November 8, 2013

The Honorable Joan Zeldon
Chair of Drafting Committee to Revise the Uniform Residential Landlord and Tenant Act
c/o Uniform Law Commission
111 N. Wabash Ave., Ste 1010
Chicago, IL 60602

RE: National Apartment Association November 2013 Comments to the Revised Uniform Residential Landlord and Tenant Act

Dear Chair Zeldon:

Thank you for inviting the National Apartment Association (NAA) to participate in the process and provide comment as the Uniform Law Commission (ULC) works to revise the Uniform Residential Landlord and Tenant Act (URLTA or the Act).

In anticipation of the drafting committee's fall meeting, NAA has assembled a working group to evaluate the proposed draft. The working group, composed of NAA staff, staff from NAA's state and local affiliated associations, members and attorneys specializing in landlord-tenant law, represents industry professionals from across the country as well as NAA's diverse membership. NAA is comprised of 170 state and local affiliated associations and 63,000 members representing 6.8 million apartment homes throughout the United States and Canada.

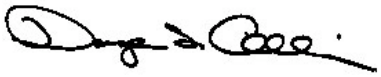
The following comments and recommendations are based on the working group's diverse input. While the rental housing industry appreciates being involved in an effort to update the Uniform Residential Landlord Tenant Act of 1972, the ULC should recognize that state landlord-tenant acts have evolved independently to reflect their individual needs. The diversity of rental housing, not only within the industry but also from state to state, and even among local ordinances within a state, makes uniformity in landlord-tenant law a difficult goal.

The recommendations in this document are meant to generally address the unintended consequences that could be caused by the updates in the revised Act. Further, if the apartment industry recommendations below were enacted, they would assist in our ability to provide prospective residents access to quality and affordable housing. These recommendations are in no way intended to meet every state's individual needs as states may require additional changes based on the local rental housing market.

For your consideration, the recommendations are listed to correspond in order of the sections in the proposed Act. Please note that the working group reviewed the iteration of the draft Act prior to the release of the November 2013 draft. Our recommendations are based on the Annual Meeting Draft but have been updated to reflect the most recent revisions.

Again, thank you for the opportunity to voice the rental housing industry's concerns on the issues being discussed. The industry looks forward to continuing its role as a resource for the URLTA drafting committee and the ULC as a whole. If you have any questions, please do not hesitate to contact Fred Tayco, Director of State & Local Government Affairs, at fred@naahq.org or (703) 797-0623.

Sincerely,



Douglas S. Culkin
President and CEO

cc: Residential Landlord and Tenant Act Committee Members

National Apartment Association Working Group
Uniform Residential Landlord Tenant Act
Comments & Recommendations

November 2013

ARTICLE 1 – GENERAL PROVISIONS

Section 106 - Unconscionability

Judges may interpret a provision in a lease as unconscionable. Although contracts remain subject to the interpretation of the courts, the unconscionability of one provision should not affect the enforceability of the entire contract. The unconscionable provision should be stricken, while leaving the remainder of the contract intact to the furthest extent possible. Only in extreme cases where the unconscionable clause is so material to the contract as to render it completely inoperable without it should a judge strike down an entire contract.

Settlement agreements are typically negotiated and reviewed by the attorneys of the landlord and the tenant. In some cases, judges oversee the settlement process and approve any agreement. Any settlement reached is agreed to by both parties and should not be subject to discretion.

Recommendation: *Either remove Section 106 or amend to the suggested language below.*

> (a) If a court finds ~~a lease or~~ any provision of a lease was unconscionable when made, the court may ~~refuse to enforce the lease,~~ enforce the remainder of the lease without the unconscionable provision~~,~~ or limit the application of the unconscionable provision to avoid an unconscionable result.
> ~~(b) If a court finds that a settlement agreement in which a party waives or agrees to forego a claim or right under this [act] or under a lease was unconscionable when made, the court may refuse to enforce the settlement agreement, enforce the remainder of the settlement agreement without the unconscionable provision, or limit the application of the unconscionable provision to avoid an unconscionable result.~~
> ~~(c)~~(b) If a party or the court puts unconscionability of a lease ~~or settlement agreement~~ into issue under subsection (a) ~~or (b)~~, the parties must be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease ~~or settlement agreement~~.

Section 107 – Knowledge and Notice

Section 107 delineates forms of valid notice by either the landlord or the tenant. Posting is a common and effective form of communication and notice utilized by landlords to tenants. Posting should be included in the notice provision; in the draft's current form, whether it is included is unclear.

Recommendation: *Clarify subsection 107(c)(1) to explicitly include posting as a valid form of notice. Please see the suggested language below.*

> (c) Whenever this [act] specifically requires notice in a record from a landlord to a tenant or a tenant to a landlord, the notice must be:
> (1) personally delivered to the landlord or tenant, or if the tenant is absent from the premises, by posting a copy in a conspicuous place at the premises, or

(2) deposited in the mail or delivered for transmission by any other usual means of transmission, electronic or otherwise, with any postage or any cost of transmission provided for and properly addressed to the landlord or the tenant.

ARTICLE 2 – GENERAL PROVISIONS APPLICABLE TO LEASE

Section 203 – Prohibited Lease Provisions in Lease

Subsection 203(a)(4) prohibits a landlord from including a provision in a lease that requires a tenant to pay attorneys' fees and costs to the landlord. 203(a)(4) conflicts with other provisions in the draft that recognize several instances where both the landlord and tenant are entitled to reasonable attorneys' fees and costs. For example, Section 203 prohibits a landlord from requiring the tenant to pay attorneys' fees but if the landlord violates this particular section, the tenant may recover attorneys' fees.

From a practical perspective, attorneys' fees are used often as a negotiating tool during the evictions process. In an eviction action, a landlord will allow a tenant to maintain possession if the tenant agrees to pay any back rent and the landlord's attorneys' fees and costs. A landlord is more likely to move forward with the eviction and removal of the tenant if this remedy is not available.

Recommendation:

- *Remove subsection 203(a)(4) as it appears to conflict with other parts of the draft, and it would severely limit the landlord's right to recoup losses incurred by the tenant.*

- *As a general observation of the current draft, the Act is significantly imbalanced in its application of attorneys' fees. In the most recent version, tenants are entitled to attorneys' fees in 10 provisions, while landlords are entitled attorneys' fees in only four areas.[1] Where there is culpability of the tenant, the landlord should be able to collect attorney's fees.*

ARTICLE 3 – LANDLORD'S DUTIES

Section 301 – Required Disclosures

According to Section 301, before a landlord can accept a security deposit of or enter into a lease with the tenant, the landlord must make certain disclosures to the tenant, including circumstances of the property related to foreclosure: "whether the premises are in foreclosure or the landlord is knowingly in default on any obligation to pay money or perform another obligation that could result in foreclosure." § 301(a)(3).

Tenants are concerned with changes in ownership only as they affect their tenancy during the term of their lease. How a property ownership is exchanged is not materially significant to the proposed tenant. For example, foreclosure may be sought but is often resolved through the bankruptcy process. The provision as written includes pending business transactions that have not or may not take place and would unnecessarily alarm tenants.

Sections b and c require the tenant to disclose to the landlord the tenant's mailing address and email address and keep the information provided to the landlord current. The tenant should also be

[1] Tenants are entitled to attorneys' fees in §§ 203(b), 501(f), 502(c), 504(a)(3), 507, 514)(d)(2), 702(b), 903(a)(2), 1203(b) and 1204(d)(2). Landlords are entitled to attorneys' fees in §§ 510(b), 604(i), 803(a) and 1202(i). The drafters removed the landlord's right to attorneys' fees in 601(c) in the November Draft.

required to provide the United States Postal Service with a forwarding address for the purpose of service of process, notice, return of the tenant's security deposit and any other communications regarding the tenant's tenancy after he or she vacates the unit. States have enacted similar provisions. For example, Colorado has found this requirement beneficial, particularly in dealing with correspondence regarding abandoned property.

Recommendation: *Amend to the suggested language below.*

> (a) Before accepting any funds to be applied towards a security deposit, prepaid rent, or fees or before entering into a lease, a prospective landlord or any person authorized to enter into a lease on the prospective landlord's behalf shall disclose to the prospective tenant in a record the following information:
> …
> (3) whether the premises are ~~in~~ subject to sale due to foreclosure ~~or the landlord is knowingly in default on any obligation to pay money or perform another obligation that could result in foreclosure~~;
> …
> (b) At or before the commencement of a tenancy,
> …
> (2) the tenant shall disclose to the landlord the tenant's mail address and any address used by the tenant for the receipt of electronic communications. The tenant shall provide the United States Postal Service with a forwarding address for the purpose of service of process, receiving notices and any other communications regarding the tenant's tenancy after he or she vacates the unit.

Section 303 – Landlord's Duty to Maintain

Recommendations:

- *Please consider adding the following language.*

> (a) A landlord has ~~the~~a duty to make ~~all~~ reasonable repairs and to do or refrain from doing whatever is necessary to assure that the premises are maintained in a habitable condition. At a minimum, the duty to maintain requires the landlord to ensure that the premises:
> …
> (7) have reasonable measures in place to control the exposure to radon, lead paint, asbestos, and other hazardous substances or at the inception of tenancy, to the presence of rodents, bedbugs, other vermin, and mold;

- *In the most recent version of the Act, "recyclable material" was added to the landlord's duty to maintain in Section 303(9). We ask the committee to remove this addition or in the alternative, put "recyclable material" in brackets as this issue has developed differently across the country primarily at the local level. Recycling requirements often vary city-to-city and should not be addressed at the state level in the Act.*

ARTICLE 4 – TENANT'S DUTIES

Section 401 – Tenant's Duty to Maintain, Use, and Occupy

Whether intentional, unintentional, or out of convenience, tenants have disengaged safety devices. As with the airline industry, tampering with safety equipment in an apartment unit or common area

is a major concern for landlords as it poses a safety risk to apartment community residents and employees in the event of a fire.

Recommendation: *Amend subsection 401(7) to address the additional risk posed by tenants who tamper with safety equipment.*

> A tenant shall:
> …
> (7) in the absence of the landlord's consent, refrain and require other persons on the premises with the tenant's consent, other than the landlord or the landlord's agent, to refrain from an act that would destroy, deface, damage, impair, or remove any part of the premises, including safety equipment;

ARTICLE 5 – TENANT REMEDIES

Section 501 – Noncompliance by Landlord; In General

In Subsection 501(a), the proposed time period to cure a landlord's noncompliance is less than the proposed time period for a tenant to cure under Subsection 601(a). The time period should be even-handed between the tenant and landlord.

As not all repairs are created equal, a landlord may need to call upon a third party specialist that may be unavailable to make repairs within the proposed five-day time period per Subsection 501(a)(1). For example, a contractor or repairman—or replacement parts—may be unavailable during weekends, holidays or during a period of high demand. An inflexible timeframe does not reflect reality and unnecessarily puts the landlord at risk for committing a lease violation.

Recommendations: *The committee to consider the following* –

- Extend the allotted time period in Subsection 501(a)(1)(A) to "as soon as possible but not later than14 days" and in Subsection 501(a)(1)(B) to "as soon as possible but not later than 30 days".

- Consider an exception similar to Texas state law that provides the landlord additional time to comply. For example, if despite due diligence, labor and materials were unavailable. See suggested language below:

  (d) A landlord may rebut the presumption provided by Subsection (a) or (b) if despite the diligence of the landlord:
  (1) the landlord did not know of the tenant's request, without the fault of the landlord;
  (2) materials, labor, or utilities were unavailable; or
  (3) a delay was caused by circumstances beyond the landlord's control, including the illness or death of the landlord or a member of the landlord's immediate family.[2]

Section 506 – Fire or Casualty Damage

Section 506 allows a tenant to either terminate their tenancy or reduce their obligations under the lease when a fire or other casualty destroys the tenant's unit. This section could be interpreted to prohibit a landlord from pursuing a damage claim against a tenant who caused the damage. Also, as

[2] See Tex. Prop. Code § 92.161.

written, this section allows a tenant to seek relief even if the tenant was the cause of the fire or other casualty.

Recommendation: *Clarify language to allow the landlord to maintain all rights to seek damages from said tenant(s). Add an exemption that prohibits a resident who caused the fire or other casualty from seeking relief under Section 506.*

Section 508 – Early Release of Tenant from Lease Because of Domestic Violence, Sexual Assault or Stalking

The proposed Act is intended to give victims of domestic violence the flexibility to terminate a lease prior to its term ending to protect a victim, without having the victim incur liability for breaching the lease. Rental housing providers recognize that extenuating circumstances may necessitate early termination from an obligation of a lease. The industry is supportive of the concept in that the Act provides a level of certainty of how to manage matters as sensitive as domestic violence. However, we ask the committee to consider the following recommendations to limit confusion and possible unintended loopholes.

In the current draft, the tenant must give notice at least 14 days before the release date. The 14-day limitation gives the landlord very little time to identify a suitable tenant to fill the vacancy created. We ask the committee to consider increasing this time limitation to 30 days with an exception for cohabitation situations. In a cohabitation situation, we propose immediate release.[3]

Subsections 508(b) and (c) emphasize that the tenant seeking relief is not responsible for rent accruing after termination of the rental agreement. However, the draft does not explicitly state that the tenant is liable for rent prior to termination. We ask the committee to consider language that makes clear that a tenant who seeks relief under Section 508 is not relieved of his or her duty to pay rent or other sums owed to the landlord prior to termination of the lease.

According to Subsection 508(d), the tenant who is a victim of domestic violence, sexual assault or stalking may be released from his or her obligations under the lease while the lease remains intact and does not terminate with respect to any cotenants. Prior to tenancy, any tenants on the lease agreement must qualify together for a unit. A landlord should not be required to continue a tenancy relationship with any remaining cotenants after one tenant is released. Although Subsection 511(a) addresses termination of a tenant who is a perpetrator of the abuse, the drafting committee should consider language to Section 508 to make the landlord's rights clear with respect to cotenants. For example, New Jersey allows the landlord to re-qualify any remaining tenants and enter into a new lease agreement with any cotenants if both parties so choose:

> If there are tenants on the lease other than the tenant who has given notice of termination as described in section 3 of P.L.2008, c.111 (C.46:8-9.6), those co-tenants' lease also terminates, notwithstanding any provisions in section 2 of P.L.1974, c.49 (C.2A:18-61.1) requiring certain grounds for eviction to the contrary. The co-tenants may enter into a new lease, for a new term, at the option of the landlord. Nothing in this section shall prohibit any co-tenants of the victim of domestic violence from holding over if holding over is permitted by the landlord.[4]

[3] See Tex. Prop. Code § 92.016.
[4] See N.J. Stat. § 46:8-9.7(c).

The language in the current draft also leaves room for abuse by unscrupulous tenants. The state of Virginia passed legislation in 2013 that addresses this concern by limiting the number of times a tenant may use the same restraining order or conviction record to terminate a lease under the terms of this section.[5]

Recommendations:
(1) Increase the notice period to 30 days with an exception for cohabitation situations. (2) Clarify language in Section 508 to make clear that the tenant is not relieved of his or her duty to pay rent or other sums owed to the landlord prior to the lease termination. (3) Give the landlord flexibility in continuing the lease agreement with any remaining cotenants and replace language in Subsection d below with language similar to New Jersey state law. (4) Limit the number of times a tenant may use the same restraining order or conviction record to terminate a lease under this section. Please see the suggested language below.

(a) Subject to subsection (g), if as the result of an act of domestic violence, sexual assault, or stalking a tenant or an immediate family member has a reasonable fear of further acts of domestic violence, sexual assault, or stalking by continued residence in the dwelling unit, the tenant may be released from ~~the lease~~ the tenant's rights and obligations under a lease and may vacate the dwelling and avoid liability for future rent and any other sums due under the lease for terminating the lease and vacating the dwelling before the end of the lease term by giving notice that complies with subsection (b).

(b) A tenant shall be released from a lease if the tenant gives the landlord:

(1) notice in a record signed by the tenant of the tenant's intent to be released from the lease not later than [90] days after the act of domestic violence, sexual assault, or stalking and at least [30] days before the release date specified in the notice specifying facts giving rise to the fear; and

…

[Delete (c) and add the following:]

(c) If the act of domestic violence, sexual assault, or stalking is committed by a cotenant or occupant of the dwelling, a tenant may exercise the right to terminate the lease under the procedures provided by Subsection (a), except that the tenant is not subject to the procedures described by Subsection (b).

(d) Except as otherwise provided in Section 511(a)(2), if there are multiple tenants who are parties to the lease, the release of one tenant under this section does not terminate the lease with respect to other tenants. The tenant who is released from the lease is not liable for rent accruing after the tenant is released from the lease. The landlord is not required to return to the released tenant or a remaining tenant any security deposit or unearned prepaid rent until the lease terminates with respect to all tenants.

(e) This section does not affect a tenant's lease obligations before the lease was terminated by the tenant under this section, including rent due under the lease, fees, any damage to the unit, and any outstanding utility bills.

(f) A victim may exercise a right of termination under this section to terminate a rental agreement in effect when the valid outstanding temporary or permanent restraining order or conviction order is entered and one subsequent rental agreement based upon the same form of documentation.

(g) This section shall not apply if the tenant is the perpetrator.

[5] See Va. Code Ann. § 55-225.16.

ARTICLE 6 – LANDLORD REMEDIES

Section 601 – Noncompliance with Lease by Tenant; Failure to Pay Rent

Since states first adopted Section 4.201 of the original Act (the basis for Section 601), this section as enacted has evolved in the following ways and should be reflected in Section 601.

Throughout Section 601, the drafting committee substituted the term "substantially" for "materially" where the word was used in the 1972 Act. Although the committee did not intend to change the meaning behind the terms, judges may interpret this change as an increase in obligation on the landlord and require a higher threshold than previously conceived. Further complicating this, state legislatures have applied the terms differently in landlord-tenant law. For example, states have used the term "substantial" to addresses noncompliance that necessitates immediate termination of the lease and denial of the opportunity to cure.

Colorado and New Mexico define "substantial violation" as criminal violations, such as drug-related activity, sexual assault, theft and public nuisance, that endanger persons or property.[6] Iowa defines this conduct as "a clear and present danger to the health or safety" of other tenants, the landlord and others on the premises.[7] This term invokes a higher threshold that allows the landlord to terminate the lease of a tenant with three days' notice and denies the tenant the opportunity to cure the breach.[8] For noncompliance *materially* affecting health and safety or *material* noncompliance, states like New Mexico require seven days' notice before a landlord may terminate the tenant's lease with an opportunity to remedy the breach within seven days.[9]

As the draft is currently written, if a tenant creates a meth lab in his apartment, the landlord must give the tenant 30 days' notice of termination, and the tenant has 14 days to remedy the noncompliance before the landlord can terminate the lease, per Subsection 601(a). According to Subsection 601(b), the landlord can terminate the lease with 14 days' notice only if the tenant's act of noncompliance recurs within 6 months of the initial notice. As the tenant's noncompliance may put community residents and employees at risk, every breach should not be given a second chance and opportunity to cure.

In the original 1972 Act, Subsection 4201(a) addresses material noncompliance by the tenant with the rental agreement or a noncompliance materially affecting health and safety, while Subsection 4.201(b) addresses nonpayment of rent:

> If rent is unpaid when due and the tenant fails to pay rent within [14] days after written notice by the landlord of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period, the landlord may terminate the rental agreement.

Section 601 as rewritten from Section 4201 omits the landlord's right to terminate due to the tenant's nonpayment of rent. Subsection 601(a) of the proposed revision applies to situations where the tenant has not complied with terms of the lease other than failure to pay rent, and Subsection 601(b) of the proposed draft addresses failure to pay rent in a timely manner and repeated substantial noncompliance. Language from Subsection 4.201(b) of the 1972 Act should be re-

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[6] See C.R.S. 13-40-107.5(3) and N.M. Stat. Ann. § 47-8-3(T).
[7] Iowa Code § 562A.27A(2)
[8] See C.R.S. 13-40-107.5(3)(4), Iowa Code § 562A.27A(1) and N.M. Stat. Ann. § 47-8-33(I).
[9] See N.M. Stat. Ann. § 47-8-33(A).

inserted in Section 601 to properly address the landlord's right to terminate the lease within 14 days of the tenant's failure to pay rent.

Section 601 needs some clarification regarding damages. Subsection 601(c) has been changed; the draft no longer provides that the landlord is entitled to attorneys' fees if the tenant's noncompliance was willful. As stated previously, the draft is severely imbalanced in favor of the tenant recovering attorneys' fees. The landlord should be entitled to attorneys' fees if the tenant's noncompliance is deliberate and intentional.

Subsection 601(i) does not account for reletting fees, termination fees or liquidated damages. Typically, a landlord will assess a fee on the tenant for the actual costs associated with wrongful termination of the lease, including administrative costs and utility hook up costs, etc., or the landlord is entitled to liquidated damages under state law.

Also, as a general note on Section 601, this section often refers to termination of lease. For example, in Subsection 601(a) the landlord may give the tenant a notice that the lease will terminate on a specified date. This section should be clearer as to whether the drafters are referring to termination of possession or termination of tenancy as the landlord should be entitled to terminate possession; this section should not terminate the tenant's obligations under the lease. The landlord should be able to recover damages for breach, including rent due under the lease for the entirety of the lease term.

Recommendations:

- *The industry requests that the committee change the term "substantially" to "materially" in this section as it was used in the 1972 Act.*
- *The committee should add language that addresses "substantial noncompliance." The draft should allow the landlord to terminate a tenant's lease whose noncompliance substantially affects health and safety or endangers persons or property without the opportunity to cure.*
- *Re-insert language from Subsection 4.201(b) of the 1972 Act in Section 601 to properly address the landlord's right to terminate the lease within 14 days of the tenant's failure to pay rent.*
- *Include the deleted provision regarding attorneys' fees for the landlord in Subsection 601(c).*
- *The landlord should be entitled to "a separate claim for actual damages for breach of the lease, reletting fees, termination fees, costs, reasonable attorneys' fees and/or liquidated damages per state law." The committee should also consider adding language to the comment for this section making clear that Section 601 does not supplant other statutory remedies that may be available to a landlord under eviction or unlawful detainer statutes.*
- *Section 601 should make clear that the landlord is entitled to terminate possession and is entitled to recover damages for breach, including rent due under the lease.*

Section 602 – Waiver of Landlord's Right to Terminate

According to Section 602, the landlord waives his right to terminate the lease for noncompliance if the landlord accepts rent from the tenant with knowledge of the noncompliance. The waiver proposed by Section 602 should be restricted to nonpayment of rent by the tenant. For example, if the tenant commits a criminal act and receives an eviction notice, the tenant should be required to pay the rent regardless as the tenant committed a nonmonetary breach. The tenant's noncompliance is at issue in this case, wholly unrelated to his or her ability to pay rent.

A landlord should not waive his right to the property or his obligation to protect other tenants due to an accounting error. To illustrate this point, if a tenant receives a notice to quit for substantial

noncompliance due to gang-related activities and the landlord accepts the rent by mistake or the tenant pays their rent via an automatic system, should the landlord waive his right to terminate the lease according to this provision? This scenario should not preclude the landlord from terminating the lease, particularly when the safety of staff and community residents is at risk.

Recommendations:

- *The waiver proposed by Section 602 should be restricted to nonpayment of rent by the tenant.*
- *This section should account for administrative error regardless of the type of noncompliance.*
- *The committee should consider the following change: "unless the landlord and tenant otherwise agree in a record after the noncompliance has occurred." The term "agreement" needs clarification. This section should require that any agreement between the parties should be in writing. Litigating a case in court involving an oral agreement would be difficult and an unnecessary burden on both parties' financial resources.*
- *This section, as written, does not allow the landlord to refuse acceptance of the rent. The drafters should clarify the language in Section 602 to ensure that the landlord has the ability to return any rent provided by the tenant to avoid an automatic waiver created by this provision.*

Section 604 – Abandonment; Remedy After Termination

Section 604 defines abandonment and outlines the duties of and remedies available the landlord if the tenant abandons the dwelling. Subsection c provides that the landlord has a duty to mitigate by making reasonable efforts to rent the unit if abandoned. According to Subsection g, if the landlord does not make reasonable efforts to relet the unit, the tenant is liable under the lease only for breaches occurring before the date of abandonment. Also, Subsection i restricts the landlord's ability to recover for damages and reletting fees from a tenant who wrongfully terminates the lease if the landlord failed to mitigate.

The landlord's duty to mitigate in Subsection 604(c) is vague and has real implications in determining the extent to which the landlord may recover. Although subsection d provides that the landlord's duty to mitigate does not have priority over the landlord's right to rent any available units other than the abandoned unit, subsection c **remains problematic as it has fair housing implications.** A landlord's preference to rent a specific unit can be construed as "steering" prospective residents to a particular unit. If the landlord's actions were interpreted as such, the landlord could be subject to a fair housing violation.

Recommendations:

- *Subsection c needs further clarification to prevent conflicts with fair housing guidelines.*
  (c) If a tenant abandons the dwelling unit before the end of the term, the landlord, in fulfilling the duty to mitigate, shall make reasonable efforts to rent the unit. Reasonable efforts include preparing the dwelling unit to be available for prospective tenants to rent and advertising available units.

- *Subsection g should be removed as the landlord's ability to recover should not be contingent upon his duty to mitigate damages after a tenant abandons a unit.*

- *The landlord's duty to mitigate should not preclude a landlord from recovering damages owed for the tenant's wrongful termination.*

(i) If a tenant wrongfully terminates the lease, the landlord has a claim for possession. The landlord also has a claim for past due rent, releting fees, and, unless the landlord accepts abandonment ~~or fails to mitigate~~, a separate claim for actual damages for breach of the lease, costs, and reasonable attorneys' fees.

NOTE: Both Section 604 and Article 10 address abandonment of a dwelling unit. The two areas of the draft should be combined as it is confusing to have the definition of abandonment in Subsection 604(b) separate from Article 10. Addressing the issue of abandoned property partly in one section while another portion of the draft addresses the issue separately is confusing for the reader and could open up the Act to be interpreted incorrectly.

ARTICLE 7 – ACCESS

Section 701 limits the landlord's ability to access the tenant's dwelling unit. While Subsection 701(b)(1) allows the landlord to enter the tenant's unit with reasonable notice, this provision does not address instances where the landlord requires routine access to the tenant's unit.

Recommendation: *Section 701(b) should contain language that allots for routine maintenance with general notification. For example, Alabama law allows a landlord to provide the tenant with a schedule of routine service once with advanced notice.*[10] *See recommended language below.*

(2) If a landlord provides separate from the lease in a general notice or an advance schedule in excess of one day for repairs, maintenance, pest control, or for service relating to health or safety, whether such notice is for a specific time or within a designated time period, then no additional days' notice is required to access the premises.
(3) When there is an emergency, when maintenance or repairs are being made at the tenant's request, or when it is otherwise impracticable to give [one] day's notice, the landlord shall give notice that is reasonable under the circumstances…

Section 702 – Landlord and Tenant Remedies for Abuse of Access
Section 702 lists the remedies available to the landlord and tenant for abuse of either party in accessing the tenant's dwelling unit. While the landlord may recover actual damages, costs and attorneys' fees if the tenant unreasonably refuses access the landlord, the landlord is subject to an additional penalty equal to one month's rent plus actual damages, costs and attorneys' fees. This penalty is not available to the landlord per Subsection a and according to Subsection b, a judge could award the penalty of one month's rent to the tenant merely based on one unlawful entry.

The tenant's unreasonable refusal to allow the landlord into the dwelling unit is equally as onerous as the landlord's abuse of access as the tenant's actions affect other community residents. For example, in the event of a bedbug infestation, it is imperative that the landlord has access to all affected units as the infestation can spread quickly. The tenant should be held to the same standard as the landlord for abuse of the access provision, and the landlord should not be subject to the additional penalty.

Recommendation: *The committee should consider the following changes to Section 702.*

[10] See Code of Ala. § 35-9A-303(d).

(b) If a landlord makes ~~an~~ repeated unlawful entries~~y~~ or ~~a~~ lawful entries~~y~~ in an unreasonable manner or makes repeated demands for entry otherwise law but which have the effect of harassing the tenant, the court may award injunctive relief to prevent the recurrence of the conduct or may terminate the lease. In either case the court shall award the tenant actual damages ~~or an amount equal to [one] month's rent, whichever is greater~~, costs and reasonable attorneys' fees.

ARTICLE 8 – TENANT REMEDIES

Section 802 – Termination Upon Death of a Tenant

In the event that a tenant who is the only party to the lease dies during the lease term, Subsection 801(a) gives the deceased tenant's surviving spouse the right to assume the deceased tenant's rights and responsibilities under the lease.

This section purports a very unusual scenario: addressing the rights of a surviving spouse who is not a party to or listed in the lease. When tenancy commences, tenants are required to list any occupants or residents of the unit in the lease agreement. Also, the tenant must notify the landlord of any changes in occupancy subsequent to signing of lease. Subsection 801(a) should reflect consistency with that practice as this section could have real implications in rent controlled jurisdictions. Clarification of Subsection a would also prevent abuse. For example, an estranged spouse should be exempt from seeking relief under this section.

Recommendations:

- *Subsection 801(a) should include additional language acknowledging a surviving spouse's status as an occupant or resident of the unit under the lease.*
- *This provision should make clear that the surviving spouse must qualify to assume the lease. The deceased tenant was required to meet any qualifying criteria for the property as an applicant, including qualifying for any federal subsidies, etc. for the unit. See recommended language below.*

(a) the tenant's surviving spouse [, partner in a civil union, or domestic partner] who is a listed occupant or resident per the lease agreement ~~resides in the dwelling unit~~ may assume the lease by giving the landlord a notice in a record expressing the spouse's [or partner's] intent to assume the lease. The record shall be:
…
(2) sent to the landlord not later than [20] days after the tenant's death of the spouse's intent to assume the lease in accordance with its terms and so long as the spouse qualifies for the unit per the qualifying criteria of the landlord or applicable federal, state or local law. For purposes of this subparagraph (2), the notice is sent if it is deposited in the mail or delivered for transmission by ant other usual means of transmission, electronic or otherwise, with postage or any cost of transmission provided for and properly addressed.

Section 803 – Holdover Tenancy

Holdover tenants prevent a landlord from making a unit available to come to market after the termination of an agreed upon lease term. Holdover tenants create uncertainty for prospective incoming tenants and tie the hands of landlords who wish to end the lease of problem tenants. For this, and other reasons, holdover tenancies should be discouraged.

Recommendations: *The committee to consider the following language changes.*

(a) Except as otherwise provided in subsections (b) and (c) and in Section 502(a)(2), if a tenant remains in possession without the landlord's consent after the expiration of a tenancy for a fixed term or the termination of the lease, the landlord may bring an action for possession. If the tenant~~'s holdover is willful and not in good faith~~ continues to occupy the unit after the term of the lease agreement has expired in violation of this section and without the landlord's consent, the court shall award the landlord an amount [equal to] [three] month's periodic rent or [triple] the actual damages, whichever is greater, costs, and reasonable attorneys' fees.

ARTICLE 9 – RETALIATORY CONDUCT

Article 9 prohibits a landlord from retaliation against a tenant and defines the remedies available to the tenant as a result of the landlord's retaliatory conduct. The apartment industry has serious concerns about this section.

Section 901 needs clarification to prevent abuse.

Recommendation: *Subsections (a)(1)(A) and (a)(2) should be limited to substantial code violations. This offers sufficient recourse for tenants, while ensuring that unscrupulous tenants are not filing minor complaints in bad faith.*

Section 904 creates a presumption of retaliatory conduct in Section 901, Section 901 could be interpreted as a general prohibition on the conduct listed in Subsection b. Retaliation laws are often abused and extend the evictions process in some cities to six to 10 months as the parties dispute the retaliation claim in court.

Recommendation: *As this section opens up landlords to litigation, we ask the committee to remove the brackets around "in good faith" throughout Section 901(a) to ensure that landlords have the ability to dispute whether the tenant made a false claim.*

Section 904 creates an arbitrary six-month standard to determine whether the landlord engaged in conduct for the purpose of retaliating against the tenant. Section 904(a) creates a presumption that the dominant purpose of the landlord's conduct was retaliation if the tenant engaged in conduct described in Section 901(a) within [six months] before the landlord's alleged retaliatory conduct.

Recommendation: *For the sake of parity, we also ask the committee to add language that addresses a tenant's retaliatory conduct similar to Texas state law. Texas allows the landlord to recover possession of the dwelling unit and entitles the landlord to a civil penalty, costs and attorneys' fees:*

(a) If a tenant files or prosecutes a suit for retaliatory action based on a complaint asserted under Section 92.331(a)(3), and the government building or housing inspector or utility company representative visits the premises and determines in writing that a violation of a building or housing code does not exist or that a utility problem does not exist, there is a rebuttable presumption that the tenant acted in bad faith.
(b) If a tenant files or prosecutes a suit under this subchapter in bad faith, the landlord may recover possession of the dwelling unit and may recover from the tenant a civil penalty of one month's rent plus $ 500, court costs and reasonable attorneys' fees. If the tenant's rent payment to the landlord is subsidized in whole or in part by a governmental entity, the civil

penalty granted under this section shall reflect the fair market rent of the dwelling plus $ 500.[11]

ARTICLE 10 – DISPOSITION OF PERSONAL PROPERTY

Section 1001 – Tenant's Rights to Retrieve Personal Property

Section 1001 stipulates the landlord is required to notify and store the tenant's personal property that remains after the landlord accepts possession of the unit. The landlord should not be subject to additional notice and storage requirements according to the first two provisions identified in Section 1001(a) as in either case, the tenant has been given ample notice and instructed on his or her duty to move or remove their belongings from the unit.

If a tenant vacates the dwelling unit at the termination of the lease, presumably the tenant has returned the keys and voluntarily relinquished possession of the unit to the landlord. The tenant knows the move-out date well in advance. The landlord should be able to presume that any items remaining were intentionally left by the tenant. For example, if several college students leave several pieces of furniture behind because the tenants are unable to move the items, the landlord should not be held to additional notice and storage requirements. Furthermore if the furniture is valued over $1,000, the landlord will have to expend resources to sell the items, only to return the net proceeds to the tenants who abandoned them, per Subsection 1001(f)(2).

When a writ of possession has been issued to the landlord and executed, the tenant is notified well in advance of the scheduled execution date. Before the date of execution, the tenant is either instructed to remove their property from the unit or to secure the property once the local sheriff removes the property. No obligation whatsoever attaches to, or remains with, the landlord in regard to the tenant's personal property. The landlord should not be obligated with additional requirements to notify and store the tenant's belongings following the execution date.

Subsection f delineates a landlord's disposal requirements for the tenant's personal property if unclaimed, dependent on whether the value of the property is greater or less than $1,000. This provision requires the landlord to make a good faith estimate as to the value of the property. In the alternative, the industry suggests that the value be based on fair market value. An estimate based on fair market value would leave less room for interpretation.

In Subsection 1001(f)(2), the use of the words "commercially reasonable manner" in this provision also leave room for interpretation. The term "commercially reasonable" as defined by the UCC would create additional requirements for the sale of the property by the landlord. The text should allow the landlord to sell the property in any reasonable manner, such as a yard sale or via the internet, ensuring the property is sold as quickly and efficiently as possible. This provision should also anticipate the possibility that some items may not sell and allow the landlord to dispose of any remaining items as is permissible in Subsection 1001(f)(1).

Subsection 1001(f)(2) requires the landlord to treat any net proceeds from the sale as part of the tenant's security deposit. This requirement is problematic as many states mandate that security deposit funds must be deposited in a bank account separate from other monies. In addition several states require the landlord to pay interest on the tenant's security deposit. Also, this provision may conflict with state statutes allowing tenant's to recover for willful retention of the security deposit.

[11] See Tex. Prop. Code § 92.334.

According to Colorado's statute, a tenant would be entitled to three times the security deposit, costs and attorneys' fees, if the landlord mistakenly withheld the tenant's security deposit.[12] In the alternative, any net proceeds should be applied to any balance accrued by the tenant with the remainder sent to the tenant's last known address or forwarding address.

Recommendations:

- *Delete Subsections 1001(a)(1) and (2).*
- *Change Subsection 1001(b)(1) to "at the dwelling unit." Proper posting would be "at the residence" of the tenant.*
- *Amend Subsections 1001(f)(1) and (2) to the following.*
  (f) Unless the landlord and tenant otherwise agree, if the tenant fails to contact the landlord as provided in subsection (c) or to retrieve personal property as provided in subsection (d):
  (1) if the landlord estimates ~~in good faith~~ the fair market value of the personal property to be no more than $[1,000], the landlord may dispose of the property in any manner the landlord considers appropriate; or
  (2) if the landlord estimates ~~in good faith~~ the fair market value of the personal property to be greater than $[1,000], the landlord shall sell it in a ~~commercially~~ reasonable manner and ~~treat~~apply the net proceeds to any balance accrued by the tenant with the remainder sent to the tenant's last known address or forwarding address.

Section 1002 – Disposition of Personal Property on Tenant's Death
Section 1002 identifies the duties and responsibilities assigned to the landlord in locating a tenant representative to take custody of the deceased tenant's personal property.

According to subsection 1002(b)(2), a landlord must publish in a notice at least once for two consecutive weeks, if the landlord is unable to contact a tenant representative after 10 days following the tenant's death. Although notice by publication is a common fallback for legislators, this type of posting is costly and elicits very few responses in practice. In place of the publication requirement, the landlord should be required to mail the notice to any person identified on rental application or rental agreement, such as an emergency contact person in addition to mailing a copy of the notice to the tenant's last known address or other address known by the landlord per Subsection (b)(1).

Section 1002(c) prohibits the landlord from moving the tenant's property for 15 days following the last date of published notice. Essentially, the landlord may wait 39 days from the time the landlord learns of the tenant's death before the landlord may remove the property from the dwelling unit. During this period, the landlord is subject to vacancy loss. This waiting period could be particularly burdensome for rental owners who are small businesses and cannot easily shoulder the loss in rental income. To reduce the revenue shortfall, subsection 1002(c) should mirror § 1001(e) as it allows the landlord to store the property in the dwelling unit or other place for safekeeping.

In general, the time periods for notice and storage proposed by this section are overly burdensome for the landlord. According to Subsection d, the tenant representative has 30 days to contact the landlord after the last date of the published notice and 60 days to retrieve. The committee should keep in mind this 90-day period is in addition to the 10-day period the landlord utilizes for initial contact to the tenant representative and two weeks for the published notice. During this period, the landlord incurs rent loss, administrative costs (including the inventory requirement), and moving and storage fees.

[12] See C.R.S. 38-12-103.

Recommendations:

- *Remove the requirement to publish a notice in the newspaper.*
- § 1002(c) should mirror § 1001(d):
  (c) The landlord shall store or leave the personal property in the dwelling unit or other place of safekeeping and shall exercise reasonable care in moving or storing the personal property.
- *Reduce the time periods for notice and storage, particularly in Subsection d.*

  (d) If a tenant representative is identified not later than [15] after the last date of publication of the notice, the tenant representative may retrieve the tenant's personal property from the landlord not later than [30] days after the last date of publication of the notice. Before retrieving the property, the tenant representative must pay the landlord's reasonable costs of inventorying, moving, and storing the property and the reasonable costs of publishing the notice pursuant to subsection(b)(2).

ARTICLE 11 - ASSIGNMENTS AND SUBLEASES

Article 11 is a departure from the common law on assignments. This section releases the assignor from liability if the landlord consents to an assignment. The industry is concerned with the possible implications of the section on rent-controlled and off-campus, student housing.
In a college town, guarantors are routinely used. Typically students sign leases for a single property in waves. A group of students may maintain possession of a property for years with only a handful of roommates changing each year, in some cases indefinitely, in the case of a swim team, fraternity or sorority for example. In off-campus, student housing, security deposit transitions in assignments are difficult. The transition between students does not allow for re-inspections and damage assessments. As a result, assignors and assignees routinely remain liable on the lease until the property is eventually rented to entirely groups of tenants.

Recommendation: *Maintain the established common law on assignments.*

ARTICLE 12 – SECURITY DEPOSITS, FEES, AND PREPAID RENT

Section 1201 – Nature and Amount of Security Deposit, Fees, and Prepaid Rent
Section 1201 limits the amount a landlord may charge for a security deposit to two months' rent, including prepaid rent. The limitation does not apply to first month's rent, application fees, non-refundable cleaning fees, or non-refundable pet fees. This security deposit calculation is a significant change to the November Draft and appropriately recognizes various deposits and fees that landlord's commonly assess to ensure against possible damages incurred by the tenant.

The change is a more balanced approach to the calculation of security deposits, however the industry remains concerned with the inclusion of prepaid rent in a security deposit. The current limitation addresses the landlord's risk of increased damages, however it does not account for the landlord's increase risk in accepting a tenant who has unfavorable financial or rental history.
For example, a member of NAA's URLTA working group shared the following real-life example showing the effect of prepaid rent limitations on higher-end properties. Friends of the member, a couple with a small child, sold their condo because they had outgrown the property. The family

decided to rent an apartment as they continued to search for a house to purchase. Although the couple had $400,000 in their bank account, they did not meet the landlord's resident screening criteria for a large apartment and were deemed "underemployed" because one spouse worked part-time while the other spouse was not employed in any capacity. The couple agreed to pay six months' prepaid rent and in exchange, was approved for the apartment.

Any constraint on the ability to require prepaid rent will have that negative effect on a landlord's willingness to assume the risk of renting to certain tenants. This argument will especially hold true in rent-controlled jurisdictions or areas where obtaining an eviction is difficult. For example, in DC, it may take up to six months to evict a tenant. If a property is situated in a jurisdiction where the eviction process is long and arduous, a landlord will be unwilling to accept a resident who does not otherwise meet the property's income standards without a payment of prepaid rent.

Recommendations:

- *Reconsider the inclusion of prepaid rent in Section 1201's security deposit calculation*

Section 1203 – Safekeeping of Security Deposits

As many individuals utilize online banking, oft times at large multi-state banking institutions, the requirement in Section 1203(a)(1)(A) to hold security deposit funds at "a bank in this state" seems unnecessary.

Recommendation:

- *Consider the suggested language below.*
  (A) holding the funds in a bank account maintained by any state or federal chartered bank ~~in this state~~ which is used exclusively for security deposits; and

Section 1204 – Return of Security Deposits or Unearned Rent

The 30-day limitation to return security deposits may not be sufficient for the landlord to estimate damages. For example, in a college town hundreds of apartment turn over at one time. It would be difficult for a landlord that owns a large multifamily property to determine damages for hundreds of students at the conclusion of the school year. In the case of a fire, the landlord would require additional time to have the unit assessed for insurance purposes.

As in the case of a fire or other significant damage caused by the tenant, a landlord may estimate the value of physical damages to the unit in excess of the tenant's security deposit. Section 1204 should include language to assure that landlords can retain the tenant's security deposit in full and collect for physical damages exceeding the security deposit amount.

Recommendations*:*

- *We suggest increasing the time limitation to 45 days or including language similar to current law in North Carolina:*

> If the extent of the landlord's claim against the security deposit cannot be determined within 30 days, the landlord shall provide the tenant with an interim accounting no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord and shall provide a final accounting within 60 days after termination of the tenancy and delivery of possession of the premises to the landlord. [13]

[13] See N.C. Gen. Stat. § 42-52.

- *Section 1204 should include language to assure that landlords can retain the tenant's security deposit in full and collect for physical damages exceeding the security deposit amount.*

- *Please consider the following language as it provides clarification.*

(a)Not later than [30] days after ~~a tenancy ends~~ the termination of the lease and vacation of the premises, a landlord shall send to a tenant the amount by which the security deposit and any unearned rent exceeds the amount, based upon the landlord's good faith calculation, that the landlord is owed for unpaid rent due under the lease and for the tenant's noncompliance with the terms of the lease or this [act].

In regard to the definitions associated with Article 12, the industry has reservations regarding the definition of "unearned rent." As written in Section 102(41), the definition could be interpreted to prevent the landlord from recovering rent due under the lease. We ask the committee to update the definition as follows.

(41) "Unearned rent" means rent and prepaid rent paid to a landlord for any period of time beyond the termination of the tenancy. Unearned rent does not include rent due under the lease.

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