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ASPECTS OF FEDERAL RENT CONTROL

JOHN F. McCARTHY

Generally, the necessity for some type of residential rent control is conceded. Likewise, the desirability of continued control for some time after the war, at least until new construction has effected a near normal renting market, is accepted.¹ With real estate the basis for much of our wealth, federal control of residential rents is a restriction of primary importance. At the same time, many lawyers, confronted by the numerous wartime laws and regulations, often have not had the opportunity to become familiar with rent control. This article seeks to give certain general information about the program and to discuss some problems which, in the writer's experience, sometimes have been puzzling. More specifically, after a general review of the applicable statute and regulations, this article will discuss the constitutional bases for federal control of residential rents; compliance with the applicable statutory requirement concerning general fairness and equity of regulations; review of regulations and orders issued thereunder, including satisfaction of the requirements for due process in such proceedings.

THE APPLICABLE STATUTE—THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED

The Emergency Price Control Act of 1942, as variously amended,² established the Office of Price Administration and provides for an Administrator thereof. Sections 2 (b) and 2 (d) of the Act direct the designation of so-called defense rental areas, *viz.*, areas where defense activities have resulted or threaten to result in increases in rents for housing accommodations inconsistent with the purposes of the Act, and the issuance of regulations or orders concerning such accommodations within those areas establishing maximum rents, restricting evictions of tenants, and regulating or prohibiting speculative or manipulative renting or leasing practices. The sections contain various standards to guide the Administrator in issuing regulations or orders.³ Among other things, he is directed, so far as practicable, to

¹On June 30, 1945, the President approved Senate Joint Resolution 30, adopted by the Congress, which, among other things, extended the authority of the Administrator of the Office of Price Administration and of all regulations for the control of residential rents under the Emergency Price Control Act of 1942, as amended, for one year, or through June 30, 1946.

²56 Stat. 23, 767; 58 Stat. 632; Senate Joint Resolution 30, approved June 30, 1945; U.S.C.A., Title 50, App., § 901 *et seq.*

³In *Bowles v. Willingham*, 321 U. S. 503, 64 Sup. Ct. 641 (1944), the United States

ascertain and give due consideration to rents on a date, not earlier than April 1, 1940, which do not reflect increases inconsistent with the purposes of the Act, and to make adjustments for relevant factors of general applicability, including property taxes and other costs. The regulations must be generally fair and equitable. Thus it will be seen that federal control of residential rents is not geographically universal, but is restricted to defense rental areas. However, at the present time, most populous areas have been subjected to control.⁴

The Act also establishes elaborate procedures for review of regulations and orders, which will be discussed in further detail later, and provides several sanctions to enforce compliance, a matter not within the scope of this article.⁵

THE REGULATIONS

Pursuant to the authority of The Emergency Price Control Act, as amended, the Administrator has issued two regulations,⁶ effective within the various defense rental areas,⁷ one covering housing generally and the other rooms within rooming houses and hotels. Under those regulations, all types of housing accommodations within the defense rental areas, not only houses and apartments and rooms within rooming houses and hotels, but also trailers, tourist camps, and, in fact, any type of accommodation rented for living purposes, have been subjected to control.

The regulations for housing generally and for rooms within rooming houses and hotels are similar in purpose and effect, although to some extent containing different provisions by reason of differences in types of accommodations covered. Each has four principal parts, *viz.*, one freezing rents, a second freezing the equipment and services furnished with accommodations,

Supreme Court decided that in view of those standards the act was not invalid as an attempted delegation of legislative power to the Administrator.

⁴At the present time, federal control of residential rents is in effect in approximately 400 separate defense rental areas, containing 15,000,000 housing units and 80,000,000 people.

⁵There are three principal sanctions, *viz.*, an injunction to restrain violations provided for by § 205 (a) of the Act; a criminal penalty of a fine of not more than \$5,000 or imprisonment for not more than a year, or both, on conviction of willful violations, provided for by § 205 (b) of the Act; and triple damages, three times overcharges of rent, at the suit of the tenant or the administrator, provided for by § 205 (c) of the Act.

⁶For the housing regulation, see 9 FED. REG. 11335; for the hotel and rooming house regulation, 9 FED. REG. 11322.

⁷For the areas in and around New York City, Atlantic City and Miami, separate regulations have been issued, which, while basically the same as the regulations for housing and for hotels and rooming houses effective elsewhere, contain some different provisions necessary by reason of peculiarities in these areas.

a third restricting the eviction of tenants, and a fourth requiring registration of all units. Essentially, the regulations are a freeze and not an equalization program. Nowhere do they provide for increases in rents solely because the rent of a particular unit is lower than that of similar units in the same building or in the same neighborhood.

Very generally speaking, the regulations, in Section 4 thereof, provide that maximum rents for a house or an apartment shall be the rent thereof on a certain freeze date, and for a room within a rooming house or hotel, the highest rate for each term (daily, weekly, or monthly) and for each number of occupants (one, two, or three) during a thirty day period ending on the same freeze date. The freeze date varies from area to area.⁸ Section 5 provides for adjustments in frozen rents—increases on petitions of landlords, decreases on applications of tenants or on the initiative of the Administrator. The most common grounds for adjustments of rents are major capital improvements, as distinguished from ordinary repairs, replacement and maintenance; substantial deterioration, as distinguished from ordinary wear and tear; substantial increases or substantial decreases in furniture, furnishings, equipment or services; some blood, personal or special relationship between the landlord and the tenant resulting in a rent substantially lower or higher than rents of comparable units; substantial hardship by reason of a substantial decrease in net income for the current year as compared with a period prior to the freeze date due to a substantial and unavoidable increase in property taxes or operating costs.

Still very generally speaking, the regulations, in Sections 3 and 5 (b) thereof, require that the landlord must continue to supply substantially the furniture, furnishings, equipment and services furnished on the freeze date. Again, adjustments are permitted, usually after petitions or reports by landlords and with reductions in rents following substantial decreases in equipment or services. Here emphasis must be placed on the word *substantial*. It permits of some minor decreases in equipment or services without corresponding reductions in rents.⁹

Section 6 restricts evictions of tenants. With certain exceptions, regardless of the termination of a lease or other rental agreement, a landlord may not evict a tenant. The most common exceptions are for nonpayment of rent,

⁸Thus the freeze date in the Chicago area is March 1, 1942; in Detroit, April 1, 1941; in Cleveland, July 1, 1941.

⁹Thus in houses or apartments, somewhat less cleaning or decorating may be furnished and in hotels, doormen and Sunday maid service, except to transient guests, may be discontinued, all without rent reductions.

continued violation of a substantial obligation of tenancy after written notice that such violation cease, commission of a nuisance, self-occupancy by the landlord and under express permission to evict under local law granted after petition by the landlord.

Section 7 requires the registration of all units with local rent offices, and, in rooming houses and hotels, the posting of rates in each room and the maintenance of certain records.

CONSTITUTIONALITY

The United States Supreme Court has decided that the war powers conferred on the Congress by the Constitution amply sustain the right to control residential rents as expressed by The Emergency Price Control Act of 1942, as amended.¹⁰ The Court might have reached the same result on the basis of the monetary powers of the Constitution.¹¹ The validity of continued federal control of residential rents, even for some period after the termination of the war, can be sustained by reference to the same powers.¹²

The present day application of the war powers conferred on the Congress by the Constitution to sustain the right to control residential rents is, of

¹⁰*Bowles v. Willingham*, 321 U. S. 503, 64 Sup. Ct. 641 (1944). The war powers are found in § 8 of Article I of the Constitution and include the power:

"... to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States. . . .

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water;

"To raise and support armies; . . .

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia, to execute the laws of the Union, suppress insurrections and repel invasions;

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers"

¹¹*Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482 (1869); *The Gold Clause Cases*, *Norman v. Baltimore & Ohio R.R. Co.*, 294 U. S. 240, 55 Sup. Ct. 407 (1934); *Nortz v. United States*, 294 U. S. 317, 55 Sup. Ct. 428 (1934); *Perry v. United States*, 294 U. S. 330, 55 Sup. Ct. 432 (1934); *The Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287 (1870); *Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122 (1884). The monetary powers are found in § 8 of Article I of the Constitution and include the power:

"... to lay and collect taxes . . . ;

"To coin money, regulate the value thereof and of foreign coin;

"To borrow money on the credit of the United States . . . ;

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ."

¹²Concerning the war powers, see *Stewart v. Kahn*, 11 Wall. 493, 20 L. ed. 176 (1870); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 Sup. Ct. 106 (1919); *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141 (1920); *United States v. Gettysburg Electric Co.*, 160 U. S. 668, 16 Sup. Ct. 427 (1896); Concerning the monetary powers, see cases cited under footnote 11, *supra*.

course, obvious. The use of those powers to uphold continued control for some period after the termination of the war is, at first, perhaps less clear, but equally sound. For some period after the war, because of the shortages of materials and labor caused thereby, there will remain an acute housing shortage, with the danger of sharply rising rents and post war inflation and collapse. It will be remembered that after World War I, and as a result of conditions caused thereby, there came a great price and rent rise with the collapse of the late 20's. Under the war powers, the Congress has the right to legislate concerning evils which have resulted from the conflict, and, to that end, continue its control of residential rents. As stated in *Stewart v. Kahn*,¹³ "In the latter case the (war) power is not limited to victories in the field and dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. . . . It would be a strange result if . . . Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences."¹⁴ To the same effect are *Hamilton v. Kentucky Distilleries Co.*¹⁵ and *Ruppert v. Caffey*.¹⁶

The application of the monetary powers conferred on the Congress by the Constitution is found on the basis that from those powers the Congress has the right to maintain a sound and stable currency. That is inherent in the constitutional power "to coin money and regulate the value thereof." Likewise it is the basis of the powers "to lay and collect taxes" and "to borrow money on the credit of the United States." Obviously, a rent rise will contribute to a general inflation and a correlative decrease in the value of the dollar. That may mean a debasement of the national currency and considerable difficulty in laying and collecting taxes and borrowing money. Under the monetary powers, the Congress has the right to continue its control of residential rents to aid in preventing those results. As was said in *Veazie Bank v. Fenno*,¹⁷ involving a tax on state bank notes, admittedly to drive them from circulation, "Having thus in the exercise of undisputed constitutional powers undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Con-

¹³11 Wall. 493, 20 L. ed. 176 (1870).

¹⁴*Id.* at 507.

¹⁵251 U. S. 146, 40 Sup. Ct. 106 (1919).

¹⁶251 U. S. 264, 40 Sup. Ct. 141 (1920).

¹⁷8 Wall. 533, 19 L. ed. 482 (1869).

gress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactment, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."¹⁸ And in *The Gold Clause Cases*, particularly *Norman v. Baltimore & Ohio R.R. Co.*,¹⁹ the Court upheld the power of Congress to invalidate private contracts for the payment of gold or the value of gold because the enforcement of such contracts would interfere with the exertion of Congressional power to devalue the dollar in terms of gold, by causing "dislocation of domestic economy."²⁰

GENERAL FAIRNESS AND EQUITY OF REGULATIONS

As has been seen, the Emergency Price Control Act, in Section 2 (b) thereof, requires that regulations for the control of residential rents, issued by the Administrator, be generally fair and equitable. That requirement has raised several troublesome questions. Among them are what comparative time periods are to be used and whether specific groups among landlords are to be treated separately.

It now seems settled that by the requirement under discussion, current returns to landlords must compare not unfavorably with returns for some pre-war year which did not reflect changes in rents inconsistent with the purposes of the Act, probably 1939.²¹ The period of original construction or the time of purchase is rejected as probably abnormal, *viz.*, a period of inflation or of depression. If, on the other hand, without compulsion, for the returns of 1939, landlords were willing to own and rent their properties, then regulations which afford them similar returns cannot be generally unfair or inequitable. At least such has been the reasoning of the courts.

In *Spaeth v. Brown*²² the Emergency Court of Appeals pointed out, "Congress clearly authorized the Administrator to stabilize rents at the level at which they stood in the particular area in question on the most recent date

¹⁸*Id.* at 549.

¹⁹294 U. S. 240, 55 Sup. Ct. 407 (1934).

²⁰*Id.* at 315.

²¹*Spaeth v. Brown*, 137 F. (2d) 669 (Emergency Court of Appeals, 1943); *Madison Park Corporation v. Bowles*, 140 F. (2d) 316 (Emergency Court of Appeals, 1943); 315 West 97th Street Realty Co. v. Bowles (Emergency Court of Appeals No. 166, 1945) opinion filed June 25, 1945, now pending on rehearing; *Equitable Trust Co. v. Bowles*, 143 F. (2d) 735 (Emergency Court of Appeals, 1944); *Gillespie-Rogers-Pyatt Co. v. Bowles*, 144 F. (2d) 361 (Emergency Court of Appeals, 1944).

²²137 F. (2d) 669 (Emergency Court of Appeals, 1943).

which did not reflect increases resulting from defense activities. It did not intend that all rent control should be suspended until rentals reached the higher levels of an earlier generation."²³ In *Madison Park Corporation v. Bowles*²⁴ the same court concluded, from the legislative history of the Act, that Congress intended "to permit business a yield or profit sufficient for its sustenance in a state of efficiency and for reasonable development and expansion" and that this objective "usually will be obtained by permitting profits which the industry was willing to accept prior to defense activities."²⁵

Currently, in *315 West 97th Street Realty Co. v. Bowles*²⁶ the Court approved the cases just cited and said, "The complainants' second contention is that the regulation is not generally fair and equitable because it prevents landlords from realizing the profits which they normally enjoyed before the impact of defense activities. The Administrator concedes the appropriateness of this test of the validity of the regulation and indeed urges that it is the only practicable way to measure the fairness of the return which landlords will realize on their investment. This Court has upon several occasions given tacit approval to such a test. . . . The test of the historical return has been applied by the Administrator in price control also. By the use of the so-called industry earnings standard he has permitted price increases in order to compensate for those cost increases which an industry could not absorb without impairment of its normal peacetime earnings. . . . It may well be that in earlier decades landlords did receive rates of return in excess of that enjoyed in 1939. . . . 1939 was the last full calendar year which could be described as a peacetime year. It, therefore, appears to be the logical year to use for comparison. By 1940, the war in Europe had begun to show its effects in the economy of the United States, so that it would not be accurate to describe it as a normal peacetime year."

It further seems settled that the regulations, to be generally fair and equitable, need not afford such returns to each individual landlord.²⁷ On the contrary, the Office of Price Administration contends that it is sufficient that, in any defense rental area, average returns of all landlords subject to a regulation, taken as a whole, be not unfavorable. As against that, in *315 West 97th Street Realty Co. v. Bowles*, just discussed, the Emergency Court of Appeals has held that the regulations must be fair and equitable to each

²³*Id.* at 670.

²⁴140 F. (2d) 316 (Emergency Court of Appeals, 1943).

²⁵*Id.* at 324.

²⁶Emergency Court of Appeals, No. 166, 1945, opinion filed June 25, 1945, now pending on rehearing.

²⁷*Bowles v. Willingham*, 321 U. S. 503, 64 Sup. Ct. 641 (1944).

typical, distinguishable segment of housing accommodations. It said, "Although it is true, as a general rule, that a regulation must be judged by its effect on the industry as a whole, there may be occasions when a typical segment of the industry may call for distinctive treatment. . . . Upon the same principle, the validity of the regulation here in question (for housing for the New York City Defense Rental Area) must be determined separately with respect to its effect upon each of the three distinct groups (housing renting under \$30 per month, from \$30 to \$99.99 per month, and \$100 or over) into which the rental housing accommodations of the New York City Defense Rental Area are found to fall." In view of the different sections and accommodations within each area and the different factors affecting each, there is considerable logic to the Court's position. However, such a result will place a tremendous added burden on the administrator of the program.

REVIEW OF REGULATIONS AND ORDERS

This matter involves, among other things, some consideration of Procedural Regulation No. 3, as amended,²⁸ issued by the Administrator, establishing the procedures of his office in making various determinations concerning rents. It is well to understand that the administrative machinery in question consists of O.P.A.'s national office in Washington, its regional offices with jurisdiction over the several states adjacent to the locations of such offices,²⁹ a defense rental area office within each area, a board of review consisting of O.P.A. employees, and the Emergency Court of Appeals established for the review of O.P.A. matters.³⁰ This discussion conveniently lends itself to a consideration of the review of general regulations, *vis.*, that for housing and that for hotels and rooming houses, and of the review of specific orders pertaining to rents and evictions.³¹

Section 203a of the Emergency Price Control Act provides that at any time after the issuance of any regulation, a landlord may file a protest setting forth objections thereto and affidavits or other written evidence in support of

²⁸8 FED. REG. 526.

²⁹For continental United States, the regional offices are in Boston, New York, Cleveland, Atlanta, Dallas, Chicago, Denver, and San Francisco.

³⁰The Emergency Court of Appeals is created by § 204 (c) of the Emergency Price Control Act. It consists of three judges designated by the Chief Justice of the United States from among the judges of the various district courts and circuit courts of appeal. The principal site of the court is at Washington. However, it holds sessions in the principal cities throughout the country.

³¹Under the Act and the regulations, only landlords have a right to review. Tenants, as with consumers under the Federal Trade Commission and workers under the various labor laws, do not have such rights.

such objections. Under Section 203(c), on request of the landlord, any protest filed after September 1, 1944 may be considered by a Board of Review, consisting of O.P.A. employees, which shall make recommendations to the Administrator. Of course, the Administrator may grant or deny any protest, in whole or in part. If the landlord is aggrieved by undue delay by the Administrator in disposing of his protest, he may petition the Emergency Court of Appeals for relief, which court shall enter some appropriate order. If the Administrator does not act within a time fixed by the court, the protest is deemed to be denied. Protests are filed with the Secretary of the O.P.A. at its national office in Washington.

Section 204(a) provides that within thirty days after the denial of a protest, the landlord may file a complaint with the Emergency Court of Appeals praying that the regulation be set aside. Under Section 204(b), such relief is to be granted only if the regulation is not in accordance with law or is arbitrary or capricious. Review of the decisions of the Emergency Court by the United States Supreme Court is provided as in other cases on petitions for certiorari. Under the Act, the Emergency Court and the Supreme Court, on review, have exclusive jurisdiction to determine the validity of any regulation, and every other court has been excluded from that right.³²

Under Procedural Regulation No. 3, as amended, matters concerning specific adjustments in frozen rents—increases on petitions of landlords, decreases on applications of tenants or on the initiative of the Administrator—and proceedings involving particular equipment and services or evictions are considered in the defense rental area offices. Within ninety days after the issuance of an adverse determination, the landlord may file with the defense rental area office an application for review by the appropriate regional office. Within ninety days after an adverse determination by the regional office, the landlord may file a protest against the particular order in question, from whence the procedures are similar to those for protests of general regulations, just discussed. Generally, forms for proceedings before the area offices are available there.

Returning to the Act, Section 204(c) provides that within thirty days after arraignment in any criminal proceeding, and within five days after judgment in any civil or criminal case, for violation of the Act or any regulation or order thereunder, the defendant (landlord) may apply for leave,

³²These exclusive jurisdiction features have been held to be constitutional. See *Lockerty v. Phillips*, 319 U. S. 182, 63 Sup. Ct. 1019 (1943).

and the court may grant leave, to file a complaint with the Emergency Court of Appeals concerning the validity of the regulation or order alleged to have been violated. In that event, stays of further proceedings in the civil or criminal case are possible.

The Act and the regulations are complete with provisions permitting landlords to submit affidavits and written evidence in support of protests and petitions, permitting oral hearings, if necessary, and requiring notices of actions and evidence relied on. In view of those requirements, the elements of due process have been held to have been fulfilled.³³

³³*Yakus v. United States*, 321 U. S. 414, 64 Sup. Ct. 660 (1944) ; *Bowles v. Willingham*, 321 U. S. 503, 64 Sup. Ct. 641 (1944).