Fair Rents' Systems." 16 George Washington Law Review 104 (1947-48).
- . "The Federal Housing and Rent Act of 1947." 47 Columbia Law Review 1118 (1947).

Interviews

- Buehler, George. Major landlord, Brookline, Massachusetts: Spring, 1981.
- Hayashi, Waichiro. Former Hearing Examiner, Brookline Rent Control Agency, Brookline, Massachusetts: Spring, 1981.
- Hoey, Cheryl. Hearing Officer, Boston Rent Control Agency, Boston, Massachusetts: Spring, 1981.
- Katz, Estelle. Chairman, Brookline Rent Control Board, Brookline, Massachusetts: Spring, 1981.
- Lipson, Roger. Director-Counsel, Brookline Rent Control Agency, Brookline Massachusetts: Spring, 1981.
- Malone, Ray. Assistant Director, Boston Rent Control Agency, Boston, Massachusetts: Spring, 1981.
- Whittlesey, Robert. Former Court-appointed Master of Boston Housing Authority, Master in leading case of Perez v. BHA, Boston, Massachusetts: Spring, 1981.

2000