#007

October 16, 2020

SENT VIA ELECTRONIC DELIVERY

The Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08524-0037

Subject: **Comments on Proposed Amendments to Rule 1:38-3 – Records of Landlord/Tenant Matters Not Resulting in Judgement for Possession**

Dear Judge Grant:

On behalf of the New Jersey Apartment Association ("NJAA"), we appreciate the opportunity to comment on the above captioned proposal in which the Administrative Office of the Courts is proposing to restrict public access to certain records of landlord-tenant cases that are maintained by the Judiciary. Specifically, the court is proposing to amend Rule 1:38-3 to restrict access to court records of landlord-tenant cases that did not result in a judgement for possession or where a judgment for possession was entered and then subsequently vacated after a tenant repaid the past due rent that was the basis of the issuance of the judgment for possession. NJAA has significant concerns with this proposal, which we outline in our comments below.

The NJAA is an association of owners, managers, and developers of more than 220,000 apartment homes formed to represent the interests of the multifamily housing industry in New Jersey. One in three New Jersey families rent their home and more than one million of New Jersey residents live in professionally managed rental apartments.

While we understand that the Judiciary believes that this proposal to limit access to eviction records would expand housing opportunities, we are concerned that it will not have the intended effect, and may, in fact, have the opposite effect. Furthermore, we believe that the proposal is misguided in that it removes many records that properly reflect a person's suitability as a tenant and ignores the significant negative impact of repeat offenders on housing providers, especially small property owners who rely on consistent and timely rent payments to meet their own financial obligations.

We respectfully urge the Judiciary to reconsider this proposal, and would ask for the opportunity to discuss this matter further, with the goal of identifying a more holistic approach that would better balance the interests of both housing providers and renters. NJAA is committed to working with all stakeholders to improve access to housing, and hopes to have the opportunity for a continued dialogue on this issue.

Regarding the above captioned proposal, NJAA would like to submit the following comments:

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1) **Proposal Ignores the Negative Impact of Going Through the Court Process** – Property owners do not want to go through the eviction process, which is both time-consuming and costly. When tenants are unable to pay rent, most property owners will work with them in order to develop payment plans, connect them with social services, or identify other options outside of the eviction process. However, when these efforts fail, or residents simply are non-communicative, property owners' sole remedy is the eviction process.

   But by the time a nonpayment of rent case goes to trial, typically two to three months' rent is past due. Obtaining legal counsel, which is required for certain entities and recommended for all landlords, is costly. And depending on the lease agreement, rent regulations, or programmatic restrictions, attorneys fees are not always recoverable.

   For small property owners, especially those who own only one or two units, the disruption in income from a single nonpayment of rent case, coupled with legal expenses and court costs, can be daunting. As such, it makes sense for these property owners to carefully scrutinize applicants' suitability prior to renting to them, including evaluating applicants based in part on their history of appearances in landlord-tenant court.

2) **Many Records of Probative Value Would Be Sealed Under This Proposal** – The proposal attempts to seal records where no judgment of possession was entered, or where a judgement for possession was entered and then subsequently vacated. In the majority of nonpayment of rent cases where no judgment for possession is entered, or a judgment is entered but subsequently vacated, it is because the tenant paid rent after filing, but prior to the end of the court process.[1] As such, the court is operating under the theory that no harm was committed by the tenant's actions, and, as such, the record of that action should be sealed. But recent changes to statute provide tenants with three days after a lockout is executed to pay rent and have a judgement dismissed with prejudice.[2] And, so even if a tenant's case is ultimately dismissed, a property owner may have been without rent for months, while incurring court costs, legal fees, and other disruptions that might not be recoverable.

   While we would understand sealing records where the tenant raised a valid defense (e.g. habitability issues with the apartment, rent alleged was not due or was invalid, or landlord's failure to register), sealing records where a tenant failed to pay rent until taken to court will be significantly damaging to small property owners.

3) **Strong Protections Exist for Tenants** – It is also important to note that frequent claims that eviction records form a 'blacklist' and bar tenants from housing 'indefinitely' are simply untrue. Apartment owners frequently screen prospective residents based upon numerous

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[1] The Supreme Court discussed the dynamic in Hodges v. Sasil Corporation, 189 N.J. 210, 915 A.2d1 (2007) that while landlord-tenant court is putatively only about recovering possession, "in practice, the summary dispossess action is also a powerful debt collection mechanism." The Court noted that in oral arguments it was determined "that approximately one half of all summary dispossess proceedings result in tenants remitting owed rent to stave off eviction."

[2] N.J.S.A. 2A:42-10.16a

nondiscriminatory criteria, including credit scores, debt levels, collections, bankruptcies, and eviction records to determine creditworthiness. While income determines a tenant's ability to repay, creditworthiness determines a tenant's likelihood of repaying, and both are important in the screening process. Rarely, however, is a tenancy record an automatic disqualifier. Rather, apartment owners typically use screening algorithms and/or procedures that look at eviction records in tandem with other factors. For example, an application from a tenant with a marginal history score and an eviction record might be denied, while a tenant with excellent credit history and an eviction record might be accepted.

Furthermore, most landlords obtain court records indirectly from third-party suppliers rather than obtaining them directly from the courts. This provides key protections to tenants as these third parties are "consumer reporting agencies" regulated under the Fair Credit Reporting Act (FCRA). These protections include: the obligation to disclose information on a credit report to consumers,[3] the obligation to follow reasonable procedures to assure maximum possible accuracy of information,[4] and the obligation to provide a notice and follow certain procedures when taking an adverse action based upon information contained in a consumer report.[5] Moreover, a consumer reporting agency may not report most negative information that is more than seven years old, except for bankruptcies, which is 10 years.[6] As such, tenancy records older than seven years, cannot be considered in any information maintained by a credit reporting agency.

4) **Efforts to Seal Tenancy Records Could Have Unintended Impacts** – Restricting public access to tenancy records could have unintended consequences for the very population that the court seeks to help with this proposal. Landlords, who can no longer rely on court records, will instead be forced to give greater weight to other valid nondiscriminatory screening criteria, such as credit history or collections. Therefore, a tenant with poor credit, but a strong history of paying rent, will have no way of proving himself/herself. Furthermore, landlords may seek other risk mitigation strategies, such as higher income standards, increased security deposit demands, or higher rents, which may disproportionally harm low-income renters.

5) **Timing of the Proposal Is Difficult Given the Ongoing Impacts of the Eviction Moratorium** -- The COVID-19 pandemic has been a challenging time for the apartment industry. When Governor Murphy, in Executive Order 107, mandated all citizens to "stay-at-home," more than three million New Jersey residents sheltered-in-place at a rental property. This put increased demands on apartment staff to clean and maintain those properties, increased demand on building systems, and increased utility costs.

At the same time, the moratorium on evictions imposed by P.L. 2020, c.1, Executive Order 106, and the court's orders, beginning March 9, indefinitely suspending landlord-trials have left property owners with no recourse when tenants have stopped paying rent. For some small property owners, the drop-off in rent collections that has ensued will be unsustainable and lead

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[3] 15 U.S.C. § 1681g(a)
[4] 15 U.S.C. § 1681e(b)
[5] 15 U.S.C. § 1681m(a)
[6] 15 U.S.C. § 1681c(a)

to bankruptcies and foreclosures. Many large property owners are already significantly financially constrained, as properties simply do not have the cash flow or reserves to absorb long-term rent losses.[7] While we understand the court's motivations, we would caution that now is not the appropriate time to insert more uncertainty in an already precarious sector of our economy.

Again, we certainly understand the goals of this proposal, and believe that many of them can be achieved by more holistically evaluating the use of tenancy records and identifying ways of improving the system. Successful models have been deployed in Chicago, Illinois, for example, where certain tenancy records can be sealed by judges, and New Jersey can draw from its own experience expunging certain low-level criminal convictions. As such, we believe that the court can achieve its goals of removing what it perceives as a barrier to justice, while at the same time, avoiding harm to property owners and renters alike.

Nobody – not landlords or tenants – ever want to see an eviction happen. To a property owner, there business is to rent apartments, not evict tenants. Avoiding evictions, wherever possible, is important to all property owners, and is especially important for small property owners who rely on consistent and timely rent payments to meet their own financial obligations. Appropriate, nondiscriminatory tenant screening is the only tool that property owners have to ensure that their tenants will be likely to honor their rental obligations, and access to tenant records is an important component.

Given the impact of this proposal to the multifamily housing industry, we would respectfully request the opportunity to meet and have a continued dialogue with the Judiciary regarding this issue.

I appreciate your consideration of our comments.

Very truly yours,

Nicholas J. Kikis
Vice President
Legislative & Regulatory Affairs
New Jersey Apartment Association

[7] An analysis of apartment expenses by the National Apartment Association (NAA) shows that rent generally flows from a landlord to other entities. NAA estimates that 39% of rental income going to debt service, 14% to property taxes, 27% to salaries and payroll, 10% on long-term capital improvements, and 9% returned as equity (numbers do not add up to 100 due to rounding). https://www.naahq.org/sites/default/files/naa-documents/dollarofrent.pdf