D.C. Office of the Tenant Advocate
Comments on the Rental Housing Commission's Second Proposed Rulemaking
for 14 D.C.M.R. Chapters 38 through 44
February 16, 2021

OVERVIEW

The Chief Tenant Advocate and the OTA once again wish to commend the Rental Housing Commission for how it has undertaken what we believe is among the most significant rulemaking exercises in the District's history. The Rental Housing Act encompasses many of the critical rights and protections that renters in the District enjoy – including rent stabilization; protections against eviction and retaliation; the tenant right to organize; and many others. Notwithstanding the numerous critical amendments in the intervening decades, the Act's implementing regulations have not been significantly revised or updated in 35 years -- to which the detail and scope of this 200 plus-page proposed rulemaking attest. Just as the importance of the rulemaking to District tenants and the rental housing community cannot be overstated, nor can the importance of the Commission's commitment to a comprehensive, responsive, and balanced process. The OTA appreciates the changes to the proposed rulemaking the Commission has made to date and this opportunity to suggest further changes. We look forward to continuing the conversation.

CHAPTER 38: COMMISSION OPERATIONS AND PROCEDURES

3805: Stays pending appeal

Concern: 3805.1 through 3805.3 provide that certain final orders of the Rent Administrator or the Office of Administrative Hearings (OAH) shall be effective immediately regardless of an appeal, while others are automatically stayed, and still others may be stayed upon the motion of a party. We understand the intent -- as explained in the introductory explanation -- is to codify caselaw relevant to the matter of stays pending appeal. Inasmuch as 3805.2 lists orders that are automatically stayed that primarily benefit the housing provider ("including rent refunds, fines, or attorney's fees"), our concern is an actual or a perceived unfairness to tenants.

Recommendation: If an award of back rent owed by the tenant to the housing provider is an example of a "payment of a specific amount of money" that is automatically stayed, that would tend to mitigate our concern. However, in that case, we recommend that such orders should be added to the list at 3805.2 of examples of orders that are automatically stayed for the sake of the appearance of balance. More generally, we recommend that the Commission assess the matter of stays pending appeal from the perspective of equity and balance between tenants and housing providers, and whether or not incorporating the current caselaw in the final rulemaking makes the best sense from that perspective.

3812: Notices of Appearance

Concern: 3812.2 requires that the notice of appearance must include certain contact information for the appearing individual but does not require an e-mail address.

Recommendation: For the convenience of the parties and the Commission alike, we recommend requiring the appearing party's contact information to include an email address.

3812 & 3918: Referral to Bar Counsel for Disciplinary Action

Concern: Proposed 14 DCMR § 3812.14 and § 3918.14 refer to the "Office of Bar Counsel," which has been renamed the "Office of Disciplinary Counsel." Also these provisions state that the Commission or the Rent Administrator, as applicable, may refer an attorney to the DC Bar for possible disciplinary action, without necessarily providing the attorney with an opportunity to be heard on the matter. Consistent with our policy of encouraging more attorneys to take on tenant cases, a possible concern is that this may discourage less experienced attorneys from doing so.

Recommendation: We recommend replacing the term "Office of Bar Counsel" with the term "Office of Disciplinary Counsel." We also recommend that the Commission consider whether these provisions should be amended to ensure that the affected attorney has an opportunity to be heard before being referred to the DC Bar for disciplinary action.

3825: Attorney's Fees

Concern: The attorney's fees provision at 3825 does not explicitly incorporate the DC Court of Appeals holding in *Loney v. DC Rental Housing Commission* (11 A.3d 753, 760 (DCCA 2010)) that a *pro bono* attorney, one who does not charge the tenant any attorney's fees at all, is entitled to the "lodestar" fee calculation based on prevailing market rate. It is also our understanding that OAH has applied this calculation to the calculation of fees for "low-bono" attorneys, attorneys who charge tenants a low hourly rate or who cap the attorney's fee at a low aggregate amount.

Recommendation: We believe codifying this caselaw in the regulations would encourage more attorneys in the District to take on tenant cases. Specifically, we recommend adding the phrase "which shall apply to *pro bono* and low-bono attorneys at the end of the phrase "the prevailing market rates in the District of Columbia" at 3825.12(a)(2)(C).

3899: Terms and Definitions: "rent ceiling" & maximum, lawful rent"

Concern: The proposed definition for "rent ceiling" refers to section 206(a) of the Act as it stood when rent ceilings were operative prior to their abolition in August 2006. The 2006 Reform Act changed the statutory heading for Section 206(a) to "***rent ceilings abolished***." That heading provides important informative context -- especially for anyone less familiar with the rent stabilization program – and helps the reader keep in mind the continuing relevance of the term to prohibited practices under the current regulatory scheme.

Recommendation: We recommend that that heading "rent ceiling abolition" be incorporated, at least parenthetically, in the definition for "rent ceiling."

Concern: This rulemaking introduces the new term "maximum, lawful rent." As explained in the rulemaking's introduction, that term is intended to refer to the maximum amount a landlord can charge for the unit prior to agreeing upon an actual "rent charged" amount with the next tenant. Relevant situations include the termination of an exemption or exclusion or when a

vacancy occurs. Presumably, the term also applies to rent adjustments pursuant to housing provider petitions that have been approved but have not yet been implemented.

While we believe a new term is needed to cover such "pendency" situations, we note that such terms have proven to be controversial in the legislative context – most prominently during efforts to address the problem of *de facto* rent ceilings that circumvent the Council's abolition of rent ceilings and to clarify the term "rent charged" (which the Commission addressed in its decision in the *Fineman* case). For many, the term "maximum, lawful rent" may be reminiscent of the term "rent ceiling" and may raise concerns about opportunities for creative mischief by some housing providers at the tenant's expense.

Recommendation: Accordingly, we recommend that Commission consider either defining the term, or clarifying in the relevant provisions that the legal effect of the term for any given unit is limited. It would be helpful if it were explicitly stated that "maximum, lawful rent" is merely a placeholder prior to an agreement with the next tenant on the "rent charged" amount; is irrelevant to any rent increase calculation; and is null and void once the actual "rent charged" amount is agreed upon.

CHAPTER 39: RENTAL ACCOMMODATIONS DIVISION

3900.4(b): The Rent Administrator and Defective Notices to Vacate

Concern: Section 3900.4(b) provides that the Rent Administrator's duties include "reviewing and disapproving of defective notices to vacate pursuant to 4300.5 of this title". With respect to defective notices to vacate, however, 4300.5 also includes among the Rent Administrator's duties the more definitive term "voiding." The term "voiding" more clearly and more definitively indicates how defective notices will be dealt with.

Recommendation: We recommend incorporating the term "voiding" at 3900.4(b).

3901.7: Filing Petitions and Other Documents

Concern: Section 3901.7 requests five (5) copies of the tenant petition to be filed for it to be properly submitted which may be a barrier to tenants facing financial hardships. It is unclear why five (5) copies are needed. This requirement is potentially burdensome for some lower-income tenants, and may even compromise the ability to assert rights through the tenant petition process.

Recommendation: In keeping with the Commission's intentions as set forth in Section 3901.2 ("no fee shall be charged for filing any petition or other document with the Rental Accommodations Division"), we ask the Commission to consider amending Section 3901.7 to require only the original tenant petition for filing purposes, and that any necessary copies be made either by the Rental Accommodations Division (RAD), or at RAD by the affected party free of charge.

CHAPTER 41: COVERAGE AND REGISTRATION

4106.8: Rent increase "Cooling Off" Period where Housing Provider has failed to notify the tenant of the unit's exempt status

Concern: 4106.8 provides for a 60-day "cooling off" period when housing provider has failed to notify a tenant of the unit's exempt status prior to the execution of the lease agreement, in violation of the registration requirements. During the cooling off period the housing provider is deemed not to have met the registration requirement to qualify for the exemption, or to be eligible to implement a rent increase.

Recommendation: We ask the Commission to reconsider our prior recommendation regarding a 365-day cooling off period for the following reasons: first, it would serve as a stronger incentive for housing providers to comply with this critically important notice requirement; second, it better accommodates the contractual expectations of a tenant who moved into the unit anticipating longer-term affordability due to the unit's rent control status; third, it better reflects the relative hardships between the tenant, who still may be compelled to move upon the second annual rent increase, and the housing provider, who would either have to forego a single annual rent increase, or, if the Commission so chooses, could be subject to rent control limitations for that single annual rent increase.

In the alternative, we recommend that the Commission establish a 90-day rather than a 60-day "cooling off" period. In part, this is because we are not clear as to why the rent increase situation (as described in the introductory explanation) would only apply to month-to-month tenancies. We believe such rent increase situations could occur, and are likely to occur, as of the expiration of the initial lease term. In such instances, section 534 of the Act permits the housing provider to require more than a 30-day notice of intent to vacate from the tenant, so long as the tenant is provided with a notice of any rent increase that is at least fifteen days greater than the required notice of intent to vacate. Indeed, it is increasingly common for the lease to require the tenant to provide a 60-day notice of tenant intent to vacate. A longer period is perfectly legal so long as the housing provider meets the "plus 15 days" rent increase notice requirement. Thus, as we understand the logic in the introductory explanation, a total 90-day cooling off period would in many more situations better achieve the purpose of providing the tenant with sufficient time to decide whether to stay or move.

4111: Penalty for Failure to Provide Disclosures to New and Current Tenants

Concern: 4111.10 states that the prohibition on rent increases provided by § 4111.7 (we believe this should be § 4111.8) shall last until 60 days after the housing provider corrects noncompliance with that section's disclosure requirements. While we recognize that section 222(c) of the Act provides little or no statutory guidance in this regard, these statutory disclosure requirements are critical to the enforcement and administration of the rent stabilization program. Therefore, we believe that a stiffer penalty especially for willful violations is warranted.

Recommendation: Where the housing provider has willfully failed to comply with these disclosure requirements, we ask that the Commission consider prohibiting rent increases for 360 days, or at least 180 days, after the housing provider has cured the violation.

CHAPTER 42: RENT STABILIZATION PROGRAM

4200: General Overview (rent decreases)

Concern: Section 4200.1 states that "rent may be decreased at any time" without any qualification or cross-reference. Our concern is the possible inference that rent decreases are unregulated and do not require any administrative action or notice to RAD. Such possible inferences are at cross-purposes with section 4204.11, which explicitly requires the housing provider upon decreasing the rent to file with the Rent Administrator a Certificate of Notice of Adjustment in Rent Charged in accordance with 4204.10.

Recommendation: To prevent this possible mis-inference, we recommend that 4200.1, in relevant part, be amended to read "Rent may be decreased at any time, in accordance with the filing requirement at section 4204.11 …".

4204.13: Excessive rent amount stated in lease is "void"

Concern: 4204.13 states that language in a lease seeking to permit or authorize a rent increase beyond that allowed by the Act is "void." Our concern is the possible inference that such lease terms, since they are void *ab initio* and thus a nullity, carry no further legal consequence. Such inferences are at cross-purposes with Commission case law (Tonica Washington v. A&A Marbury, LLC/UIP Property Management, RH-TP-11-30,151 (RHC 9/29/18).

Recommendation: We recommend amending 4204.13 to add at the end of the existing text the phrase "… and may constitute an unlawful demand for rent."

4205 & 4207: Effective date of a vacancy rent adjustment

Concern: Under section 4205.6(b)(1) & 4207.4 a vacancy adjustment is authorized and deemed effective ***when the housing provider retakes possession of the unit,*** and not when the next tenant first pays the new rent. While we appreciate and understand the logic of the introductory explanation, we believe that the effective date of the vacancy increase should be consistent with the effective date that the Commission acknowledges applies for statute of limitations purposes – namely the date when the next tenant first pays the new rent charged amount.

To be clear, we embrace the statement in the introductory explanation that a vacancy adjustment should be "*perfected*" – which we understand here to mean timely claimed – "based on and close to the date of the vacancy." In other words, the housing provider should claim the vacancy adjustment within 30 days of the vacancy occurrence or forfeit that right. We also strongly agree that "*this requirement helps assure that clear records are kept and that calculations are done based on the rent charged at the time the vacancy occurs*".

Nevertheless, we have two overarching reasons for distinguishing between date of 'perfection' and effective date. First, we believe it is unnecessarily confusing to have two effective dates in play at the same time – one for "effective date of maximum, lawful rent" (4207.1) and another for "effective date of rent charged" (which section

213(d)(1) of the Act may suggest is the statutory "effective date" for a vacancy adjustment).

Second, we believe that the vacancy increase is a "pendency" situation as described above regarding the term "maximum, lawful rent" and should become a nullity once the "rent charged" is agreed upon.

We also note how similar the vacancy scenario is to the "termination of exemption" scenario as described in the rulemaking's introduction regarding the term "maximum, lawful rent." The "termination of exemption" requires the filing of a Registration/Claim of Exemption form within 30 days of the triggering event (4203.2) and sets forth a formula (4203.3) for establishing the "maximum, lawful rent" pending the establishment of the "rent charged."

Recommendation: Accordingly, while again we recommend ***no change*** in the 30-day "Certificate of Notice of Adjustment in Rent Charged" or "perfection" requirement, we recommend that 4207.4 be amended so that the vacancy adjustment is deemed to be effective when the next tenant first pays the initial "rent charged" amount.

4207.2: Preconditions for a vacancy rent adjustment

Concern: The preconditions for a vacancy rent adjustment at 4207.2 do not make it clear that a vacancy adjustment is only appropriate when all co-tenants, not just a tenant, have vacated the unit.

Recommendation: We recommend that 4207.2(a) be amended to read in relevant part "… vacancy adjustment shall be authorized only if a tenant vacates a rent unit: (a) On the tenant's own initiative; provided that no co-tenants remain in the unit."

4208: Rent Adjustments by Any Housing Provider Petition

Cost of Code Compliance

Concern: 4211 ("Petitions for Changes in related Services or Facilities") appropriately includes as a condition for the approval of an S&F petition that "the change is not … intended to correct an ongoing or recurring violation of the Housing Regulations or other legal requirement." We believe this restriction applies or should apply to housing provider petitions generally and thus should also be included at 4208 governing housing provider petitions generally.

Recommendation: We recommend that a new subsection 4208.17 be added to provide that, "No housing provider petition shall be approved to the extent that it is intended to correct an ongoing or recurring violation of the Housing Regulations or other legal requirement." We also recommend that the Commission consider adding a comparable provision for each of the other petition types.

4208.4: Notice to Tenants of the Right to Contest the Petition

Concern: 4208.4 requires that each housing provider petition form must explain the purpose of the petition and alert tenants of the right to contest the petition. We believe this notice of tenants' right to contest the petition within the petition form is necessary but insufficient.

Recommendation: We recommend that the Commission consider amending 4208 to require the housing provider to conspicuously post the petition as well as any subsequent proposed order which tenants have the right to contest or regarding which tenants have the right to file exceptions and objections (for example the audit report for hardship petitions).

4208: Transmittal of Filed Petitions to the Office of the Tenant Advocate

Concern: The OTA is statutorily charged with "reviewing landlord petitions on behalf of tenants." (D.C. Official Code 42-3531.07(2)). However, the proposed regulations do not require or address the transmittal of all petitions filed with the Rent Administrator to the OTA.

Recommendation: We recommend that 4208 be amended to formally establish the procedure by which the Rent Administrator upon receipt transmits each filed housing provider petition to the OTA.

4209: Petitions Based on Claim of Hardship

4209.13 Items Excluded from the Calculation of Operating Expenses

Concern: Section 4209.13 lists specific expenses that the housing provider cannot include as an operating expense but that list may omit any number of other expenses that a housing provider could inappropriately categorize as an operating expense.

Recommendation: We agree with a prior recommendation that a catch-all provision be added to capture other expenses that housing providers may inappropriately include in calculating operating expenses, such as "any expenses not related to the ordinary operation and management of a rental housing business."

4209.35: Selective Implementation of Hardship Petition Rent Surcharges

Concern: Section 4209.2 provides that the total dollar amount of rent surcharges under a hardship petition "shall be divided between all rental units in the housing accommodation so that the rent surcharge for each unit shall be an equal percent of the rent charged." However, 4209.35(e) indicates that tenants may contest a petition's application of surcharges of different percentages only with respect to whether "good cause" exists for such selective implementation. These two provisions appear to be in conflict. Furthermore, it is not clear what may constitute "good cause" for selective surcharge implementation.

Recommendation: We recommend that 4209.2 be amended to clarify whether for "good cause" rent surcharges may be different percentages of the rent charged for different units, and if so that 4209.35(e) be amended to indicate what may constitute "good cause."

4209.30: Findings to be Included in the Audit Report

Concern: We are glad that 4209.30 was amended between the first and second proposed rulemaking to require that the Audit Report for a hardship petition be prepared by a Certified Public Accountant. However, the section does not specify what information must be included in the Audit Report.

Recommendation: We concur with previous recommendations that the regulations be amended to specify items that must be included in the Audit Report. Such items should include findings of fact and conclusions of law with respect to (1) the calculation of the total surcharge and (2) each itemized subpart requested by the housing provider and recommended by the auditor.

4210: Petitions Based on Capital Improvements

4210.29 & 4210.32: Selective Implementation

Concern: In the introductory explanation, the Commission states that "it is not apparent that any partial implementation or waiver as to some tenants should necessarily be prohibited." To be clear, the OTA does ***not*** believe that the housing provider should be prohibited from only partially implementing capital improvement surcharges or entirely waiving them. The problem only arises if and when the housing provider seeks to continue the surcharges only on certain units. We believe that it is both unfair and, by legislative intent and design, unlawful to continue to impose the surcharge past the amortization period on those tenants who have already paid their statutory *pro rata* share of the total surcharge – that is where the housing provider selectively ***chose*** not to implement the surcharge on other, more privileged, units.

Our reasoning is based on the statutory formula at section 210(c)(1) of the Act, under which the per unit surcharge shall be determined "… by dividing the cost over a 96-month (or 64-month) period of amortization and by dividing the result by the number of rental units in the housing accommodation." DC Official Code 42-3502.10(c)(1) & (2).

We also believe that selective implementation, when combined with a certificate of continuation for the purpose of continuing that selective implementation, impermissibly defeats a core statutory purpose: "To protect low- and moderate-income tenants from the erosion of their income from increased housing costs." DC Official Code 42-3501.02(1)**.**

Indeed, the OTA is aware of instances in which the housing provider declares on the CI petition form itself that among the possible reasons why continuation may be necessary is "... delays caused by (among other things) a decision to defer implementation of the increase or any portion thereof." In these instances, tenants have raised concerns about the possibility of selective implementation pursuant to the housing provider's express reservation of a prospective right to defer implementation.

Recommendation: Accordingly, we urge the Commission to explicitly disallow any continuation of surcharges beyond the 96-month or 64-month amortization period on the basis of selective implementation.

4210.25: Horizontal (versus vertical) stacking

Concern: The filing of capital improvement petitions in successive years for a particular building has triggered concerns that what should be a single project is being sub-divided into separate projects. It is easy to surmise an illicit purpose for doing so -- to evade the statutory per unit cap on CI surcharges that can be imposed pursuant to a single approved CI petition.

While this practice does not constitute "vertical stacking" in violation of the unitary adjustment restriction at section 208(g)(1) of the Act, it does constitute a different kind of illicit stacking – that is, "horizontal stacking" in the sense that subdividing a CI project into separate petitions can expose tenants to new surcharges being implemented in successive years, where that cannot happen if all the work is included in a single CI petition. Consequently, the effective CI per unit surcharge after a second consecutive CI rent adjustment could be as much as 30% of the rent charged instead of 15%, or 40% of the rent charged instead of 20%, depending on whether it is a building-wide or less than building-wide CI.

Recommendation: We recommend that the Commission add this practice at 4210.25 as a basis upon which tenants may contest a CI petition.

4210.31: Time to contest an application for Certificate of Continuation

Concern: This section provides affected tenants the opportunity to present exceptions and objections to an application for a Certificate of Continuation within 15 days of being served with the Certificate of Continuation. The concern is that 15 days may not be sufficient time for tenants to prepare and file the corresponding objections and exceptions.

Recommendation: We request that the Commission consider extending the time period for an affected tenant to present exceptions and objections to an application for a Certificate of Continuation to (30) days.

4211: Petitions for Changes in Related Services or Facilities

Maintaining Predictability for Tenants who Contracted for Utilities to be Included in Rent

Concern: 4211 would permit a housing provider to shift responsibility for paying for utilities to the tenant via a services and facilities petition that reduces the rent accordingly. This is problematic for tenants who signed leases that included utilities in the monthly rent specifically to secure the predictability that this arrangement provides.

Recommendation: Regarding services and facilities petitions that would shift the burden of paying for the utility to tenants, we concur with previous recommendations that tenants who signed leases under which a utility is included in the monthly rent should be permitted an opt out. If the current tenant opts out, the housing provider would not be permitted to shift the costs for that utility with respect to that unit until the next tenant occupies the unit. Thus, in the event that

the petition for a decrease in services or facilities is approved, it could not affect the rent level of a tenant who has opted out. The S&F rent adjustment could be imposed, however, on the affected unit following the termination of that tenancy.

4211.7: Proportional Adjustment of Rents Under a Services & Facilities Petition

Concern: 4211.7 provides necessary conditions for an S&F petition to be approved. The conditions do not speak to the proportionality of the proposed rent adjustments, either upward or downward, to the value of the service or facility being added to or subtracted from the rent charged.

Recommendation: We recommend that a new paragraph (f) be added to Section 4211.7 to read: "(f) The proposed rent increase for each affected unit pursuant to § 4211.6(h) does not exceed the value of the benefit to the unit; or the proposed rent decrease for each affected unit pursuant to § 4211.6(h) is no less than the value of the service or facility that will no longer be included in the rent."

4213: Voluntary Agreements

Reasonableness standard

Concern: 4213.21 & 22 refer to a "reasonableness" standard for an ALJ to weigh and consider the 9 relevant factors in determining whether the VA should be approved or disapproved. As a general matter we believe that is more than appropriate, however, we are concerned that the list of factors could become a "take it or leave it" "grab-bag" proposition.

Recommendation: We recommend that the Commission explicitly require the ALJ to issue Findings of Fact as to each of the 9 factors, and Conclusions of Law that follow from those facts.

Cost shifting

Concern: We are concerned that there is no explicit restriction on the use of a VA as an "insider" deal for current tenants to secure agreement to raise the rents on future tenants, effectively removing the building from meaningful rent control as the units turn over. As we have noted previously, we believe that practice is unlawful both in terms of legislative intent and statutory structure including the Act's legislative purposes. 4213.21(c) does prohibit "unreasonable rent adjustments" and "inequitable treatment of … classes of tenants or rental units." We believe that language is desirable so far as it goes, but also believe that further language is needed.

Recommendation: We recommend that the Commission establish a rebuttable presumption that the cost-shifting of a VA from current to future tenants constitutes inequitable treatment of classes of tenants or rental units and thus is impermissible. (§ 4213.21(c))

Pre-filing negotiations

Concern: In the introductory explanation, the Commission clarifies that negotiations can begin prior to the formal 30-day negotiation phase following the filing of a Proposed Voluntary Agreement. We agree that should be permissible inasmuch as efforts to reach early consensus are desirable. However, the history of VAs regarding those pre-filing negotiations indicates the need for regulatory standards or guidance regarding that pre-filing process.

Recommendation: We recommend that the Commission consider amending the relevant regulations to incorporate the following principles: (1) ***transparency*** meaning notice to all tenants and the opportunity to participate in those discussions; (2) ***disclosure*** of all terms under discussion, including a proposed VA as filed; and (3) a requirement of ***arms-length dealing*** so that tenants are treated equally and no one receives special advantages or disadvantages.

Timeline for construction work

Concern: Under 4213(g), a Proposed VA must include specific points of information, including "an estimated, nonbinding timeline" for the commencement and completion of any work. However, we believe that in some instances a binding agreement on timeframe for completion of the work may be an essential and integral part of the parties' "meeting of minds."

Recommendation: We recommend that (g) be amended to refer to "an estimated timeline" and "an indication as to whether the stated timeline is binding or non-binding."

4214: Tenant Petitions

4214.4: Non-disclosure Basis for Filing a Tenant Petition

Concern: A housing provider's failure to provide the tenant with a required disclosure pursuant to section 222 of the Act is not currently among the bases listed at 4214.4 for filing a Tenant Petition to contest a rent adjustment. The Commission has added to the proposed rulemaking a 60-day "cooling off" period at 4106.8 where the tenant was not given notice of a unit's exempt status prior to the start of the tenancy. This additional penalty provision provides a further reason to add "failure to disclose" as a specific basis for filing a tenant petition.

Recommendation: We recommend that "failure to provide a required disclosure" be added as new paragraph 4214.4(j) to the list of bases for challenging a rent adjustment via a tenant petition.

4215: Prohibited rent Adjustments for Elderly tenants and Tenants with a Disability

4206.7 and 4215.1: Elderly / Disability Protections & Authorized Household Members

Concern: These provisions state that in order to qualify for elderly / disability status for purposes of the lower standard annual cap on rent increases and for protection from rent adjustments pursuant to housing provider petitions, the unit must be "leased to and occupied by" a protected tenant. It is unclear whether the elderly tenant or tenant with a disability must be a leaseholder or may be an authorized occupant. We do not believe there is a statutory basis for

limiting the relevant protections to leaseholders. Indeed, we believe the statutory language is better read as extending these protections to authorized occupants.

Regarding the annual increase, section 224(a) of the Act applies to "an adjustment in the amount of rent charged *while a unit* ***is occupied*** *by an elderly tenant or tenant with a disability*, without regard to income." (*emphasis added*) (DC Official Code section 224(a)). Regarding rent adjustments pursuant to housing provider petitions, section 224(b) of the Act applies to "a current or future elderly tenant or tenant with a disability with a qualifying income." (DC Official Code section 224(b)).

Recommendation: Accordingly, we recommend that the phrase "leased to and occupied by" in 4206.7 and 4215.1 be amended to read "leaseholders and authorized others who occupy the unit." We believe this would better reflect the statutory intent to extend these affordability protections to tenants, for example, whose elderly grandparents move in with them, or whose household members include a dependent with a disability.

4216: Requirement to Maintain Substantial Compliance with Housing Regulations

4216.5: Timing of Evidence of Substantial Housing Code Violations

Concern: The regulation states that evidence of a substantial housing code violation will not be admissible if the violation was abated more than 12 months prior to the hearing. The twelve-month deadline seems arbitrary inasmuch as the statute of limitations is 3 years (see 4214.10), and there's no way of predicting the length of time between filing and the actual hearing date. So as written, it appears as though relevant evidence could and would be excluded for no reason. We are not certain that evidence of past non-compliance would ***never*** be relevant to the approval or disapproval determination or the calculation of the approved amount of the adjustment.

That said, we infer that the underlying policy rationale could be that housing provider petitions generally warrant a more forward-looking approach and should require only reasonably contemporaneous code compliance rather than "historic" code compliance. Arguably this policy approach is all the more warranted given that tenants have a remedy for past code non-compliance through the tenant petition process at 4214.3(a).

Recommendation: We recommend that the Commission consider removing the 12-month rule so that 4216.5 would read "Evidence of substantial violations of the Housing Regulations may be presented at a hearing by notices of violations issued by DCRA or any District or federal agency with jurisdiction over the particular violation or by the testimony of witnesses~~, except that no testimony of substantial violations shall be received in evidence in any hearing if the conditions giving rise to the complaint occurred and were abated more than twelve (12) months prior to the date of the hearing~~."

In the alternative, we recommend that 4216.5 be amended to reference the ability of tenants to seek rent abatements for past non-compliance by filing a tenant petition pursuant to 4214.3(a), so long as the tenant petition is filed within the 3-year statute of limitations. Providing this alert in the housing provider petition context would serve as a reminder to tenants who, not having

pursued damages for past actionable claims, are understandably aggrieved at the prospect of having to pay a substantial rent increase potentially to improve building conditions.

CHAPTER 43: EVICTIONS, RETALIATION, AND TENANT RIGHTS

4300.1: Grounds for eviction & notice to co-tenants

Concern: There is no general provision requiring that a notice to vacate be served on each co-tenant on a multi-tenant lease. We note that in the context of a Notice to Cure or Vacate, 4301.7 does require service "on each tenant who is demanded to vacate a rent unit." The absence of this provision for other kinds of notices to vacate raises due process concerns for any co-tenant who does not receive the notice.

Recommendation: We recommend that 4300.1, or the respective provisions for each kind of notice to vacate, be amended to require that the housing provider provide notice to each co-tenant on a multi-tenant lease who is subject to eviction.

4300.9: Personal Use & Occupancy and family members

Concern: Section 501(d) of the Act clearly states that this basis for eviction only applies where "natural person with a freehold interest" "seeks in good faith to recover possession of the rental unit for the person's immediate and personal use and occupancy as a dwelling." We do not believe this language can be interpreted as extending to the personal use and occupancy of an owner's family member.

Recommendation: 4300.9 should clarify that "personal" means only the housing provider him or herself and not a family member.

4300.10 et al: Notices to vacate for which TOPA is prerequisite

Concern: 4300.10; 4300.13; and 4300.15 do not specify what satisifes the requirement that the housing provider must provide the tenant with the opportunity to purchase the premises before issuing a notice to vacate due to (1) contract purchaser's personal use and occupancy (501(e) of the Act); (2) demolition (501(g) of the Act); or (3) discontinuance of housing use (501(i) of the Act). From that silence it could be inferred either that the Offer of Sale itself satisfies the requirement, or that the period of the notice to vacate may run concurrently with one of TOPA's statutory timeframes.

Presumably, however, the "opportunity to purchase provided by TOPA" can only mean that the tenant's opportunity to purchase has not expired due to the lapse of any relevant statutory deadline at D.C. Official Code 42-35404.02 *et seq*., including for the tenant statement of interest in purchasing, the negotiation of a contract, and contract settlement after a financing period.

Recommendation: We recommend that sections 4300.10; 4300.13; and 4300.15 be amended to clarify that the housing provider may not issue the notice to vacate prior to the termination of the tenant's opportunity to purchase under any statutory timeframe under TOPA.

4300.9: "Immediate personal use and occupancy" & timeframe

Concern: This section refers to the housing provider's ability to issue a notice for the housing provider's "immediate personal use and occupancy." It is unclear what time span constitutes "immediate" use and occupancy. This is particularly problematic in situations where the housing provider intends to perform renovations prior to his occupancy and issues a 501(d) notice rather than the more appropriate – but more time-consuming – notice under section 501(f) of the Act.

Recommendation: We recommend that the Commission consider whether to establish a timeframe of a number of days certain for "immediate personal use and occupancy" -- or to require that the housing provider provide such a timeframe subject to a reasonableness test.

4300.9: Good faith basis not to reoccupy a unit as represented in the notice to vacate versus good faith basis not to demand or receive rent

Concern: 4300.9 requires the housing provider or purchaser to submit to the Rent Administrator an affidavit stating that "the housing provider or the purchaser, as applicable, intends in good faith to not demand or receive rent for the repossessed rental unit from any person" for twelve months after repossessing the unit; and that "possession is sought only for the immediate and personal use and occupancy of the rental unit." Our concern is that requiring a "good faith intention" not to rent out the unit may well suggest that the housing provider or purchaser ***may*** rent out the unit in the event that there is a good faith basis not to reoccupy the dwelling as initially intended.

Our understanding is that section 501(d) and (e) of the Act prohibit renting out the unit within a 12-month period, whether or not there is a good faith basis not to reoccupy the dwelling for personal use as intended.

Recommendation*:* We recommend that 4300.9 be amended so as to (1) limit the "good faith intention" statement in the affidavit to the intention to personally use and occupy the dwelling; and (2) prohibit outright the collection of rent within the twelve (12) month period, as we believe is the statutory intent.

4300.16: Tenancy status while the unit is placarded

Concern: 4300.16 refers to situations in which the government has placarded the premises due to unsafe conditions, thus displacing the tenant. The provision states that the tenancy shall not be deemed terminated until the unit has been offered for reoccupation by the tenant and the tenant has waived that right. It is unclear, however, whether the tenant is obligated to pay rent prior to reoccupation.

Recommendation: We recommend that 4300.16 be amended to clarify that the tenant has no obligation to pay rent unless and until the tenant reoccupies the dwelling.

4302.1(a): Notices to Vacate for Other Reasons

Concern: Regarding notices to vacate covered by section 501(c) through (j) of the Act, the housing provider is required to disclose the factual basis he or she relied on "in sufficient detail to allow a reasonable person in the circumstances to know *what allegedly occurred*." (emphasis

added) This language mirrors the proposed language in section 4301.4. However, section 4301 refers to a *past* violation of an obligation of tenancy. In the instant section, the predicate event giving rise to the notice to vacate may not have yet "allegedly occurred." For example, if the basis for the notice to vacate is the housing provider's intention to immediately personally occupy the premises, that event has not yet occurred.

Recommendation: We recommend amending the language to require that the housing provider disclose the factual basis he relies on "in sufficient detail to allow a reasonable person in the circumstances to know what allegedly occurred or what the housing provider in good faith believes will occur."

4302.3: Criminal act basis to evict the tenant and tenant's right of appeal

Concern: The list of requirements for a notice to vacate pursuant to 501(c) does not reflect an important item enumerated at 4300.8. Namely, before a 501(c) notice to vacate can be issued, the tenant's opportunity to appeal the court decision (that an illegal act was committed) must be exhausted.

Recommendation: 4302.3 should be amended to require that the 501(c) notice include statements to the effect that "no appeal is pending" and "the time for appeal has ended."

Retaliation

4303.2(d): Retaliatory action and tenant's right to continue the tenancy

Concern: Among the list of actions against a tenant that may be prohibited as retaliatory, 4303.2(d) includes housing provider's "refusal to renew a lease or rental agreement." While we realize this language is identical to the statutory language at 42-3505.02 (a), we note that a landlord is typically within his or her rights to refuse to renew a term lease. We believe the underlying statutory intent is to protect the tenant against retaliatory action as it relates to tenant's right to continue the tenancy, whether under a renewed lease term or on a month-to-month basis.

Recommendation: We recommend that 4303.2(d) be amended to add to the phrase "refusal to renew a lease or rental agreement" the phrase "including denying the tenant the right to continue the tenancy on a month-to-month basis after the initial lease term has expired."