

**To: New Jersey Law Review Commission**  
**From: Joseph Miller, Legislative Law Clerk**  
**Re: "Additional Rent" as discussed in *Opex Realty Mgmt v. Taylor*, 460 N.J. Super. 287 (Law. Div. 2019)**  
**Date: March 08, 2021**

## MEMORANDUM

### Executive 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.”<sup>1</sup> Pursuant to the State’s eviction statutes, a tenant may be subject to eviction for failure to pay rent.<sup>2</sup> “Rent” is not defined in the New Jersey statutes.<sup>3, 4</sup>

In *Opex Realty Mgmt, LLC v. Taylor*, the Court considered whether non-payment of late fees and legal fees, deemed “additional rent” in the lease, may form the basis of an eviction when the “additional rent” would cause the total rent to exceed the maximum rent allowed by local ordinance.<sup>5</sup>

### Statute Considered

N.J.S. 2A:18-61.1 concerns the grounds for removal of residential tenants. Subsection a. of that section provides that an individual may be removed if:

[t]he 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**. (Emphasis added)

N.J.S. 2A:18-53 also provides, in pertinent part, that certain tenants may be removed from premises by an action in the Superior Court, Law Division, Special Civil Part “[w]here such person

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<sup>1</sup> N.J. STAT. ANN. § 2A:18-61.1a (West 2021).

<sup>2</sup> N.J. STAT. ANN. § 2A:18-61.1 (West 2021) and N.J. STAT. ANN. § 2A:18-18-53. (West 2021).

<sup>3</sup> *Opex Realty Mgmt., LLC v. Taylor*, 460 N.J. Super. 287 (Law. Div. 2019).

<sup>4</sup> N.J. STAT. ANN. § 2A:18-61.16a (West 2021) defined rent as “the amount currently payable by the tenant to the landlord pursuant to lease or other agreement...” but that statute (regarding relocation assistance for displaced tenants in Atlantic City, effective in 1981), is shown as “expired as a supplement to 1978, c.139 by operation of s.10 of 1978, c.139 as amended by 1984, c.177”.

<sup>5</sup> *Id.* at 289.

shall hold over after a default in the payment of **rent**, pursuant to the agreement under which the premises are held. [Emphasis added]”

## Background

In the case of *Opex Realty Mgmt., LLC v. Taylor*, the defendants Robert and Mildred Taylor lived in an apartment in Newark subject to the city’s rent control ordinance.<sup>6</sup> Their landlord, Opex Realty Management, LLC, brought a summary dispossess action to evict them for the non-payment of rent.<sup>7</sup> The action included a claim for \$372 in “additional rent” in the form of late fees and legal fees.<sup>8</sup> The defendants paid the overdue monthly rent into escrow, but did not pay the \$372 in fees designated “additional rent” in their lease.<sup>9</sup>

At the time of the suit, the defendant’s monthly rent was equal to the maximum allowable rate set by Newark’s rent control ordinance.<sup>10</sup> The Court was asked to consider whether a landlord may evict a tenant for the nonpayment of fees, characterized as “additional rent” in the lease, if the fees raised the tenant’s total rent above the allowable rate set by a local rent control ordinance.<sup>11</sup>

The defendants argued that if the landlord can claim “additional rent” as rent in eviction proceedings, it must be considered rent for purposes of the Newark rent control ordinance.<sup>12</sup> As such, their rent would exceed the city ordinance making the additional rent invalid for the purposes of eviction.

## Analysis

The New Jersey statutes do not define the term “rent.”<sup>13</sup> Courts have consistently held that parties are free to define the terms of a lease, including rent, “absent some superior contravening public policy.”<sup>14</sup> In 1998, the New Jersey Supreme Court held that parties to a lease may designate late and legal fees as “additional rent,” so long as it does not violate public policy.<sup>15</sup>

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<sup>6</sup> *Id.* at 289.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 290.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 296.

<sup>11</sup> *Id.* at 289-90.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 290.

<sup>14</sup> *Id.* citing *Hous. Auth. & Urban Redev. Agency v. Taylor*, 171 N.J. 580 (2002) (the case of public housing, federal law defines rent as “the amount payable monthly...as rent”); *Marini v. Ireland*, 56 N.J. 130 (1970) (according to the lease, Landlord was required to make repairs to furnish a livable apartment, failing to do so, the tenant could make the repairs and deduct the cost from rent); *Fargo Realty, Inc. v. Harris*, 173 N.J. Super. 262 (App. Div. 1980) (rent may include tenant-inflicted damages including legal fees if defined as such in the lease). See also *Vineland Shopping Ctr., Inc. v. De Marco*, 35 N.J. 459 (1961) (sewage charges not defined as “rent” or “additional rent” in the lease were considered as rent because the tenant had agreed to pay them each month

<sup>15</sup> *Id.* citing *Cnty. Realty Mgmt., Inc. v. Harris*, 155 N.J. 212, 234 (1998).

### *Opex Realty Mgmt v. Taylor*

The *Opex* Court described the case as squarely presenting “an unresolved issue of landlord-tenant law with important implications in a fast-changing residential rental market in our state's largest city.”<sup>16</sup> The Court recognized that a municipality may define rent, for the purposes of a rent control ordinance, as including or excluding various fees or damages.<sup>17</sup> Further, if a local ordinance does not explicitly exclude “additional rent” from its definition, it should be interpreted as rent under the ordinance.<sup>18</sup>

In *Opex*, the Court found that because Newark’s definition of rent was broad (“the consideration... demanded or received for, or in connection with, the use or occupancy of housing space...”), it should be read liberally to include late fees and legal fees described as “additional rent” in a lease.<sup>19</sup>

Courts considering this issue have determined that they would not allow a landlord to claim a fee as “additional rent” for the purposes of an eviction proceeding, while simultaneously claiming the fee does not constitute rent under a local ordinance.<sup>20</sup> Since the landlord in *Opex* had taken the position that the late and legal fees were “additional rent” under the lease, the total amount of rent exceeded the Newark rent control ordinance.<sup>21</sup> As such, the Court held that the additional rent could not be imposed on the tenant.<sup>22</sup>

The Court specified that their ruling did not preclude a landlord from imposing additional rent on a tenant under all circumstances.<sup>23</sup> Instead, the Court explained that “rent, additional or otherwise, may never exceed the maximum allowable cost provided by an applicable rent control ordinance.”<sup>24</sup> Had the tenant not already been paying the maximum allowable rent, the landlord may have been able to impose some or all of the fees as additional rent, so long as it remained within the bounds of the local ordinance.<sup>25</sup>

### *The New Jersey Rules of Court*

The New Jersey Rules of Court provide that “[a] tenant does not have to pay for attorney's fees, late fees or other charges to avoid eviction unless there is a written lease that calls these items

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<sup>16</sup> *Id.* at 289.

<sup>17</sup> *Id.* at 291.

<sup>18</sup> *Id.* at 292-4 citing *Ivy Hill Park Apartments v. Sidisin*, 258 N.J. Super. 19 (App. Div. 1992) (Property damage considered as “additional rent” in a lease agreement must be included as rent under Newark’s rent control ordinance); *316 49 St. Assocs. Ltd. P'ship v. Galvez*, 269 N.J. Super. 481 (App. Div. 1994). (A landlord who created a lease-to-own scheme, which required a tenant to pay \$626 per month to circumvent a local rent limit of \$420, could only collect the regular \$388 monthly rent).

<sup>19</sup> *Id.* at 294-5

<sup>20</sup> *Opex*, 460 N.J. Super. 287 at 296.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

“additional rent.”<sup>26</sup> The Rules also provide that even if the lease defines fees as “additional rent,” the amount due may not exceed the amount permitted by local ordinances, or federal law in the case of federal public assistance.<sup>27</sup> A trial court judge presiding over a landlord-tenant trial must inform both parties of this limitation during the pre-calendar call.<sup>28</sup>

### **Pending Legislation**

There is no legislation currently pending that addresses the issue raised in this Memorandum.

### **Conclusion**

Staff requests authorization to conduct additional research and outreach to determine whether it would be useful to modify the statutes to address the issue raised in *Opex Realty Mgmt., LLC v. Taylor*.

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<sup>26</sup> Landlord/Tenant Pre-Calendar Call Instructions, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-S to R. 6:3-4(c), [www.gannlaw.com](http://www.gannlaw.com) (2021).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*