

April 15, 2011

Bill Rowe  
General Counsel  
North Carolina Justice Center  
Raleigh, NC

re: Constitutionality of proposed additional bonding requirements in landlord-tenant statute

Dear Mr. Rowe:

You have asked me to consider the constitutional propriety of proposed amendments to North Carolina's landlord-tenant laws that would impose an additional undertaking for tenants seeking to appeal via trial de novo in district court pursuant to NCGS 42-34(b). The proffered amendment to Section 4 would require that, beyond posting a bond and paying rent that accrues while awaiting trial, the tenant must pay into the clerk's office an additional sum for whatever "reasonable damages that the landlord may suffer." In my judgment, this discriminatory bonding hurdle violates the equal protection clause of the fourteenth amendment – placing an impermissible burden "on the less-than-affluent tenant-appellants in summary ejection cases." <sup>1</sup> If passed, I am confident it will be invalidated.

The proposed Section 4 "reasonable damages" amendment places hurdles in the face of the statutory right to appeal that do not apply to magistrates' judgments generally. Currently, under NCGS 7A-227, all money judgments are automatically stayed. This policy recognizes that magistrates, who are not required to be lawyers, may, on occasion, fail to issue valid judgments. It is preferable, therefore, to disallow immediate execution -- since the rulings can be reviewed in short order by the district court. Section 4 would depart from this broad practice under circumstances in which the additional costs imposed would often

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<sup>1</sup> This is the language of the federal court, reviewing North Carolina's eviction statute, in *Usher v. Waters Ins. & Realty Co.*, 438 F.Supp. 1215 (W.D.N.C. 1977); see also, *Lindsey v. Normet*, 405 U.S. 56 (1971).

result in the effective forfeiture of statutorily-granted rights to appeal. Many tenants cannot afford to meet the statute's existing financial requirements. Adding what may be thousands of dollars to them will frequently be preclusive. Likely forfeiture may, in fact, be one of the principal purposes of the proffered amendment. It is not a goal, however, that can be squared with the fourteenth amendment.

Both the United States Supreme Court and the federal district courts in North Carolina have been extraordinarily skeptical of discriminatory bonding requirements that burden the procedural rights of low-income citizens. In *Lindsey v. Normet*, for example, the Supreme Court invalidated an Oregon provision requiring a double bond in eviction proceedings. The justices concluded that the added "bond prerequisite for appeal of a forcible entry and detainer action... arbitrarily discriminates against tenants seeking to appeal" adverse decisions. The requirement "burdened" the statutory right of appeal and was not necessary to preserve the property at issue in the litigation.<sup>2</sup>

Similarly, and closer to home, in *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977), the federal district court invalidated an earlier selective burden on tenants' rights to appeal eviction. There, the court struck down a bonding requirement linked to a three months rent standard. It is important to note that, upon the mere assertion of the landlord, the proposed amendment to Sec. 4 may be even larger, in some circumstances, than the long-invalidated three month standard. Even when it is not, however, the non-discrimination principle recognized in both *Lindsey* and *Waters* applies with full force:

"Tenants wishing to remain in possession pending appeal of summary ejectment orders are subject to ... special requirements which do not apply to appellants in any other classes of cases. ... The tenant who cannot put up the three months' rent bond and other required assurances is thus effectively denied jury trial by being thus denied access to the District Court.

Taken together, the North Carolina statutes and rules deny access to jury

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<sup>2</sup> *Lindsey v. Normet*, 405 U. S. at 74-79.

trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants in summary ejection .... The composite practical effect of the North Carolina statutes and rules is to deny the right of trial by jury and to deny any effective appeal from an order of summary ejection.<sup>3</sup>

The rights of procedural fairness and equal access to the system of justice which animate Lindsey and Waters cannot be squared with the attempt to require additional, discriminatory bonding requirements as reflected in the proposed amendments to Sec. 4.

Sincerely,

Gene R. Nichol  
Professor of Law  
University of North Carolina

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<sup>3</sup> Usher v. Waters Ins. & Realty Co., 438 F.Supp. 1215 (W.D.N.C. 1977).