

To: New Jersey Law Review Commission
From: Whitney G. Schlimbach, Counsel¹
Re: Definition of “Rent” in Landlord-Tenant Law
Date: March 11, 2024

Project Summary

The New Jersey Legislature has determined that it “is in the public interest of the State to maintain for citizens the broadest protection available under State eviction laws” to avoid “displacement and resultant loss of affordable housing.”² Pursuant to the State’s eviction statutes, a tenant may be subject to eviction for failure to pay rent.³ However, the term “rent” is not defined in the New Jersey statutes.⁴

In *Opex Realty Management, LLC v. Taylor*, the Law Division considered whether non-payment of late and legal fees, deemed “additional rent” in the lease, can be a ground for an eviction proceeding when the amount of “additional rent” would cause the total monthly rent to exceed the maximum allowed by the local rent control ordinance.⁵

The Commission authorized targeted outreach regarding whether the issue addressed by *Opex* arises often in New Jersey.⁶ Staff conducted outreach to practitioners in the area of housing law, as well as organizations representing both tenants and landlords. Given the response from commenters,⁷ Staff requests guidance from the Commission regarding the direction of the project.

Statutes Considered

N.J.S. 2A:18-53 provides, in relevant part, that:

¹ Preliminary work on this project was conducted by Joseph Miller, during his tenure as a Legislative Law Clerk with the NJLRC.

² N.J. STAT. ANN. § 2A:18-61.1a(d) (West 2023) (“It is in the public interest of the State to maintain for citizens the broadest protections available under State eviction laws to avoid such displacement and resultant loss of affordable housing, which, due to housing’s uniqueness as the most costly and difficult to change necessity of life, causes overcrowding, unsafe and unsanitary conditions, blight, burdens on community services, wasted resources, homelessness, emigration from the State and personal hardship, which is particularly severe for vulnerable seniors, the disabled, the frail, minorities, large families and single parents.”).

³ N.J. STAT. ANN. § 2A:18-18-53 (West 2023) and N.J. STAT. ANN. § 2A:18-61.1 (West 2023).

⁴ *Opex Realty Mgmt., LLC v. Taylor*, 460 N.J. Super. 287, 290 (Law. Div. 2019).

⁵ *Id.* at 289.

⁶ See N.J. Law Revision Comm’n, Minutes of NJLRC Meeting, at 8, Mar. 18, 2021, www.njlrc.org (last visited Mar. 5, 2024) [hereinafter “March 2021 Minutes”] (“Chairman Gagliardi . . . suggested that targeted outreach may provide the Commission with an idea of whether this issue was prevalent in New Jersey” and “Commissioner Bertone concurred with the suggestion that outreach should be done on this issue; stating that she thinks that this is a common issue”).

⁷ See *infra* at pp. 8-12.

Except for residential lessees and tenants included in section 2 of this act,^[8] any lessee or tenant at will or at sufferance, or for a part of a year, or for one or more years, of any houses, buildings, lands or tenements, and the assigns, undertenants or legal representatives of such tenant or lessee, may be removed from such premises by the Superior Court, Law Division, Special Civil Part in an action in the following cases:

* * *

b. Where such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held.⁹

* * *

N.J.S. 2A:18-61.1 provides, in relevant part, that:

No lessee or tenant or the assigns, under-tenants or legal representatives of such lessee or tenant may be removed by the Superior Court from any house, building, mobile home or land in a mobile home park or tenement leased for residential purposes, . . . ,¹⁰ except upon establishment of one of the following grounds as good cause:

a. The person fails to pay rent due and owing under the lease whether the same be oral or written; provided that, for the purposes of this section, any portion of rent unpaid by a tenant to a landlord but utilized by the tenant to continue utility service to the rental premises after receiving notice from an electric, gas, water or sewer public utility that such service was in danger of discontinuance based on nonpayment by the landlord, shall not be deemed to be unpaid rent.¹¹

* * *

Background

In *Opex Realty Mgmt., LLC v. Taylor*, Robert and Mildred Taylor (“Tenants”) lived in an apartment subject to Newark’s rent control ordinance.¹² Their landlord, Opex Realty Management, LLC (“Opex”), brought a summary dispossess action to evict them for non-payment of rent.¹³ The

⁸ N.J. STAT. ANN. § 2A:18-61.1.

⁹ N.J. STAT. ANN. § 2A:18-18-53 (emphasis added).

¹⁰ N.J. STAT. ANN. § 2A:18-61.1 (excluding the following properties from the statute’s reach: “(1) owner-occupied premises with not more than two rental units or a hotel, motel or other guest house or part thereof rented to a transient guest or seasonal tenant; (2) a dwelling unit which is held in trust on behalf of a member of the immediate family of the person or persons establishing the trust, provided that the member of the immediate family on whose behalf the trust is established permanently occupies the unit; and (3) a dwelling unit which is permanently occupied by a member of the immediate family of the owner of that unit, provided, however, that exception (2) or (3) shall apply only in cases in which the member of the immediate family has a developmental disability”).

¹¹ *Id.* (emphasis added).

¹² *Opex*, 460 N.J. Super. at 289.

¹³ *Id.*

Tenants paid the base monthly rent amount into escrow, meaning the action hinged on Opex's claim for \$372 in late and legal fees, designated as "additional rent" in the lease.¹⁴ The Court considered

whether . . . Newark's rent control ordinance is violated when a landlord seeks to evict a tenant for non-payment of late and legal fees, deemed "additional rent" in the lease, if the addition of the "additional rent" would cause the total rent due to exceed the maximum rent allowed by local ordinance.¹⁵

The Tenants argued that if a landlord can bring an eviction action for failure to pay "additional rent," the "additional rent" also must be counted toward the total rent permitted under the applicable rent control ordinance.¹⁶

Analysis

Noting that the *Opex* case presented "an unresolved issue of landlord-tenant law with important implications," the Court addressed whether a "landlord [may] claim late and legal fees as rent in [a] summary dispossess action, but then deny these same charges constitute rent under [a] rent control ordinance."¹⁷

New Jersey Eviction Statutes

Although N.J.S. 2A:18-61.1(a) and N.J.S. 2A:18-53(b) "subject a tenant to eviction for failure to pay 'rent,'" New Jersey's statutes do not define the term "rent."¹⁸ New Jersey courts have consistently held that the parties to a lease may define its terms as they wish, "absent some superior contravening public policy."¹⁹ Therefore, other expenses or fees may be treated as "additional rent" in a lease.²⁰

¹⁴ *Id.* at 290 ("The monthly rent in dispute and the ongoing monthly rent that has come due has been paid to the tenant's attorney in escrow.").

¹⁵ *Id.* at 289.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 290.

¹⁹ *Id.* (citing *Hous. Auth. & Urban Redev. Agency v. Taylor*, 171 N.J. 580, 586 (2002); *Marini v. Ireland*, 56 N.J. 130, 143 (1970); *Fargo Realty, Inc. v. Harris*, 173 N.J. Super. 262, 265-66 (App. Div. 1980); and *Vineland Shopping Ctr., Inc. v. De Marco*, 35 N.J. 459, 470 (1961)).

²⁰ *Id.* (adding that "[t]he landlord-tenant court will enforce such lease provisions as long as they do not violate public policy") (citing *Cnty. Realty Mgmt., Inc. v. Harris*, 155 N.J. 212, 234 (1998) ("The written lease, however, must expressly permit a landlord to recover reasonable attorney's fees and damages in a summary dispossess proceeding before a landlord-tenant court may consider those expenses as additional rent.")).

Newark Rent Control Ordinance

In addition, the Court explained that a municipality may provide its own definition of the term “rent,” as used in its municipal ordinances.²¹ Newark’s relevant ordinance provides that:

[r]ent shall mean the consideration and shall include any bonus, benefits or gratuity demanded or received for or, in connection with, the use or occupancy of housing space or the transfer of a lease of such housing spaces, including, but not limited to monies demanded or paid for parking, pets, the use of furniture, subletting, security deposits and damage and cleaning deposits.²²

The *Opex* Court observed that Newark’s ordinance “does not expressly include or exclude late fees and legal fees [or “other items of ‘additional rent’”²³] in its calculation of the rent control cap.”²⁴

In another section,²⁵ Newark’s rent control ordinances specifically exclude “attorney’s fees, accountant’s fees [and] application fees incurred . . . in connection with any application to” the Rent Control Board, from the determination “whether a landlord is entitled to any rent increases.”²⁶ The *Opex* Court concluded that, although “the ordinance clearly recognizes the existence of attorney’s fees as a cost incurred by a land owner,” the governing body “chose not to allow legal fees incurred by landlords to be passed on to their tenants as rent increases.”²⁷

By contrast, the Newark ordinance defining “rent” does not exclude “items of ‘additional rent,’” including late and legal fees, from the “calculation of the rent control cap.”²⁸ The *Opex* Court characterized the ordinance as setting forth “a broad definition of rent,” which “should be read to include items denoted as ‘additional rent’ being asserted by landlords in non-payment claims under N.J.S.A. 2A:18-61.1.”²⁹

Thus, the Court concluded that “[r]ent as defined by the parties, be it additional or otherwise, is rent” for the purposes of Newark’s rent control ordinance.³⁰

²¹ *Id.* at 291.

²² *Id.* at 292 (emphasis added) (*quoting* Newark, N.J., Rev. Gen. Ordinances § 19:2-2).

²³ *Id.* at 291-92.

²⁴ *Id.* at 294.

²⁵ *Id.* (*quoting* Newark, N.J., Rev. Gen. Ordinances § 19:2-8.4).

²⁶ *Id.* (explaining that “Newark has placed a cap on rent that can be lawfully charged, tied to the Consumer Price Index,” which “essentially limit[s] owners] to one rent increase per year”).

²⁷ *Id.*

²⁸ *Id.* at 291-92 (observing that “[t]he Newark rent control ordinance . . . is silent” regarding “late or legal fees designated as ‘additional rent’”).

²⁹ *Id.* at 294-95.

³⁰ *Id.* at 295.

Appellate Division Cases

In *Ivy Hill Park Apartments v. Sidisin*,³¹ the Appellate Division analyzed Newark’s rent control ordinance “in an analogous circumstance,” specifically “whether damages to the apartment considered ‘additional rent’ were lawful under” the rent control ordinance.³² Concluding that Newark’s definition of “rent”³³ permitted “property damages” to be considered “additional rent” in a lease, the Appellate Division held that “property damages deemed ‘additional rent’ must be included as rent under the Newark rent control ordinance.”³⁴

Similarly, the *Opex* Court pointed to the Appellate Division’s decision in *316 49 Street Ass’n, Ltd. v. Galvez*.³⁵ *Galvez* involved (1) a rent control ordinance “limit[ing] rent to \$420 per month”; (2) an “actual monthly rent [of] \$388”; and (3) “an additional \$229 payment each month, designated as an option to purchase,” which, if missed, “would be deemed ‘additional rent’ and subject the tenant to eviction.”³⁶ The *Galvez* Court held the “option payments were a subterfuge to circumvent the rent control ordinance and disallowed them.”³⁷

Just as in *Sidisin* and *Galvez*, *Opex* took the position that late and legal fees were “additional rent” under the lease and initiated an eviction proceeding against Tenants for failure to pay rent.³⁸ The *Opex* Court concluded that a landlord cannot “circumvent a rent control ordinance and raise the rent beyond the lawful limits by labeling a late fee or legal fee as ‘additional rent’ and then . . . disavow that very label so as to avoid the prohibitions of local [rent control] law.”³⁹

Therefore, the Court held that “rent, additional or otherwise, may not ever exceed the maximum allowable cost provided by an applicable rent control ordinance.”⁴⁰

New Jersey Rules of Court

The New Jersey Rules of Court (“Rules”) specify procedures to be followed in landlord tenant proceedings, including proceedings for “recovery of premises.”⁴¹ N.J. Ct. R. 6:3-4(c)

³¹ 258 N.J. Super. 19 (App. Div. 1992).

³² *Opex*, 460 N.J. Super. at 292 (citing *Sidisin*, 258 N.J. Super. at 20-21).

³³ The *Opex* Court “note[d] that the current definition of rent contained in the Newark rent control ordinance is virtually the same as cited in *Sidison*.” *Id.* at 293.

³⁴ *Id.* (citing *Sidisin*, 258 N.J. Super. at 21 (“We are reluctant to permit plaintiff to establish jurisdiction under N.J.S.A. 2A:18-61.1a by characterizing certain damages as rent and in the same proceeding to deny that the charge sought to be enforced is rent under the rent control ordinance.”)).

³⁵ 269 N.J. Super. 481 (App. Div. 1994).

³⁶ *Opex*, 460 N.J. Super. at 293 (citing *Galvez*, 269 N.J. Super. at 483 & 489).

³⁷ *Id.* (citing *Galvez*, 269 N.J. Super. at 489).

³⁸ *Id.* at 289.

³⁹ *Id.* at 296.

⁴⁰ *Id.* (finding that the Tenants were “already paying the maximum rent allowed by law,” the Court determined that “any judgment for possession for non-payment of ‘additional rent’ in this summary dispossess action would violate the Newark rent control ordinance”).

⁴¹ N.J. Ct. R. 6:3-4 (West 2023).

provides that “[t]he amount of rent owed for purposes of the dispossession action can include only the amount that the tenant is required to pay by federal, state or local law and the lease executed by the parties.”⁴²

In addition, as the *Opex* Court pointed out, the Rules also provide “a **brief** overview of landlord tenant court procedures” in Appendix XI-S.⁴³ With respect to “Non-Payment of Rent Cases,” the Appendix instructs that:

[a]ttorney's fees, late fees and/or other charges are only allowed if there is a lease that calls these items “additional rent.” Even if the lease does say that, the amount due as rent may be limited by rent control, or if there is public assistance, the rent may be limited by local, state, or federal law. For example, if a tenant receives Section 8 assistance, the landlord cannot include a late charge in the amount that the tenant owes.⁴⁴

Policy Considerations

The legislative policies and goals underlying the “Anti-Eviction Act,” in N.J.S. 2A:18-61.1 to 61.12 are expressly stated in N.J.S. 2A:18-61.1a:

[a]cute State and local shortages of supply and high levels of demand for residential dwellings have motivated removal of blameless tenants . . . This has resulted in unfortunate attempts to displace tenants employing pretexts, stratagems or means other than those provided pursuant to the intent of State eviction laws designated to fairly balance and protect rights of tenants and landlords. . . . It is in the public interest of the State to maintain for citizens the broadest protections available under State eviction laws to avoid such displacement . . .⁴⁵

The Anti-Eviction Act was “designed to limit the eviction of tenants to ‘reasonable grounds’ and to provide for ‘suitable notice’ to tenants in the event of eviction proceedings.”⁴⁶ The “strong public policy” favored by the provisions of the Anti-Eviction Act “protect[] residential

⁴² N.J. CT. R. 6:3-4(c) (entitled “Form of Complaint in Non-Payment Cases”).

⁴³ *Opex*, 460 N.J. Super. at 291 (explaining that the instructions in Appendix XI-S include the “Harris Announcement” [which is] read to litigants before every landlord-tenant calendar call”) (*citing* Landlord/Tenant Pre-Calendar Call Instructions, Pressler & Verniero, Current N.J. Court Rules, Appendix XI-S at www.gannlaw.com (2019)). *See also Harris*, 155 N.J. at 241–42 (concluding that “[t]he better procedure is to have landlord/tenant courts provide information to *pro se* tenants through instructions from the court and written notices explaining court procedures,” and “refer[ring] the matter to the Special Civil Part Practice Committee to draft a set of proposed instructions . . . [that] shall incorporate the substantive information required by this opinion”).

⁴⁴ N.J. R. PRAC. APP. 11-S (West 2024) (emphasis added).

⁴⁵ N.J. STAT. ANN. § 2A:18-61.1a(a)-(d).

⁴⁶ *Prospect Point Gardens Inc. v. Timoshenko*, 293 N.J. Super. 459, 463 (Law. Div. 1996).

tenancies so that no landlord may remove a tenant . . . without establishing good cause.”⁴⁷ To that end, N.J.S. 2A:18-61.1 “furnishes a lengthy list of what constitutes good cause.”⁴⁸

Tenant Waiver Statutes⁴⁹

In addition, there are multiple New Jersey statutes that prohibit tenants from waiving the rights guaranteed to them under the provisions of the relevant acts.⁵⁰ For example, in N.J.S. 2A:18-61.4 in the Anti-Eviction Act, a lease provision permitting a tenancy to be “terminated or not renewed for other than good cause” or waiving “any other rights under this act” is unenforceable.⁵¹ Similarly in the Tenant Protection Act,⁵² N.J.S. 2A:18-61.55 deems “[a]ny agreement whereby the tenant waives any rights under this act . . . against public policy and unenforceable.”⁵³

In *Tave v. Furst*, the Court held that a lease permitting the landlord to charge a higher rent than was authorized under the applicable rent control ordinance was “void because it contravene[d] the legitimate public policy considerations embodied in the ordinance.”⁵⁴ Rather than nullifying the lease altogether, the Court ordered a “modified enforcement of the agreement giving the landlord the maximum rental allowable under the ordinance.”⁵⁵

However, as explained in *Opex*, “[a]bsent some superior contravening public policy, parties [to a lease in New Jersey] are free to define the terms of the lease agreement.”⁵⁶ Although acknowledging the unequal bargaining positions of parties to a lease,⁵⁷ New Jersey courts make

⁴⁷ *Id.*

⁴⁸ *Id.* at 463-64.

⁴⁹ Information regarding statutes prohibiting the waiver of tenants’ rights was brought to Staff’s attention by Judge Mahlon Fast, who co-authors the Guide to Landlord-Tenant & Related Issues in the Superior Court of New Jersey with Bruce Gudin. See E-Mail from Mahlon L. Fast, J.S.C. (Ret.), to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 6, 2024, 4:25 PM EST) [hereinafter “Judge Fast Email”].

⁵⁰ N.J. STAT. ANN. § 2A:18-61.4 (West 2023); N.J. STAT. ANN. § 2A:18-61.36 (West 2023) (“Senior Citizens and Disabled Protected Tenancy Act”); N.J. STAT. ANN. § 2A:18-61.55 (West 2023); N.J. STAT. ANN. § 2A:42-96 (West 2023) (“Actions, etc., for Maintenance of Safe and Sanitary Housing”); N.J. STAT. ANN. § 46:8-36 (West 2023) (security deposit law); N.J. STAT. ANN. § 46:8-49 (West 2023) (“Truth in Renting Act”); N.J. STAT. ANN. § 46:8C-2 (West 2023) (mobile home park law).

⁵¹ N.J. STAT. ANN. § 2A:18-61.4.

⁵² N.J. STAT. ANN. §§ 2A:18-61.40 to -61.67 (“Tenant Protection Act of 1992”) (West 2023).

⁵³ N.J. STAT. ANN. § 2A:18-61.55.

⁵⁴ 182 N.J. Super. 497, 500 (Dist. Ct. 1981).

⁵⁵ *Id.* at 501 (“the public interest demands the court not ‘give either efficacy or consolation to the efforts of a party to an agreement to subvert the administratively determined price structure’”) (*quoting Marx v. Jaffe*, 92 N.J. Super. 143, 147 (App.Div.1966)).

⁵⁶ *Opex*, 460 N.J. Super. at 290. See e.g. *Hous. Auth. & Urb. Redevelopment Agency of City of Atl. City v. Taylor*, 171 N.J. 580, 593 (2002) (finding that “[a]lthough state law authorizes the Housing Authority to designate certain charges such as attorneys’ fees and late charges as ‘additional rent,’ [the] state law conflicts with the [federal] limit on public housing tenant rent,” and holding, therefore, that “federal law preempts state law to the extent that it . . . permits public housing authorities to designate certain extra charges as ‘additional rent’”).

⁵⁷ See e.g. *Sacks Realty Co. v. Shore*, 317 N.J. Super. 258, 269 (App. Div. 1998) (“It is also clear that these public policy concerns become more insistent when, as here, there is obviously unequal bargaining power, the burdened party is weaker and is a member of a class for which the Legislature has articulated the need for special protection, and the offending contractual provisions are in direct violation of the Legislature’s enacted protective scheme. Residential

clear that not “every lease provision favorable to a landlord is against public policy.”⁵⁸ Courts have upheld lease provisions “defining rent to include tenant-inflicted damages”⁵⁹ or treating “a reasonable attorney’s fee incurred [for] bringing a summary dispossession action . . . as part of the rent due and owing.”⁶⁰

Outreach

Pursuant to the direction provided by the Commission, Staff conducted limited outreach to knowledgeable and interested individuals and organizations regarding the prevalence of the issue raised in *Opex*.

Outreach was conducted to the New Jersey Department of Community Affairs; Legal Services of New Jersey; the Housing Coalition of New Jersey; the Affordable Housing Alliance; the New Jersey Citizen Action Education Fund; the Manufactured Homeowners Association of New Jersey; the New Jersey Apartment Association; the New Jersey Tenants Organization; the Elizabeth Coalition to House the Homeless; the New Jersey State Bar Association; clinical professors at Rutgers Law School; and the attorneys who represented the landlord in *Opex*.

Judge Mahlon L. Fast

Judge Fast, who co-authors the Guide to Landlord-Tenant & Related Issues in the Superior Court of New Jersey, provided Staff with an excerpt from the manual along with his position regarding the issue raised in *Opex*.⁶¹ Judge Fast indicated that, “[i]n his opinion there is no need to define the word ‘rent’ in either statute.”⁶² In support of this position, Judge Fast cited the authorities mentioned in the NJLRC Memorandum, as well as the material he provided detailing

tenants, faced with eviction because of circumstances beyond their control and solely within that of the landlord, constitute just such a class . . .”).

⁵⁸ *Mury v. Tublitz*, 151 N.J. Super. 39, 44 (App. Div. 1977) (addressing a case in which “the landlords deducted [attorney’s] fee and costs [for the dispossession action] from the security deposit” as authorized in the lease).

⁵⁹ *Fargo Realty, Inc. v. Harris*, 173 N.J. Super. 262, 266 (App. Div. 1980) (concluding that “a clause defining rent to include tenant-inflicted damages [does not] conflict with the purpose underlying the enactment of N.J.S.A. 2A:18-61.1 et seq.”, which “was designed to protect tenants who have caused no problems against unfair and arbitrary evictions”).

⁶⁰ *Univ. Ct. v. Mahasin*, 166 N.J. Super. 551, 553–54 (App. Div. 1979) (citing *Trenton Housing Auth. v. Green*, 118 N.J. Super. 544, 545-46 (App.Div.1972), *certif. den.* 61 N.J. 159, 293 A.2d 389 (1972) (finding that “[i]t is entirely consistent with those (low-rent housing) policies that landlord housing authorities recoup from dilatory tenants the reasonable legal costs attendant upon necessary dispossession actions,” and additionally, it is not “unconscionable or otherwise contrary to public policy in doing so by a lease stipulation that the reasonable attorney’s fees become additional rent due and owing by the tenant”). See also N.J. STAT. ANN. § 2A:18-61.66 (West 2023) (“If a residential lease agreement provides that the landlord is or may be entitled to recover either attorney’s fees or expenses, or both . . . or if the lease provides that such costs may be recovered as additional rent, the court shall read an additional parallel implied covenant into the lease . . . requir[ing] the landlord to pay the tenant either the reasonable attorney’s fees or the reasonable expenses, or both, incurred by that tenant as the result of the tenant’s successful defense of any action or summary proceeding”).

⁶¹ Judge Fast Email, *supra* note 45.

⁶² *Id.*

the various statutes prohibiting tenants from waiving the rights guaranteed to them by New Jersey’s landlord tenant laws.⁶³

Judge Fast added that “[u]nless an amendment to these statutory sections includes only the restrictive word ‘legal,’ it is my opinion that to further define the word would most likely require undue verbiage, considering the cited authorities.”⁶⁴

New Jersey Tenants Organization

Staff also received feedback from Matthew Shapiro, President of the New Jersey Tenants Organization.⁶⁵ Mr. Shapiro expressed reservations regarding the codification of the *Opex* holding, although he opined that amending the statute to reflect the holding “would be much stronger in practical use.”⁶⁶ Mr. Shapiro cautioned, however, that such an attempted amendment to the statute would likely end up in a “severely watered down” form that “would actually reduce the rights tenants currently have with the court precedent.”⁶⁷

Professor Emeritus Jack Feinstein

Professor Emeritus Jack Feinstein at Rutgers Law School, who worked as a “tenant advocate for many years,” provided Staff with his perspective on this issue, as well.⁶⁸ Professor Feinstein wrote that “if the Legislature were to consider codifying the decision in *Opex Realty v. Taylor*, I would support its doing so.”⁶⁹ He agreed with the holding in *Opex* that “[l]andlords shouldn't be able to have it both ways, i.e. to define in their leases things like attorney's fees and late charges as rent . . . and then arguing that those additional charges should nevertheless not be considered rent under local rent control ordinances.”⁷⁰ With respect to how often the situation arises, Professor Feinstein pointed out that “there is only a small percentage of municipalities in [New Jersey] that have rent control ordinances.”⁷¹

The Professor expressed that his “preference . . . would be for the Legislature to go well beyond what [the NJLRC] appears to be considering.”⁷² He recommended that the statutes should be amended “to state that late charges and attorney's fees (and whatever additional charges that a landlord’s lease states should be considered ‘additional rent’) should never be considered rent.”⁷³

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ E-Mail from Matthew Shapiro, President, New Jersey Tenants Organization, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 6, 2024, 6:00 PM EST).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ E-Mail from Jack C. Feinstein, Clinical Professor Emeritus, Rutgers Law School, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 20, 2024, 1:13 PM EST).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

He pointed out that, from a tenant’s – and possibly a landlord’s – perspective, “rent” is the “monthly dollar amount without mention of a late fee or attorney’s fee.”⁷⁴ Professor Feinstein opined that “landlords should not [be] able to change common understanding by creating a fiction [through] their leases that these charges are rent.”⁷⁵

In addition, Professor Feinstein raised an issue related to N.J.S. 2A:18-61.1(f), prohibiting “unconscionable” rent increases.⁷⁶ Explaining that “[t]he major problem with this . . . section is that there is no clarity in the case law as to what percentage of a rent increase makes that increase unconscionable,” Professor Feinstein suggested that “[i]t would be a major improvement if the statute clarified this.”⁷⁷

New Jersey Apartment Association

Nicholas Kikis, the Vice-President of Legislative and Regulatory Affairs in the New Jersey Apartment Association (“NJAA”), also provided comments.⁷⁸ Mr. Kikis indicated that the NJAA does not “believe that this would be a useful undertaking for the [C]ommission” given that the *Opex* holding “was not particularly novel and courts have long imposed limitations on what can be characterized as ‘additional rent’ in eviction proceedings.”⁷⁹

Mr. Kikis continued that “[t]here are also inherent challenges in codifying these decisions.”⁸⁰ He pointed out the “fact-specific inquiries undertaken by the courts,” and that “rent control . . . is a local regulation . . . operat[ing] under generalized police powers without clear statutory authorization [and therefore], each ordinance differs greatly with respect to what may or may not be permitted.”⁸¹

However, should the Commission move forward with this project, Mr. Kikis graciously offered his continued assistance.⁸² He further provided that “any . . . statutory recommendation

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Professor Feinstein provided some additional recommendations. *Id.* He suggested that the statute should reflect the following practice: “if a court finds a rent increase to be unconscionable, then the request for the tenancy complaint regarding the increase must be dismissed.” *Id.* He explained that the “current practice . . . seems to be that . . . the court comes up with its own increase that it decides is not unconscionable,” and the change “would encourage landlords to ask only for reasonable increases.” *Id.* Finally, the Professor indicated that the “[s]tatutes could also be amended to allow for discovery in rent unconscionability cases or . . . unconscionability cases [could] not be tried in landlord tenant court at all.” *Id.*

⁷⁸ E-Mail from Nicholas J. Kikis, Vice President, Legislative & Regulatory Affairs, New Jersey Apartment Association, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 29, 2024, 10:42 AM EST).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

[should] make clear that while certain fees may not be considered ‘additional rent’ they may . . . be equitably charged and would be due and owing.”⁸³

Rutgers Law School Housing Justice and Tenant Solidarity Clinic

Comment regarding the Commission’s work in this area was received from the Rutgers-Newark Law School Housing Justice and Tenant Solidarity Clinic (“Rutgers Housing Clinic”).⁸⁴ The Rutgers Housing Clinic provided a comprehensive and thoughtful letter addressing the prevalence of the issue raised in *Opex*, as well as other relevant considerations.⁸⁵

The Rutgers Housing Clinic represents many “eviction defense clients liv[ing] in Essex County municipalities which have enacted rent control ordinances.”⁸⁶ Often, the *Opex* decision is used “to challenge landlords’ calculations of arrears in nonpayment proceedings,” as “[l]andlords often add late fees, legal fees and other charges onto tenant ledgers when asserting nonpayment of rent as a grounds for eviction.”⁸⁷ The Rutgers Housing Clinic explained that the *Opex* holding “provides a mechanism to protect tenants and to vindicate municipal intentions in enacting rent control ordinances.”⁸⁸ “In the Clinic’s usual region of operation, the issue of ‘additional rent’ exceeding permissible rent under a rent control ordinance is prevalent and one that the Clinic regularly raises.”⁸⁹

Observing that the *Opex* decision “strengthens rent control by clarifying that it truly limits what a landlord can charge,” the Rutgers Housing Clinic “supports modification of N.J.S. 2A:18-53 and N.J.S. 2A:18-61.1 to establish that the total monthly amount may not exceed the amount authorized by local ordinance.”⁹⁰

⁸³ *Id.*

⁸⁴ Letter from Elias Bell, Clinical Law Student, Rutgers Law School Housing Justice and Tenant Solidarity Clinic and Victor Monterrosa, Jr., Esq., Managing Director, Rutgers Law School Housing Justice and Tenant Solidarity Clinic, to Whitney G. Schlimbach, Counsel, NJLRC, Re: Comments on Statutory Modification in Response to *Opex* (Mar. 4, 2024).

⁸⁵ *Id.*

⁸⁶ *Id.* at *1.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at *1-2.

⁹⁰ *Id.* at *2-3 (providing additionally that the *Opex* Court’s “recognition of rent control as setting a hard limit to the amount that can be charged a tenant represents appropriate deference to the role of municipal governing bodies in ascertaining and responding to local conditions” because the holding “restrict[s] the ability of landlords to circumvent rent control ordinances through the imposition of fees”).

The Rutgers Housing Clinic also emphasized that, in the case of unpaid “additional rent,” a tenant may still be threatened with eviction, although “‘additional rent’ is an amount over and above that charged for the use of the dwelling unit.” *Id.* at *2. Since tenants will, if possible, “pay arrears in order to avoid losing their home,” “landlords stand in a special category” of debtors who are able to employ the threat of eviction to collect debt, “even when the debt is for fees in excess of the base rent.” *Id.* The Rutgers Housing Clinic concluded that, “[w]ithout *Opex Realty*, landlords retain that special status even when the alleged debt exceeds the legal rent.” *Id.* However, *Opex* “appropriately recognize[d] rent control as a limit on this status and prevents eviction over a debt that can be collected through ordinary debt-collection mechanisms.” *Id.*

In addition, outside the context of rent control, the Rutgers Housing Clinic “urge[d] the Commission and the Legislature to review how leases may define ‘additional rent’ in light of the strong public policy considerations in favor of tenant protection.”⁹¹ Noting the legislative goals of the Anti-Eviction Act and the severe shortage of all types of housing in New Jersey and nationally, the Rutgers Housing Clinic suggested that, in addition to “clarifying that the total monthly amount due from tenant to landlord may not exceed the amount authorized by local ordinance,” the statute should be amended “to establish that fees may not constitute ‘additional rent’ for which nonpayment provides grounds for eviction.”⁹²

Legal Services of New Jersey

Finally, comments were also submitted by Legal Services of New Jersey (“LSNJ”).⁹³ LSNJ represents low-income individuals in many types of proceedings, “including eviction defense, civil disputes over rent and security deposit, and rental discrimination complaints.”⁹⁴ In addition, LSNJ explained that it has been Amicus Curiae “in virtually every New Jersey Supreme Court decision regarding the Anti-Eviction Act.”⁹⁵

With respect to the issue addressed by the Court in *Opex*, LSNJ “does not believe that amendment to the statute is necessary in this matter, as the law regarding rent, and the authority of a municipal rent control ordinance in establishing what rent is legally due and owing, is already well established.”⁹⁶ Since the principle in *Opex* was “affirmed by the New Jersey Supreme Court and [is] routinely considered in Special Civil Part tenancy matters, the statute already requires compliance with federal, state and municipal laws” with respect to whether “and to what extent rent is due and owing and whether or not grounds to enter a judgment meet the statutory requirements.”⁹⁷

LSNJ explained that “[t]he statute – affirmed by case law – already provides that a landlord may not remove a tenant from the premises for failure to pay rent or a rental increase, unless the amount claimed due complies with other applicable law, including a municipal rent leveling ordinance.”⁹⁸

⁹¹ *Id.* at *4.

⁹² *Id.* at *4-5.

⁹³ Letter from Maura Sanders, Practice Section Chief Counsel for Housing, Legal Services of New Jersey, to Whitney G. Schlimbach, Counsel, NJLRC, Re: Consideration of Changes to the New Jersey Anti-Eviction Act (Mar. 7, 2024) (by E-Mail rec’d Mar. 7, 2024, 6:28 PM EST) [hereinafter “LSNJ Letter”] (“Within our statewide Housing Task Force and Eviction Defense Group meetings, we have discussed and reviewed the Law Revision Commission’s consideration of proposed changes to the Anti-Eviction Act.”).

⁹⁴ *Id.* at *1.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *1-2.

⁹⁸ *Id.* at *2 (citing N.J. STAT. ANN. § 2A:18-61.1(f) and *Sidisin*, 258 N.J. Super. at 19).

Therefore, “LSNJ does not believe that an amendment is necessary, particularly if it references municipal rent control ordinances only and does not reflect the full range of considerations necessary when determining if in fact a rent charge is legally due and owing.”⁹⁹ In addition, LSNJ expressed concern that “[s]uch an amendment could in fact create confusion or call into question why municipal rent control is provided additional emphasis beyond what already exists in statute, while other factors impacting the amount of rent due and owing are not.”¹⁰⁰

Pending Bills

There are multiple pending bills addressing N.J.S. 2A:18-53¹⁰¹ and N.J.S. 2A:18-6.1.1.¹⁰² None of these bills provide clarification regarding the definition of the term “rent” in the statutes.

Conclusion

New Jersey statutes do not define the term “rent” in the context of landlord tenant law. In *Opex*, the Court held that “[r]ent as defined by the parties, be it additional or otherwise, is rent, and unless expressly exempt from a rent control ordinance, must be viewed in light of the controls, limitations, and provisions contained therein.”¹⁰³

Following a request to conduct further outreach and research to determine whether N.J.S. 2A:18-53 and N.J.S. 2A:18-61.1 would benefit from a modification clarifying the definition of the term “rent” as discussed in *Opex*, the Commission authorized targeted outreach to determine the prevalence of this issue in New Jersey.¹⁰⁴ In light of the comments received in response to this outreach, Staff requests guidance from the Commission regarding the direction of the project.

LSNJ added that the Supreme Court “has recognized that the matter is well settled that even with lease provisions designating rent or ‘additional rent’ the amount due as rent may be limited by a rent control ordinance,” or other relevant law, and furthermore, that “this information is announced at the start of every Special Civil Part tenancy calendar call.” *Id.* (citing *Taylor*, 171 N.J. at 586 and *Harris*, 155 N.J. at 234). *See supra* note 43.

⁹⁹ LSNJ Letter, *supra* note 93, at *2.

¹⁰⁰ *Id.* (“as remedial legislation deserving of liberal construction, the Commission should be cautious in recommending an addition[] to the statute that could upset the construction already established through substantial case law”).

¹⁰¹ A.B. 3741 (identical to S.B. 1007), 221st Leg., 2024 Sess. (Feb. 22, 2024) (“[p]rovides rental and lease protections for victims of domestic violence, sexual assault or stalking”); A.B. 3592, 221st Leg., 2024 Sess. (Feb. 8, 2024) (“[r]equires landlord to provide written explanation for rent increase”); A.B. 158, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[a]uthorizes imposition of additional fines for overcrowding”); A.B. 2627, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[p]ermits landlords to take actions after death of tenant in certain situations”); A.B. 2862, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[d]esignates drug court program as the ‘special probation recovery court program’ in statutes”); S.B. 1028, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[r]equires landlord to provide written explanation for rent increase on tenant of senior citizen housing project”).

¹⁰² A.B. 3741 (identical to S.B. 1007), 221st Leg., 2024 Sess. (Feb. 22, 2024) (“[p]rovides rental and lease protections for victims of domestic violence, sexual assault or stalking”).

¹⁰³ *Opex*, 460 N.J. Super. at 295.

¹⁰⁴ March 2021 Minutes, *supra* note 6, at 8.