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FROM: Jeffrey C. Turk, Esq.  
DATE: July 17, 2020  
RE: House Bill 5166

While House Bill 5166 purports to allow for the filing of summary process actions at the conclusion of the current “eviction moratorium”, this Bill, in fact, establishes a system which would prevent all non-payment cases for, at least, an additional twelve (12) months. The Bill also prohibits owners from recovering their properties at the end of lease terms, increasing rent and limits the ability to enforce behavioral provisions of a lease. In general terms, this Bill would prohibit an owner from commencing any eviction action to collect rent or recover their property based on rent due from March 10, 2020 through the twelve (12) months following the expiration of the Governor’s Emergency Order. The only exception would be where the owner can prove, by clear and convincing evidence, that the failure to pay rent was not a result of, in “any way, directly or indirectly”, any conditions or events caused by COVID-19. The Bill further imposes civil penalties and liability where the owner is unable to prove that COVID-19 had no effect, in whole or in part, on the tenant’s ability to pay the rent. Of course, since an owner would never possess the evidence needed to prove this “cause”, by clear and convincing evidence or otherwise, the Bill creates an insurmountable barrier thereby effectively preventing all such filings for this significant period. Likewise, in order to deter any potential filings, the Bill deems any such filing, or threat to file such a case, a per se violation of G.L. C. 93A, which would entitle the tenant to treble damages and attorney’s fees.

This memorandum provides a review of the Bill and a brief analysis of the serious issues this law would create.

## I. Legal Restrictions

### A. Legal Action

While this Bill would permit property owners to once again commence summary process actions, it restricts such cases to “just cause” evictions. “Just cause” is limited to (a) material lease violations ONLY after a tenant is afforded thirty (30) days to cure; (b) creating a nuisance, substantial damage to a unit, or substantial interference with quiet enjoyment; (c) use of the apartment for illegal purposes; and (d) non-payment of rent where the owner is able to prove, by “clear and convincing” evidence, that the failure to pay did not result from a loss of income or other change in “economic circumstance”,

whether whole or in part, caused “in any way, directly or indirectly”, by any condition or event related to the pandemic.

Additionally, the Bill creates a rebuttable presumption in all non-payment of rent cases, that the non-payment of rent was, in fact, the result of such a loss of income. The tenant would not have to offer any evidence to support such a claim and it would be the owner’s burden to obtain such evidence and prove same at trial by this clear and convincing evidence. This standard is higher than the normal “preponderance of the evidence” standard of proof in civil cases. Likewise, if the alleged cause of the eviction was a material lease violation, a tenant would now be afforded thirty (30) days to cure such violation, in which case the owner could not commence an action. In other words, material lease violations, such as smoking, disturbances, unauthorized occupants, etc. could continue for thirty (30) days and, if the tenant then resolves that alleged violation, the owner would have no remedy. If another similar lease violation occurred, the owner would again need to afford the tenant an additional thirty (30) days to address such allegations. Only if the lease violation was not cured within this period could the landlord then serve a notice to quit and proceed with legal action. Finally, the Bill would prevent owners from recovering an apartment at the end of a fixed-term lease or after terminating a tenancy at will. Tenants under a lease which has expired could remain during this additional twelve (12) month period regardless of whether the inability to relocate was the result of any COVID-19 issue or inability to locate alternative housing. Owners are also prohibited from recovering property for their own personal use, to sell the property, to perform required repairs, or for any other reason other than lease violations, criminal conduct, damage, and interference with quiet enjoyment. Similarly, a person who agreed to a month to month tenancy may not be required to relocate during this extended period.

#### B. Rent Control

The Bill would re-impose a form of rent control by prohibiting owners from raising rents above those in effect on March 10, 2020 for a period of twelve (12) months after the expiration of the Emergency Declaration. This is regardless of the tenant’s income, including whether the tenant has actually suffered any loss of income, and regardless of whether the lease permitted such an increase. The sole exception would be subsidized housing in which the rent is permitted to be recalculated based on the tenant’s household income. Otherwise, even if the lease permits a rent increase, or the lease has ended and the tenant remains, no rent increase may be imposed.

#### C. Sealed Records/Credit Reporting

The Bill would permanently seal all records of any non-payment of rent cases from March 10, 2020 through twelve (12) months after the expiration of the Emergency Declaration. Thus, access to these public records would be prohibited even in those cases filed based on clear and convincing evidence that the non-payment had no connection to any COVID-19 condition or event. Likewise, an owner can neither initiate, file or

threaten to file any negative credit report for rent during this extended period and regardless of the reason for the non-payment.

#### D. Liability

Any owner who attempts to remove a tenant, or threatens to remove a tenant, except for “just cause”, would not only be prohibited from recovering possession of the apartment, but would also be deemed to have violated G.L. c. 93A and be subject to three (3) times actual damages and attorneys’ fees. This would include cases where the owner commences, or threatens to commence, an eviction action but ultimately is unable to prove that the tenant’s failure to pay rent was not, in any way, based in whole or in part, on an issue relating to COVID-19. For example, if the tenant fails to respond to the landlord or fails to suggest any reason for the failure to pay, the landlord would be subject to this civil liability if the tenant either later alleges a COVID-19 related loss of income or the landlord is unable to elicit such information from the tenant at trial. As noted above, in virtually all cases, the owner would lack any such evidence, let alone clear and convincing evidence, of the cause of the non-payment. However, regardless of whether the landlord acted in good faith, this civil liability would be imposed for even threatening to initiate such an action. Likewise, liability would also be imposed if the owner threatens to commence, or commences an eviction action based on a material lease violation and then fails to prevail at trial. In these cases, not only would the owner fail to recover possession of the apartment, but it would then also be subject to these civil penalties.

#### E. Mortgage Forbearance

The Bill would permit owners with less than fifteen (15) residential units to obtain mortgage forbearance for an initial period of one-hundred and eighty (180) days, with an optional extension of an additional one-hundred and eighty (180) days, if they have experienced a financial impact from COVID-19. However, during the period of the forbearance, all rents in the building must be forever waived unless the owner can demonstrate by clear and convincing evidence that a tenant’s failure to pay rent did not result from any loss of income or change in economic circumstance caused, directly or indirectly, by COVID-19. Again, as the owner would not have such information, it would be virtually impossible to produce such “clear and convincing” evidence and, as a result, all rents would be waived during any such forbearance.

#### F. COVID-19 Housing Stability and Recovery Fund

This Bill would create a COVID-19 Housing Stability and Recovery Fund which would provide assistance to owners of residential housing who are unable to pay housing or housing related costs based on COVID-19. Priority would be afforded to owner-occupant landlords, elderly owners on a fixed-income, non-profit landlords, and landlords owning fewer than fifteen (15) units. Unfortunately, the Bill does not provide any funding for this Fund and instead anticipates potential funding from “public and private sources”.

## II. Analysis

### A. Non-payment of Rent:

While this Bill purports to permit owners to make payment demands and commence evictions where a tenant's inability to pay rent is not based on a COVID-19 related loss of income, the Bill effectively prevents owners from doing so by shifting the burden of proof regarding the cause of non-payment to the landlord. As stated, an owner would be prohibited from even threatening to take any legal action to collect rent unless the landlord can prove that the cause of the non-payment was not, in any way, related to COVID-19. Of course, only the tenant would have this information. A landlord would never know whether there was some COVID-19 related reason for the non-payment of rent, especially in cases where the tenant refuses to communicate with the landlord. This issue is made even more difficult due to the exceptionally broad language used in the Bill as to the "effect" COVID-19 must have had on the tenant. The landlord does not merely need to prove that the tenant's income did not change. Rather, the landlord has to prove that the loss of income "or change in economic circumstance" was not caused "in any way, directly or indirectly" by any COVID-19 related issues. Thus, it is not only a change in income which would have to be established. The landlord would also have to prove that the current pandemic had no effect in any way on this tenant's "economic circumstances". Of course, few, if any, persons could be shown to have suffered no changes in their economic circumstances as a result of this pandemic. Even beyond this shifted burden and broad definition, the Bill also requires the landlord to prove this fact by "clear and convincing" evidence, a standard of proof which is so high as to effectively render the burden insurmountable. Again, the Bill does not require the tenant to provide this information or even appear at trial to raise the issue. The burden is on the landlord to somehow produce this evidence which is outside of its possession and/or control.

Beyond the foregoing barrier, this Bill also creates a significant deterrent to a landlord even attempting to assert such a case by imposing civil penalties and liability if the landlord commences such an action, or even threatens such an action, and then loses at trial. As noted, the Bill deems any such action, or threat of action, to constitute a per se violation of G.L. c. 93A thereby requiring the Court to award the tenant treble damages in addition to attorney's fees and costs. Thus, if the tenant refuses to communicate with the landlord and refuses to pay rent, the landlord would have to assume the risk of proceeding with an action. If the tenant then fails to provide information to the landlord as to the cause of the non-payment, or merely fails to appear at trial such that the landlord has no way to elicit this testimony, the landlord would not only lose their case, but would also be subject to damages pursuant to C. 93A. This liability would also result even if the owner sent a notice to quit and the tenant then alleged a COVID-19 related reason for not paying. In effect, this Bill would transfer the burden of proving the cause of the non-payment to the landlord, raise the level of proof required of the landlord to the high standard of "clear and convincing evidence" and impose significant liability if they are later unable to meet this burden of proof. Failing a tenant actually acknowledging that the refusal to pay rent had nothing, whatsoever, to do with the pandemic, landlords will

not be able to assume the potential risk of significant liability created by commencing or even attempting to commence such an action. The practical effect of this Bill is to enable tenants to continue the refusal to pay rent even in cases where they maintain the funds to do so.

Finally, the use of G.L. c. 93A to impose liability on an individual that seeks, in good faith, to exercise their constitutional right to petition the Courts would be unprecedented. A fundamental principal of our constitutional democracy is that people have the right to seek redress from a court without having to proffer evidence which is not within their possession. There does not appear to be any other Massachusetts Statute which not only prevents a party from accessing the courts, but imposes liability if they seek such redress but are unable to thereafter prove a fact with evidence which was outside of their possession. This Bill, in practice, imposes treble damage and attorneys' fees for the simple fact of seeking, in good faith, redress from a court. It is unconscionable and unprecedented to subject a party to liability, and potential sanctions from the Attorney General, where the required information to avoid such liability cannot be obtained by the party.

#### B. "Just Cause"

This Bill would create a "just cause" restriction on summary process actions. This raises several concerns. Initially, it should be noted that, by eliminating so called "no-fault terminations, an owner whose tenant remains after the expiration of their lease term will be permitted to remain for at least an additional year. This is true even if the owner desires to move into their own home, has rented the apartment to another tenant, or needs to sell the property. This restriction applies regardless of the contract the parties signed with a set term, and is not conditioned on the income of the tenant or any effect of COVID-19. Furthermore, at the end of this period, the owner would still need to comply with current state law which not only requires the owner to proceed with the legal process, which can often take seven (7) - ten (10) months, but also provides for a discretionary stay of an additional six (6) - twelve (12) months. Thus, this Bill would effectively allow a market tenant whose lease has expired to stay in a person's home for an additional 2 years regardless of whether the owner had a good faith need to recover their property. In addition, the Bill would prevent the owner from increasing the rent during this entire period even if the market rent increased and regardless of the income of the tenant or landlord. This would also apply to a month to month tenant. While that tenant could leave at any time, the owner could not recover their own property or seek to raise the rent for this extensive period.

In addition, while the Bill would allow evictions for material lease violations, it now requires the landlord to afford the tenant a thirty (30) day period to cure the violation. Assuming the violation remains after the thirty (30) day period, the tenant would then receive a notice to quit and the rights afforded in summary process procedure. As a result, a tenant could be smoking in the apartment and could then continue smoking for thirty (30) days if, at the end of that thirty (30)-day period, they then agreed to cease. They could then commence this behavior again and be entitled to another thirty (30)-day

cure period for this new lease violation. This would also apply to tenants housing unauthorized occupants with criminal records, using their apartments for short-term rentals, creating loud disturbances, and otherwise violating their lease. Again, under current law, the tenant would receive a notice to quit and, upon the expiration of same the landlord could proceed in court and seek an agreement for the tenant to cease this conduct. Under this law, owners would be unable to effectively enforce their leases which would have a serious impact on the other residents who are forced to live with these issues.

### C. Sealed Records

While the public policy motivations regarding sealing records for tenants who are unable to pay rent due to COVID-19 is subject to interpretation, it must be noted that based on the Bill's prohibition against filing summary process actions based on non-payment due to COVID-19, the only records being sealed would presumably be those in which the Defendants do not have a COVID-19 related reason for non-payment. It is unclear why such records should be sealed, and why such persons should not be reported to credit, where their non-payment is without any such justification.

### D. Owner Relief

A fundamental flaw in this Bill is its continued failure to address the underlying issues resulting in a tenant's inability to pay rent. As stated, this Bill does not limit its protections to persons who have incurred a loss of income which renders them unable to pay rent. Rather, it affords protections to all persons where the OWNER cannot prove the failure to pay rent was due to some issue related, directly or indirectly, to this pandemic. Likewise, simply deferring rent payments, now for at least another twelve (12) months, does nothing other than allow the rental arrears to increase to a level which will cause the tenant to ultimately lose their housing. It further imposes the sole burden of this inability to pay on the private landlords who neither caused nor created this pandemic and who are being burdened with additional expenses to address same. To the extent that the legislature intends to address the serious economic issues faced by residents who have suffered an economic impact, this Bill fails to offer any such relief. There is no provision for vouchers or other funds for at-risk residents nor any means by which owners and residents can enter into payment agreements to attempt to access resources or address these issues. Instead, it merely requires landlords to cease collecting rents for the next twelve (12) months by imposing unreasonable liability on any landlord seeking to enforce their leases.

In addition, the economic consequence of this Bill cannot be overstated. Currently, a significant number of tenants have refused to pay rent without any justification. Despite numerous communications from owners requesting residents contact them to discuss payment options, decrease their rent in affordable housing, or to offer assistance in accessing RAFT and other resources, many residents have elected to both refuse to pay rent or enter into any discussions. As a result, many owners have already suffered significant economic losses. This Bill would actually cause these losses to increase as

tenants become aware that their silence as to the cause of their failure to pay rent will actually benefit them and prevent the owner from taking any action. As these balances increase, many owners are already reducing services and eliminating employees. Owners are also delaying or cancelling construction projects and services from third party vendors, such as cleaners, exterminators, and tradespersons. Extending this rent moratorium for an addition twelve (12) months will result in owners defaulting on mortgages and service contracts, being required to lay off employees, and cease construction and repairs. On the other hand, allowing owners to bring residents to court will NOT necessarily result in evictions. For example, residents in affordable housing will be able to lower their rent through the recertification process if they had a loss of income once they are in court. Market residents who may not be familiar with RAFT and other city funds will be able to access such funds through the housing court. Owners and tenants will be able to participate in court mediation and enter agreements which, by Housing Court Standing Order, must be reviewed and approved by a Judge for fairness. Finally, even in cases where the tenant is unable to pay, Judges already have the discretion to grant tenants up to a year to locate alternative housing. Thus, rather than simply pushing off these issues to a point where a tenant owes so much that s/he cannot recover, and in the process creating an economic catastrophe, allowing the parties to simply file cases at the expiration of the current moratorium will actually safeguard these tenants and enable them to maintain this housing.

### III. CONCLUSION

Simply stated, this Bill effectively prevents owners from serving any notice to quit or otherwise threatening to or actually commencing any legal action for non-payment of rent except in the rare case where a tenant has affirmed that their non-payment of rent was not related, in any manner, to any economic effect of this pandemic. Without such an implausible affirmation, owners will be required to assume the significant risk of proceeding with an action in which their likelihood of success is minute and with the added consequence of liability pursuant to G.L. c. 93A. Furthermore, the Bill will establish a new form of rent control for, at least, the next twelve (12) months, while also creating significant uncertainty in the housing market as owners will be unable to rely on tenants vacating at the end of their lease terms. Finally, the Bill fails to actually address the economic issues being confronted by tenants and imposes a significant economic burden on property owners in the Commonwealth. While the goal of ensuring that economically impacted tenants are able to remain in their apartments is amiable, this Bill fails to address that challenge in any meaningful way and will create significant economic and personal harm to property owners.