To: **New Jersey Law Revision Commission**
From: **Staff**
Re: **Landlord Tenant Law – Substantive comments on Tentative Report**
Date: **March 7, 2011**

MEMORANDUM

Since the Commission's release of the Tentative Report on proposed Title 46A pertaining to landlord and tenant law, Staff has received extensive comments from various sources, including the Department of Community Affairs (DCA), the Administrative Office of the Courts (AOC), Legal Services of New Jersey (Legal Services), the New Jersey Tenants Organization (NJTO), the New Jersey Apartment Association (NJAA), the New Jersey Chapter of NAIOP, Judge Mahlon Fast, Ret., and other individual commenters. Many of these comments clarify language or enhance the meaning of revisions already determined by the Commission. In most cases, the comments received are consistent with the Commission's direction and will be incorporated into the tentative report for Commission review at a subsequent meeting. However, Staff now seeks Commission guidance with regard to proposed changes which either raise a new issue or seek significant deviation from the Commission's prior determinations. In some cases, Staff believes that a determination already made by the Commission deserves a second look because of an issue newly raised.

The comments are addressed in order of the provision in the tentative report to which they apply. All references are to the numbering and page numbers in the October 27, 2010 tentative report. Formal written submissions made by commenters also accompany this memorandum for Commission consideration. This memorandum does not discuss all comments received. Commenters may raise with the Commission on meeting day other issues identified in their submissions.

The following sections require Commission resolution:

1. **NOTIFICATION TO TENANTS IF PROPERTY IN FLOOD ZONE**
(46A:4-7 – p.22)

Current law requires that landlords of residential and nonresidential properties provide tenants with notification if rental property is in a flood zone. In the revision, the Commission decided to continue current law but modified the timeframe for notification. Currently, the landlord must notify the tenant about the flood zone determination prior to the tenant's occupancy. The Commission changed this to require notification to each new tenant prior to the commencement of the lease, thus better achieving the purpose of giving the tenant the option, consistent with the legislative history of the provision, not to enter into the lease at all upon learning of the flood zone determination. Each existing tenant is also to be notified at the time the flood zone determination is made.

Commercial landlords object to this requirement as it applies to nonresidential tenancies. One commenter notes that "the provision of existing law making the requirement of notice of flood zone or area applicable to commercial tenancies . . . is virtually unknown among

experienced commercial leasing lawyers." They further object to this provision because the proposed language (1) does not contain a clear definition of how a "flood zone or area" is designated or determined in accordance with law; (2) does not differentiate among portions of the property that may be in a flood zone or area, i.e., habitable area and parking area, versus known wetlands which are remote to the buildable areas of the property or address properties which have been graded so that habitable areas are above the base flood elevation in effect at the time of development; (3) does not take into consideration the landlord's knowledge of a change in status of the property since even under established and recognized flood designation or control programs, designations change because of the standards for determining them; (4) does not provide a time limit within which the tenant must notify the landlord that the tenant will not enter into the lease because of the flood zone determination; and (5) does not require the tenant to continue to pay the rent until possession is returned to the landlord. A complete set of the comments on behalf of the NAIOP are attached to this memorandum.

Working with the NAIOP, Staff has made modifications to this provision in order to address some of the concerns raised. The Staff draft now requires the landlord to give notice of the flood zone determination prior to the tenant's agreement to lease and requires the tenant, within three business days after notification, to terminate the lease in writing. The provision also permits the tenant to choose a termination date for the lease so long as it is not more than thirty days after such notice is to be given to the landlord. The tenant is obligated to pay rent until termination of the lease. Most significant, however, a landlord need not notify tenants and a tenant may not now terminate a lease under this section if the flood zone or flood area determination is made after the tenancy has commenced and the tenant is already in occupancy. This addresses the NAIOP concern that if there is a change in flood zone determination, i.e., property becomes located in a flood zone area after the tenancy has commenced (which is not often but does occur), the landlord would not be obligated to have to notify the tenant of the flood zone area. NAIOP explains that since a change in flood zone status is not the result of an act of the landlord or the tenant, a tenant should not have the right to void a lease to the detriment of an innocent landlord under such circumstances. The revised provision is set forth below for Commission comment:

46A:4-7. Notification to tenants if property in flood zone; residential and nonresidential rental premises

a. A landlord of residential or nonresidential rental premises shall notify, in writing, each tenant if the rental premises or the real property containing the rental premises subject to the lease are determined, in accordance with law, to be located in a flood zone or area either before or at the inception of the lease. ~~Each existing tenant shall be notified at the time that the determination is made.~~ If the lease is in writing, the notice required under this subsection may be included in the written lease if printed in bold face capital letters of not less than 10 point font.

b. Each new tenant shall be notified prior to the tenant's signing of the lease or, in the case of an oral lease, prior to the tenant's agreement to lease the rental premises or the real property containing the rental premises, provided that ~~I~~if notification is not ~~provided~~ given to the tenant until the lease has already been signed by both parties or the tenant has already occupied the rental premises or the real property, the tenant may, by written notice to the landlord given within three business days of the tenant's receipt of notification, ~~void~~ terminate the lease on the basis that the rental premises or the real property are located in a flood zone or area. The tenant

shall choose a termination date not more than thirty days after written notice of termination is to be given to the landlord. A tenant may not terminate a lease under this section if the flood zone or flood area determination is made after the tenancy has commenced and the tenant already is in occupancy of the rental premises or real property.

c. A tenant who terminates a lease under subsection b. shall pay rent in accordance with the provisions of the then existing lease until the lease termination date.

Source: 46:8-50.

2. **LANDLORD IDENTITY REGISTRATION**

(46A:12-10(a) – p. 41)

This proposed section requires the court to defer entry of judgment for possession where a landlord has failed to register the rental property. The section affords the landlord up to 90 days to cure a failure to provide proof that the property has been registered. The AOC prefers a 60-day time frame which appears to be acceptable to the landlord representatives. Accordingly, Staff recommends changing the time frame to cure from 90 days to 60 days. As this is a change in current law, however, Staff seeks Commission approval. The section would appear as follows:

46A:12-10. Judgment for possession in favor of landlord; compliance with chapter

a. No judgment for possession shall be entered in favor of a landlord who has failed to comply with this chapter. The court shall defer the entry of a judgment for possession for up to ~~90~~ 60 days, at which time the action shall be dismissed unless the landlord submits to the court proof of registration and service of the certificate of registration on the tenant, within the ~~90~~ 60 days.

b. Notwithstanding subsection a., if the landlord demonstrates that relocation assistance to which the tenant is entitled under applicable law has been paid, a judgment for possession may be entered in favor of a landlord who has not filed a certificate of registration for a dwelling unit from which the landlord seeks to evict a tenant under subsection e.(3) of 46A:15-1.

Source: 46:8-33.

3. **SECURITY DEPOSITS**

A.**RETURN OF SECURITY DEPOSIT TO MULTIPLE TENANTS**

(46A:13-10 b. – p. 50**)**

This proposed subsection now provides that in the case of multiple tenants, the landlord return the security deposit to "all tenants named on the lease unless the tenants otherwise instruct the landlord in writing". DCA recommends that the statute require that, in the case of multiple tenants, a written lease set forth to whom the deposit should be returned. DCA suggests that the statute further provide that if the written lease does not set forth to whom the deposit should be returned, then the landlord, in every case, and as a default rule, should return the security deposit to the tenant from whom it was received. As this is different than the current proposal, Staff seeks the Commission's views on this change.

B.**ALTERNATIVES TO SECURITY DEPOSIT**

(46A:13-16 – p.55)

Although already decided by the Commission, the issue of security deposit replacement fees may need further review. Both DCA and Legal Services object to the inclusion of replacement fees as an alternative to a security deposit. Both contend that this is contrary to the intention of the current law and does more harm than good for the tenants. DCA contends that "[a]lthough a fraction of the amount of a security deposit, a security deposit replacement fee may provide some landlords with unjust enrichment in cases where the tenant does not damage the property and terminates the lease without owing the landlord any money." The issue continues to be further complicated by the fact that at least for some landlords, the imposition of these fees, as well as pet fees (which are actually rent by another name but can be confused with security deposit replacement fees) has become current practice. Staff believes that the Commission should reconsider this issue.

4. **EVICTION**

A. **HABITUAL LATE PAYMENT OF RENT**

(46A:15-1 b. (1) – p. 62)

Although habitual late payment of rent is a ground for eviction under current law (and such ground is continued in the revision), several commenters believe that the issue of habitual late payment of rent is not adequately addressed in the statute, i.e., the statute does not clarify the standard for determining what is considered to be "habitual." Current case law requires that in order to establish "habitual late payment", a tenant must be given a notice to cease and then have paid rent late more than once ("[b]efore the landlord can initiate an eviction proceeding based on habitual late payment of rent, the landlord is obliged to accept a series of late payments in order to establish that the lateness is habitual." See *A.P. Development Corporation v. Band*, 113 N.J. 485, 497-98 (1988).) The Supreme Court, although further concluding in *Band* that the Anti-Eviction Act requires a "continuing course of conduct by the tenant over a period of time and is not based upon a single late payment", rejected the tenant's contention that the court establish a strict time limit between the notice to cease and the notice to quit, stating:

> We agree with the landlord's position that 'habitual' is a function of time and circumstances. To apply a strict time limitation rule will result in unfairness in certain instances. A more flexible time period affords tenants a greater opportunity to change their pattern of late payments of rent. Indeed, a strict time limit may, under certain circumstances, force a landlord to institute an eviction action against a tenant sooner than he or she would have in the absence of a time limit.
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> See *A. P. Development Corporation v. Band*, 113 N.J. 485, 496-498 (1988).

This reasoning was recently repeated in *Matthew G. Carter Apartments v. Richardson*, 2010 WL 4739934 (2010) where the court, citing to *Band*, was faced with the issue of what constitutes habitual late payment of rent. The court stated that "[t]he critical issue in this case is whether the Legislature intended to provide a cause of action for eviction pursuant to N.J.S. 2A:18-61.1(j) solely because a tenant makes a second late payment of rent after receipt of a notice to cease. Plaintiff contends that this was the Legislature's intent, and the trial judge agreed. We concluded, however, that whether a tenant 'has habitually and without legal justification failed to pay rent which is due and owing' cannot be determined in such a mechanical fashion." Accordingly, the Appellate Division in *Matthew G. Carter Apartments*

relied upon the Supreme Court's decision in *Band* as the basis for the inference that "each case requires a fact- sensitive inquiry into the tenant's conduct after receipt of the notice to cease", stating further that:

> A 'continuing course of conduct by the tenant' may arise immediately after the notice to cease is served, indeed within the first few months. Similarly, after the passage of several months subsequent to service of the notice to cease, a 'continuing course of conduct' may arise by repeated late payments without legal justification. We do not foreclose the possibility that in the specific circumstances presented, two late rental payments after the service of a notice to cease would amount to 'habitual ' late payment, thus giving the landlord a cause of action under N.J.S. 2A:18-61.1(j). In each case, the trial judge must assess the evidence as to the 'time and circumstances' of the late payment to determine whether a cause of action for eviction has been proven.

Staff had contemplated providing a clearer standard in the statute, in accordance with case law. However, Staff believes upon further review that the determination is so fact sensitive that the most that should be added to the current statute, if at all, is that the landlord must demonstrate a continuing course of conduct on a case-by-case basis. Staff seeks Commission guidance in this regard.

B. **EVICTION FROM PUBLIC HOUSING**
(46A:15-1 b. (5)) – p. 63)

The NJAA and another commenter alerted Staff to an error in this section in that there should not be any "notice to cease" requirement for eviction based on a public housing tenant's substantial violation or breach of a lease provision pertaining to illegal uses of controlled substances or other illegal activities. Federal law controls with respect to evictions in federally-funded properties and federal law does not require such a notice. (Staff incorrectly read the source provision when this change was made.) Staff will correct the error by placing this section at the end of subsection c. of 46A:15-1 in the next draft of the tentative report.

Another issue pertaining to this very section has also been raised in a letter from Feinstein Raiss Kelin & Booker, which accompanies this memorandum. That letter states that although the plain language of the source provision suggests that the source only applies to "public housing under the control of a public housing authority or redevelopment agency", federal regulations apply more broadly. The source section has been applied to tenants who are recipients of Section 8 assistance where the property was not under the control of a public housing authority or redevelopment agency as well as to tenants in federally assisted housing that is privately-owned but receiving project-based assistance and other housing. To remedy this issue, the letter suggests, and Staff agrees based on the case law reviewed, that the language of the section be modified (which will be a modification of current law) as follows:

46A:15-1

* * * *

b. [will become c.] (5) in public housing under the control of a public housing authority or redevelopment agency or in any federally assisted housing, substantially violates or breaches any covenants or agreements contained in the lease pertaining to illegal uses of controlled substances, or other illegal activities, regardless of whether sufficient language in the lease conveys that the violation or breach of the covenant or agreement allows the landlord to seek a termination of the lease, eviction of the tenant and a return of possession of the rental premises, provided that the covenant or agreement conforms to federal ~~guidelines~~ law and regulations regarding the lease provisions and was contained in the lease at the beginning of the lease term; or

C. **EVICTION FROM RESIDENTIAL OR NONRESIDENTIAL PREMISES OR PREMISES FOR SEASONAL USE OR RENTAL; IMMINENT SERIOUS DANGER; FALSE MATERIAL INFORMATION IN RENTAL APPLICATION**
(46A:15-5- p.72)

Two different comments have been made with regard to this section that Staff believes require Commission attention. One commenter has requested that in subsection b. of this section, which pertains to the new ground for eviction for knowingly giving false material information or omitting material facts in an application for tenancy, the phrase "No eviction under this subsection may be commenced later than 90 days after the falsity or omission is discovered and one year after the application is received" be modified to state, instead, that "No eviction under this subsection may be commenced later than 90 days after the falsity or omission is discovered *or* one year after the application is received, *whichever is earlier*." The Commission seeks approval for this clarification.

Although Legal Services objects to the entirety of this section, it raised, by its objection, the more problematic issue of whether, at the very least, a "notice to cease" should be a pre-requisite for the enforcement of subsection a. Upon further consideration, Staff believes that a notice to cease requirement may make sense for subsection a., particularly because a tenant may be doing something that the tenant does not deem dangerous but the landlord does. However, in earlier discussions of this issue, the concern had been raised that some conduct is too dangerous to address until after a notice to cease has been served. Staff seeks Commission guidance as to how to proceed with regard to both proposed changes to this section.

The entire revised provision would appear as follows:

46A:15-5. Eviction from residential or nonresidential premises or premises for seasonal use or rental; imminent serious danger; false material information in rental application

A tenant may be evicted from any rental premises, whether the rental premises are residential or nonresidential or for seasonal use or rental, upon establishment that the tenant:

a. engages in any conduct that will create, if it continues after service of a notice to cease in accordance with this article, an imminent serious danger to others, to the building, or to the immediate vicinity of the rental premises; or

b. knowingly gives false material information or omits material facts in an application for tenancy provided that the landlord proves that had the landlord known the truth, the landlord's

consistent and lawful policy would have been to deny the lease. No eviction under this subsection may be commenced later than 90 days after the falsity or omission is discovered ~~and~~ or one year after the application is received, whichever is later. This subsection shall not bar commencement of any other actions to which the landlord may be entitled under law.

Source: New.

D. WARRANT FOR EVICTION FROM RESIDENTIAL RENTAL PREMISES; REQUIREMENTS; EXECUTION

(46A:17-4 -p.87)

Although current law provides requirements for both the issuance and execution of warrants for eviction, issuance and execution are distinct and treated separately under the law. Under current section N.J.S. 2A:18-57, a warrant may not be issued until the expiration of three days after entry of judgment for possession except in the case of seasonal tenancies, for which a two-day window applies. This is consistent with court rules (i.e., Rule 6:7-1 (c)) This provision now appears in proposed section 46A:17-3 (and notably the AOC wishes to designate the three days as "business" days which Staff believes is appropriate and consistent with court rules).

However, execution of a warrant is a different matter. The requirements in current law for the contents and the execution of a warrant pertaining to residential rental premises, formerly in N.J.S. 2A:42-10.16 and 10.17, now appear in the tentative report at section 46A:17-4. Under current law, there are no clear provisions in the statute regarding the execution of warrants for eviction from nonresidential rental premises and hence no comparable provision to 46A:17-4 for nonresidential rental premises in the tentative report. However, the court rules do address the issue. R. 6:7-1 (c) provides that warrants of eviction *from residential premises* shall not be executed "earlier than the third business day after service on a residential tenant" Staff believes that the distinctions set forth in the court rules should be incorporated into the statute and a comparable provision to 46A:17-4 should be created with regard to nonresidential rental premises. A proposed new provision for execution of warrants for eviction from nonresidential rental premises appears below:

46A:17-4. Warrant for eviction from nonresidential rental premises or a dwelling unit for seasonal use or rental; requirements; execution

a. The warrant for eviction from nonresidential rental premises or from a dwelling unit for seasonal use or rental shall:

(1) be executed after it is issued without any waiting period;

(2) be executed during the hours of 8 a.m. to 6 p.m., unless the court, for good cause shown, otherwise provides in the judgment for possession or by a post-judgment determination;

(3) state that the warrant shall be executed only by an enforcement officer as defined in chapter 1 of this Title;

(4) include a notice:

(a) advising that it is illegal as a disorderly person's offense for a landlord to padlock or otherwise block entry to a nonresidential rental premises while a tenant is still in possession of the premises unless in accordance with the lease or a distraint action involving a nonresidential premises as permitted by this Title or other law; and

(b) advising that a tenant's belongings may be removed from rental premises by a landlord after eviction only in accordance with the lease and chapter 27 of this Title pertaining to abandoned property;

(c) concisely summarizing this section with special emphasis on the duties and obligations of law enforcement officers under this section;

(d) advising of the tenant's right to file a court proceeding pursuant to N.J.S. 2A:39-1 *et seq*., and

(e) advising that if the tenant is a business entity, other than a sole proprietor or a partner in a general partnership, such an entity is required to be represented by counsel under R. 1:21-1(c) and R. 6:10 of the Rules Governing the Courts of the State of New Jersey.

b. Upon execution of the warrant for eviction in accordance with subsection a., the enforcement officer shall prepare a statement of "Execution of Warrant for Eviction" that identifies the warrant, the date of issuance of the warrant, the court and judge who authorized the warrant, the date and time of execution of the warrant, and the name, signature and position of the person executing the warrant. The enforcement officer who prepares the statement shall immediately give the statement to the court and deliver the statement by personal service to the landlord or the landlord's representative and to the tenant. However, if the statement cannot be personally served on the tenant, the statement shall be affixed to the door of the rental premises to which the warrant applies and also delivered in the manner provided under section 46A:16-5.

Source: New

The AOC has also asked that the Commission set forth the statutory requirements for a writ of possession in order to facilitate the creation of a template for the benefit of counsel and the court. Staff has asked commenters to assist with the language for such a writ and Staff hopes to have draft language available in the next version of the tentative report.

E. **STAYS FOR TENANT'S VOLUNTARY MOVE; ORDERS FOR ORDERLY REMOVAL; ALL RENTAL PREMISES EXCEPT SEASONAL USE**

(46A:18-4- p. 91)

Judge Fast has suggested that stays of execution of warrants for a tenant's orderly removal should apply to both residential and nonresidential tenants. However, the NAIOP objects to the application of such stays to nonresidential tenants. NAIOP contends that a nonresidential tenant already has received a demand for possession, has waited for the eviction complaint to be filed and processed and has had the time between service of a summons or notice of a hearing and the actual hearing date to prepare to move. Notably, in current law, no statutory stay provisions apply to nonresidential tenants.

Although there is mention of orderly removal in the court rules, the proposed stay for orderly removal provision is new to the statute. The court rule does not distinguish between residential and nonresidential tenancies. Keeping in mind that under proposed section 46A:18-4, the tenant does not have to make rent payments during the seven day stay period, and that no other statutory stay provisions apply to nonresidential tenants, Staff does not recommend that orderly removal stays should apply to nonresidential tenants. However, Staff seeks Commission resolution of this issue. (The language of the provision as it appears in the tentative report is set forth below for the convenience of the Commission with minor modifications suggested by commenters.)

46A:18-4. Stays for tenant's voluntary move; orders for orderly removal; all rental premises except seasonal use

a. After entry of judgment for possession and issuance of a warrant for eviction or writ of possession pertaining to rental premises as provided in subsection d. of this section, the court may, as it deems equitable and proper under the circumstances, and upon post-judgment application ~~under the court rules pertaining to orders for orderly removal~~, grant a stay of execution of the warrant or enforcement of the writ for a period of no more than seven calendar days in order to enable a residential [or nonresidential] tenant in distressed circumstances to vacate the rental premises voluntarily.

b. Any order for post-judgment relief under this section shall be the final order in the matter unless the judgment is determined to have been void or the landlord has not complied with any prior orders concerning the same rental premises, in which case the tenant may be entitled to additional relief.

c. Nothing in this section shall preclude a landlord from commencing a separate action for payment of the rent due for the period of the stay granted under this section.

d. This section shall not be applicable to a dwelling unit for seasonal use or rental, as defined in chapter 1 of this Title or to a mobile home or land in a mobile home. The execution of a warrant for eviction from or enforcement of a writ of possession to a dwelling unit for seasonal use or rental may be stayed only upon consent of the landlord.

Source: New.

5. **DELETION OF WORD "SUBSTANTIAL" FROM CERTAIN GROUNDS FOR EVICTION OF NONRESIDENTIAL TENANTS**

(46A:15-4- p.71)

The NAIOP has requested that subsection 46A:15-4f. be modified to delete, among other things, the word "substantially" before the word "breaches or violates any covenant or agreement contained in the lease". This subsection states a ground for eviction if a commercial tenant:

> "substantially breaches or violates any covenant or agreement contained in the lease, where sufficient language in the lease conveys that the violation or breach of the covenant or agreement allows the landlord to seek a termination of the lease, eviction of the tenant and a return of possession of the rental premises . . ."

NAIOP contends that it is not the substantiality of the breach but the materiality of the covenant or agreement that is important and that "default and eviction although the standard remedies reserved by landlords, are simply not realistic remedies for breaches of immaterial covenants (failure to clean up outside debris, failure to clear ice and snow, etc.)." At the same time, though not in his written submission, Judge Fast advises that the Appellate Division has ruled that breaches under source provision 2A:18-53 (which pertains to commercial tenancies) must also be substantial.

Staff is in the process of researching this issue and will advise the Commission of its conclusions on meeting day. The word "substantial" is also used in current law (and has been continued in the revision) to qualify breaches or violations by residential tenants that form a basis for eviction.

6. **REPEAL OF 2B:12-20, MUNICIPAL HOUSING COURT; JURISDICTION**

Judge Fast reminded Staff of the existence of N.J.S. 2B:12-20 which states:

> **2B:12-20. Municipal housing court; jurisdiction**. A municipality in a county of the first class may establish, as a part of its municipal court, a full-time municipal housing court. Municipal housing courts shall have jurisdiction over actions for eviction involving property in the municipality which are transferred to the municipal housing court by the Special Civil Part of the Superior Court.
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> L.1993, c.119, s.1; amended 2003, c.295, s.29.

Although not a part of the original project, Staff believes after discussion with the AOC and others that municipal courts do not and should no longer have jurisdiction over tenant matters and therefore this provision should be recommended for repeal as part of this revision.

7. **EFFECT OF CAMPGROUNDS AND MOBILE HOMES**

Staff received comments from the New Jersey Manufactured Housing Association (NJMHA), a trade association representing manufactured housing in New Jersey that has approximately 300 members, including owners of land lease communities, community operators, suppliers, service providers and manufacturers. As they describe in their comments, their community members typically lease land to owners of manufactured homes and are colloquially (and in the statutory scheme) referred to as mobile home parks. Some of the issues they raise will require further research and review and Staff will report to the Commission after more is learned about the distinctions between mobile home parks and campgrounds as they apply to the landlord tenant laws.