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TO: Senate General Government,
Consumer and Small Business Protection Committee

FROM: Mark G. Passannante

RE: Opposition to SB 91

Date: March 22, 2013

I represent many landlords and property managers in Oregon. In addition, I have an interest in and operate residential rental property in Oregon and am a board member with the Rental Housing Association of Greater Portland. I am writing to request that you not support SB 91.

The inability, under SB 91, for a landlord to consider criminal history of tenant applicants, is an unfair barrier to selecting tenants and an unwarranted advantage for some applicants over others.

Currently, there is no state statutory provision prohibiting a private landlord's use of criminal convictions or arrest records (Public Housing Authorities have limits on the type of criminal convictions that can be used to deny housing). Understand that the lack of a statutory provision does not mean that applicants with criminal convictions cannot be approved if the landlord criteria allows for such approval or allows for such approval at the discretion of the landlord. It simply means history can be considered by the landlord in their decision-making. Further, approval or denial of an application must be done consistent with Fair Housing requirements. Different landlords use different criteria when it comes to performing criminal background checks or the use of convictions in making rental decisions. Criteria used by landlords vary widely and landlords are required to provide their criteria before charging an applicant screening fee. While greater freedom to individually (or by organization) determine applicant criteria allows landlords to determine with whom they want to enter into agreements, greater freedom in adopting criteria in relation to criminal conduct also allows applicants a better opportunity to assess the nature of the tenants being approved in any particular rental community in comparison to other communities. The restrictions suggested on using a class of criminal convictions in SB 91 will likely eliminate their consideration from the evaluative process. This impacts not only the landlords' right to determine their tenants, but also limits an applicants' right to assess whether or not the community where they are intending to move also houses convicts.

If the goal is an individualized evaluation, it is only accomplished for a small subset of applications without any justification as to why that subset of applicants is entitled or should have a different evaluation than an applicant with an old assault conviction or an applicant with a poor credit history, but no criminal record.

Tenant screening agencies will likely have a difficult time doing criminal background checks and providing only information that would be germane to a rental decision under the proposed bill. For instance, my understanding from at least one screening agency is that they do not include dismissed evictions in their reports to landlords because a dismissed eviction cannot be used to evaluate an applicant. Eviction information is easily obtainable by a review of the online public record which also provides the disposition of the eviction (dismissal, restitution, pending). Determining the difference between a "person crime" and a crime that is not a "person crime" will be difficult since the term "person crime" is not defined in the statute. What is meant by a person crime? Is it just those crimes listed under ORS 163 (Crimes Against Persons) or does it include other crimes that are listed under ORS 164 (Crimes Against Property) or ORS 162 (Crimes against the State) but could be considered a crime against a person as well, e.g. Robbery (some robberies involve injuries to persons or attempts to injure persons), what about burglary or deception crimes.

Even more confusing is how a landlord is supposed to determine whether a conviction that is not one of the "bad convictions," may be used to deny an applicant because it is "Any other crime, if the nature of the criminal conduct for which the applicant was convicted would adversely affect the landlord or other tenants' property, or the health, safety, or right to peaceful enjoyment of the premises by other residents, the landlord or the landlord's agent."

Does that mean the general conduct that results in a particular type of conviction such that a conviction for that crime is conduct that would adversely affect the things listed above. e.g. theft by deception which may not be a person crime, but certainly may put the landlord's or other tenant's property at risk. Or does it mean that a landlord will need to look into the exact nature of what the applicant did to be convicted to determine whether or not the applicant poses such a danger. One of the main definitions of "conduct" is "personal behavior." This definition would seem to imply that the proposed provision means that it is not the type of crime that is to be considered, but the specific behavior that resulted in the conviction that must be considered. If the latter level of scrutiny must be applied, where does this particularized information come from?

This type of particular information is not usually part of the online public record, which provides the statutory title of the conviction. If it is not part of the online information readily available to the public, it is not information that would be generally available to a tenant screening company either. If the information is not readily available, the ability of most landlords to use such information in making screening decisions is low and the net effect will be that most landlords will not be in a position to consider any conviction that does not fall squarely within a crime against a person, sex offense or drug related crime.

Looking forward, this bill appears to be a launching pad for future legislation eliminating the landlord's ability to use things like a payment or credit history in evaluating an applicant. The crimes that are permitted for an outright denial could broadly be characterized as safety crimes or livability crimes. While safety and livability are important concerns and may be the primary concern of a public housing agency when evaluating an applicant (public housing agencies use

limited criminal conviction criteria), private landlords also have a significant economic interest in evaluating an applicant that should not be ignored or given less consideration.

Part of the screening process is for private landlords to evaluate whether or not the applicant poses an increased risk of defaulting on the rental agreement. Some of the crimes that may be excluded from consideration as detailed above are also crimes that may be useful in assessing the risk of default (a deception type of conviction, a theft conviction, a false statement conviction, etc.). If those types of crimes cannot be used in evaluating an applicant or used only with extensive and particular individual information, what then, is the justification for using a person's payment history at their former residence or credit history in the evaluative process? If payment and credit history are not permitted, tenant screening may soon be a thing of the past.

Finally, the proposal in SB 91 changes the nature of past legislative prohibitions in applicant evaluations. ORS 90.390 is the current provision that prohibits landlords from using certain information in the screening process. The current prohibitions in ORS 90.390 are much different than those in the suggested bill. The current version of ORS 90.390 prohibits consideration of circumstances that are not necessarily determinative of an applicant's suitability from a business or community standpoint and include a prohibition on denying or offering different rental terms to a person due to race, religion, familial status, disability, etc. (fair housing). These are things that are broadly considered to have no impact on a particular applicant's ability to pay, interactions with neighbors and the care of the property. The other prohibition bars using an eviction that is dismissed. A dismissed eviction can occur for a variety of reasons, including a previous landlord's failure to meet their obligations. As such, the dismissal is not an accurate measure of anything that the tenant did or did not do. And while the same could be said for an arrest because an arrest, in and of itself, is not evidence of criminal conduct, a conviction is strong evidence of such conduct.

While there are no certainties, there has been no argument submitted that a person's criminal conviction history has no bearing on their future behavior. Further, criminal convictions are not the type of record (like an arrest) from which no conclusion on the person's behavior can be drawn.

SB 91 does not further any fair housing goal, but it does improperly make criminal convicts a protected class. Landlords are not the only persons who use criminal background checks in evaluating an applicant. Employers also use such records. The EEOC has policy guidelines on using criminal convictions to further equal employment opportunities and to prevent "nonculpable" employment discrimination based on the disparate impact of facially neutral application policies. The proposed legislation does not further this goal and cannot be said to promote any fair housing goal because ORS 90.390(3) already bars a neutral housing policy, including screening criteria, that has a disparate impact on a protected class.

There are too many unanswered issues and complications with SB 91. I urge you to vote no on this proposal.