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on
THE RENTAL HOUSING COMMISSION'S SECOND PROPOSED RULEMAKING
submitted to the Rental Housing Commission
on
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OVERVIEW OF COMMENTS

These comments are designed to provide general guidance regarding areas where the regulations proposed in the Rental Housing Commission's ("RHC") Second Proposed Rulemaking ("RHC's 2d NPR"), released on November 20, 2020, are in need of more refinement and clarification. Generally speaking, the RHC and its staff have done an extraordinary job in developing proposals to update the existing rent control regulations and addressing the many issues that have arisen since the regulations were first promulgated some 35 years ago in 1986. In the areas where more work is in order (most notably "rent" and "rent charged" terminology and its use, vacancy increases, and voluntary agreements), my suggestions for modifications are outlined in broad terms rather than in specific regulatory language. And, in each area, the issues raised may raise issues in related regulations and require further massaging of those related regulations.

Chapter 38: Rental Housing Commission Operations and Procedures

3805 Stay Pending Appeal

The proposed automatic stay for appeals from the Office of Administrative Hearings ("OAH") to the RHC for both tenants and housing providers has been deleted from the RHC's 2d NPR that was released for comment on November 20, 2020 (proposed § 3805.1). The stated rationale for this change is to "conform to the present state of the [DC Court of Appeals] case law" in such cases as *Strand v Frenkel*, 500 A.2d 1368 (D.C. 1985) (*Strand*) and *Hanson v. District of Columbia Rental Hous. Comm'n*., 584 A.2d 592 (D.C. 1991) (*Hanson*) (RHC's 2d NPR, Part III, Major Revisions, Chapter 38 (Rental Housing Commission Operations and Procedures) at 2).

DC Court of Appeals case law argues strongly for restoration of the automatic stay for both tenant and housing provider appeals that was included in the RHC's First Notice of Proposed Rulemaking, which was released in 2019. The case law indicates the existence of an implicit automatic stay for such appeals, concluding that decisions at the OAH level (*i.e.,* the "hearing examiner" level prior to designation of OAH in 2006 as the initial adjudicator for rent control cases) are not "final decisions" and therefore are not enforceable during the pendency of an RHC or court appeal ("an administrative decision does not become final for enforcement purposes until completion of the judicial review process either by definitive appellate court action or expiration of the

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appeal period," *Strand* at 1373). *See also Hanson* at 594 ("no need for the appellant . . . to move to stay enforcement of the order under review; *its enforcement is deemed stayed by operation of law*" (emphasis supplied)).

The existing regulations are a mishmash and do not comport with the DC Court of Appeals case law, providing favorable stay options for housing providers but not for tenants and creating a confusing regulatory environment that is not consistent with case law. Those existing regulations allow tenants to obtain a stay of OAH decisions approving the "payment of money" (defined as "rent increases") only by establishing an escrow account or posting a bond (existing § 3802.10) that covers at least six months of the rent increase in dispute for each party appealing the OAH decision (existing § 3802.11).

The one-sided nature of the existing regulations is primarily a result of defining the "payment of money" as including the "award of rent increases to housing providers" (existing § 3802.11) while not defining rent roll backs or awards of damages to tenants as constituting the "payment of money" to tenants and not applying bonding or escrow requirements to them when appealed by housing providers. Under this inequitable arrangement, tenants are arguably required to establish an escrow account or post a bond when challenging unlawful rent increases while the housing provider is not obligated to establish an escrow account or post a bond when challenging a rent roll back or an award of damages to tenants.

The proposed regulations provide an automatic stay for the "payment of a specific amount of money" (proposed § 3805.2), which appears to generally track the existing problematic regulations (existing § 3802.11). This provision seems to tilt in favor of items that are mostly payable by housing providers (*e.g.,* rent refunds, fines, and attorney's fees) and not in favor of items payable primarily by tenants (*e.g.,* rent increases).

Proposed Modifications to § 3805.2: Proposed § 3805.2 should be expanded to provide for an automatic stay for all OAH decisions involving disputes between housing providers and tenants over rent and related matters, including rent roll backs, during the pendency of an appeal to the RHC or the court system, bringing the regulations into conformity with case law that prohibits enforcement of an administrative order during the pendency of an appeal. Most of the other provisions in this section, including §§ 3805.1, and .3 - .13, should be deleted as they relate to stay motions which would no longer be required under the proposed modifications that would provide for an automatic stay.

3806 Escrow Accounts and Supersedeas Bonds

Under the proposed regulations, the party adversely affected by the stay of an order to pay a "specific amount of money" may request the establishment of an escrow account or a bond. A "specific amount of money" is defined as including "rent refunds, fines, or awards of attorney fees" (proposed § 3806.1). This option provides housing providers with greater opportunities for procedural protections than it does tenants challenging the legality of a rent increase approved by OAH (proposed § 3806.1).

Even more troubling, the proposed regulations include a new provision that expressly allows housing providers to obtain protective orders requiring tenants to pay disputed amounts of rent, including the amount of rent covered by a roll back order or the rent increases required to be paid under an approved petition or voluntary agreement, into a court-administered escrow account during the pendency of an appeal (proposed § 3806.3).

Proposed Modifications to Proposed § 3806: Proposed § 3806 should be removed from the regulations in its entirety or, at a minimum, be made to apply equally to housing providers and tenants and to all forms of money payments or new costs (like rent increases). The possibility of onerous escrow or bonding requirements should not serve to block tenants from appealing OAH orders approving petitions involving rent increases that are arguably illegal in whole or in part to the RHC. In any event, it does not seem to be within the RHC's jurisdiction to promulgate regulations that purport to create protective order rights in Superior Court for cases that are in the administrative review process where there is no pending court case in Superior Court with which the proposed protective order would be associated.

Chapter 41: Coverage and Registration

4110 Certificate of assurance

The RHC promulgated "certificate of assurance" regulations in 1986 that are in conflict with the express terms of the DC Code (DC Code § 42-3502.21; Rental Housing Act ("RHA") § 221) and that create uncertainty and confusion as to the circumstances in which a property owner can obtain a certificate of assurance. A certificate of assurance is a blunt and crude instrument that was enacted by the DC Council in 1985. It hobbles the authority of the DC Council to legislate by requiring the DC government to compensate property owners in perpetuity if they become subject to rent control or any other DC law limiting rents after July 17, 1985, for the loss of rental revenues attributable to the imposition of rent control or other limits on rent.

The DC Code expressly ties the grant of a certificate of assurance to the issuance of the building permit for the housing accommodation and does not sanction after-the-fact certificate of assurances. Specifically, it requires the certificate of assurance to be issued "concurrently" with the building permit, "upon the issuance" of the building permit, and only for the building permit for the "housing accommodation":

> *Upon the issuance of any building permit for a housing accommodation* to which § 42-3502.05(a)(2) or (4) applies after July 17, 1985, the Mayor shall at the request of the recipient of the building permit *issue to the recipient thereof concurrently with the building permit a certificate of assurance* (emphasis supplied) (DC Code § 42-3502.21(a); RHA § 221(a)).

Under the DC Code, a property owner is not entitled to submit a request for an *ex post facto* certificate of assurance for an existing building that was permitted and constructed without

seeking a certificate of assurance at the same time as the building permit was sought. Yet, the RHC, when it promulgated implementing rules in 1986, disregarded the DC Code's literal terms and attempted to rewrite the law, seeming to allow a building owner to apply for a certificate of assurance any time after the issuance of the building permit and thereby removing the DC Code's clear-cut time limits on when property owners can submit applications for a certificate of assurance to DC's Department of Housing and Community Development ("DHCD"):

> The Mayor shall, at the request of a housing provider, issue a Certificate of Assurance pursuant to § 221 of the Act, for a housing accommodation exempted under §§ 205(a)(2) or 205(a)(4) of the Act, *for which any building permit has been issued* (emphasis supplied) (existing § 4218.1).

The proposed regulations would compound this original error by repeating the 1986 regulations *verbatim* (existing § 4218) without correcting the obvious flaws in the existing certificate of assurance regulations. The problems with the law are sufficiently serious that the DC Council has enacted a one-year moratorium on the issuance of certificates of assurance, which took effect on December 23, 2020 (Certificate of Assurance Moratorium Temporary Amendment Act of 2020, DC Law 23-173).

The RHC should, at a minimum, adhere strictly to the statutory deadlines for certificates of assurance, especially when considered in the context of the many flawed certificate of assurance provisions of the DC Code that cry out for reform or abolition.

First, certificates of assurance appear to violate the legislative entrenchment doctrine by effectively precluding future DC Councils from enacting rent control or similar laws for post-1985 buildings.

Second, the certificate of assurance provisions appear to involve the unlawful exercise of authority by the DC Council in attempting to unilaterally establish covenants in situations where there is no privity between the parties to the covenant. Specifically, the DC Code characterizes the certificate of assurance as "constitute[ing] a covenant that runs with the land" (DC Code § 42-3502.21(b); RHA § 221(b)) even as there is no privity between the creator of the covenant (the DC government) and the covenantee (the property owner). Privity generally requires a direct contractual relationship between the creator of the covenant and the covenantee such as a purchase agreement for the sale of the property, which is generally not present in relationships between the District government and developers of new apartment buildings in the District of Columbia.

Proposed Modifications to Proposed § 4110: Proposed § 4110 should be modified to limit the availability of "certificates of assurance" to only certificates that were obtained at the same time as the grant of the original building permit for the housing accommodation and to preclude the issuance of *ex post facto* certificates of assurance to a property owner who did not apply for a certificate of assurance at the same time as it applied for its original building permit for the housing accommodation.

Chapter 42: Rent Stabilization Program

Chapter 42 3389 "Rent Charged," "Rent," "Rent Adjustment," and "Rent Increase" Terminology

The proposed regulations use the broad term "rent" instead of the narrower term "rent charged," which is defined by the DC Code as the rent a tenant is obligated to pay and established by the DC Code as the baseline rent for purposes of calculating future rent increases. Similarly, the proposed regulations use the term "rent increase" instead of the more statutorily correct terms of "rent adjustment" and "rent surcharge" to describe allowable rent increases.

Rent Charged: The introduction to the proposed regulations states that the terms "rent" and "rent charged" are "substantially similar" and that the term "rent charged" will be used in the regulations primarily for "reporting requirements" (RHC's 2d NPR, Part III, Major Revisions, Chapter 42 (Rent Stabilization Program), General issues of "rent" terminology at 6).

In fact, the term "rent" is, on its face, a broader term than the term "rent charged," encompassing amounts of rent "demanded" as well as amounts actually payable by tenants (DC Code § 42-3501.03(28); RHA § 103(28)). Using the term "rent" in the regulations where the DC Code uses the term "rent charged" to describe a tenant's legal obligation to pay rent needlessly departs from the statutory framework and injects confusion and ambiguity into the regulations (and invites the possible re-introduction of rent concessions).

Under the DC Code, the term "rent charged" is the amount "a tenant must actually pay to a housing provider" to occupy a unit (DC Code § 42-3501.03(29A); RHA § 103(29A)). It is not the higher amount that the housing provider may be authorized to seek from tenants under the Rent Stabilization Program but cannot obtain due to market conditions or for other reasons. Examples of authorized rent increases that do not become a part of the "rent charged" baseline amount include vacancy increases or increases authorized by a voluntary agreement that are either not implemented at all or only implemented in part for various reasons, including that the authorized rent exceeds the market rate for the unit.

By way of historical background, the 2006 amendments to the Rental Housing Act (Rent Control Reform Amendment Act of 2006, DC Law 16-145) generally replaced the term "rent ceiling" with the term "rent charged," tying the regulation of rents to the amount of rent actually paid by the tenant rather than the "rent ceiling" for the unit. There was a certain amount of continuity and consistency in the DC Council's use of the term "rent charged" in the 2006 law as, prior to the 2006 amendments, it was included on the forms provided to the Rental Accommodations Division ("RAD") and tenants to indicate the amount of rent actually paid by the tenant regardless of the "rent ceiling" for the unit that was also listed on the form but was typically well in excess of the "rent charged" (*i.e.,* the amount of rent actually paid).

While most housing providers complied with the new regime established by the DC Council in 2006 and accepted "rent charged" as the new baseline rent for purposes of rent control, a

significant number of housing providers sought to evade the limits established by the new system by registering rent amounts with RAD as the "rent charged" for the unit that greatly exceeded the rent paid by the tenant. An example of these evasive practices was the housing provider's inclusion of an unimplemented vacancy increase in the amount of the "rent charged" reported to RAD that was then offset in whole or in part by a reduction in the rent actually paid by the tenant through a temporary "rent concession" addendum to the tenant's lease.

The RHC found these rent concession practices to be unlawful in the 2018 *Fineman* case (*Fineman v. Smith Prop. Holdings Van Ness LP*, RH-TP-16-30,842 (RHC Jan. 18, 2018)). In the wake of the *Fineman* decision, the DC Council moved quickly to bring further clarity to the rent control system, enacting the Rent Charged Definition Clarification Amendment Act of 2018 (DC Law 22-248), which added a definition of the term "rent charged" to the DC Code (DC Code § 42-3501.03(29A); RHA § 103(29A)). That new law made clear that the "rent charged" is the amount of rent actually paid by the tenant (and therefore does not include authorized but unimplemented rent increases). The proposed regulations include the new definition of "rent charged" in its correct form (proposed § 3899) but generally do not use the term "rent charged" in the proposed regulations to define tenant rent obligations, instead electing to use the less precise term "rent" (RHC's 2d NPR, Part III, Major Revisions, Chapter 42 (Rent Stabilization Program), General issues of "rent" terminology at 6).

Rent Adjustment: The introduction to the proposed regulations states that the term "rent adjustment" is defined by the proposed regulations as the housing provider's "act" of increasing or decreasing rent (RHC's 2d NPR, Part III, Major Revisions, Chapter 42 (Rent Stabilization Program), General issues of "rent" terminology at 6). In fact, "rent adjustment" is sometimes used in the Rental Housing Act to refer to rent increases but not necessarily in a consistent way. For example, a rent increase authorized by a hardship petition is a "rent adjustment" (§ 42-3502.12(a); RHA § 212(a)). More common, however, is the Rent Stabilization Program's use of the term "increase in rent charged" or "increase in the amount of rent charged." *See, e.g.,* DC Code § 42-3502.13(a); RHA § 213(a) (vacancy increases); DC Code § 42-3592.08(h)(2); RHA § 208(h)(2) (annual rent increases); DC Code § 42-3502.14(a); RHA § 214(a) (substantial rehabilitation increases).

Further confusing the picture is the DC Code's inconsistent use of the term "rent surcharge." "Rent surcharge" is defined by the DC Code as a temporary rent increase that does not become a part of the underlying "rent charged" for the unit (DC Code § 42-3501.03(29C); RHA § 103(29C)). This statutory definition also states that rent increases authorized by capital improvement, hardship, and substantial rehabilitation petitions are rent surcharges. Similarly, provisions of the DC Code establishing exemptions for qualified senior citizens and tenants with disabilities from rent increases authorized by capital improvement, hardship, and substantial rehabilitation petitions also refer to these petition-based rent increases as "rent surcharges" (DC Code § 42-3502.24(b); RHA § 224(b)). The proposed regulations include a definition of "rent surcharge" that tracks that statutory definition (proposed § 3899) although the regulations generally avoid using the term "rent surcharge."

The proposed regulations generally employ the term "rent increase" to describe the various increases in, or additions to, rent (RHC's 2d NPR, Part III, Major Revisions, Chapter 42 (Rent Stabilization Program), General issues of "rent" terminology at 6) but do not define "rent increase." The term "rent adjustment" is the term that best captures the various rent increases and decreases authorized by the Rental Housing Act, including both permanent rent increases and temporary surcharges. However, the definition in the proposed regulations (proposed § 3899) is unnecessarily limited by focusing on the "act" of increasing or decreasing rents instead of the rent increase or decrease itself.

Proposed Modifications throughout Chapter 42: Generally speaking, the term "rent" should be replaced throughout Chapter 42 by the more accurate and precise term "rent charged" where that term is required by the DC Code. "Rent charged" more accurately describes baseline rent obligations assumed by tenants and adjusted on a going-forward basis by rent adjustments or rent surcharges authorized by the Rent Stabilization Program and is consistent with the provisions of the DC Code, especially the 2018 amendments that defined the term "rent charged."

Proposed Modifications throughout Chapter 42 and to § 3899: The definition of "rent adjustment" included in proposed § 3899 should be revised to make clear that it encompasses all rent increases or decreases, whether denominated as "rent surcharges" or "adjustments to the rent charged." Generally speaking , the term "rent increase" should be replaced throughout the proposed regulations by the term "rent adjustment," which would include both "adjustments to the rent charged" and temporary "rent surcharges" and would encompass all types of rent increases and decreases authorized by the Rent Stabilization Program.

4202 "Maximum, Lawful Rent"
4203
4207

The proposed regulations include a new term—"maximum, lawful rent"—that primarily governs setting rents for units that become newly subject to rent control after previously having been excluded (proposed §§ 4202.1, .3) or exempt (proposed §§ 4203.3, .4, .5, .8) from rent control (*see also* proposed §§ 4200.4 and 4201.4). More troubling, the term "maximum, lawful rent" is also used in the context of setting rents for vacant units (proposed §§ 4207.1, .3).

However, "maximum, lawful rent" is not used in other contexts where the Rent Stabilization Program establishes maximum rents or rent increases. For example, it is not used regarding rent increases established via petitions or voluntary agreements (VAs). The proposed regulations do not require the inclusion of "maximum, lawful rents" in required notices to the Rent Administrator and tenants, including for vacancy increases, rendering the use of the term in the regulations somewhat superfluous

Proposed Modifications to §§ 4202, 4203, and 4207: The term "maximum, lawful rent" should be removed from the regulations and replaced with equally correct and clear terms that are consistent with the Rent Stabilization Program such as the "rent charged" for a unit newly subject to

rent control "may not exceed . . [insert applicable formulation]." The regulations should also make clear that the maximum rent, however it is renamed, is a temporary placeholder and is permanently superseded by the "rent charged" (plus any applicable "rent surcharge") once it is established and while it is in effect even if it is lower than the maximum rent authorized by the Rent Stabilization Program.

4204 Authorization and Filing of Rent Adjustments Generally

4204.10 Notice to the Rent Administrator of Rent Adjustments
4207.4

The general rule under the proposed regulations is that housing providers are required to file a Certificate of Notice of Adjustment in the Rent Charged with RAD no later than 30 days after the "effective date" of a rent adjustment (proposed § 4204.10). The proposed "effective date" rules are not compatible in important respects with the rules established by the DC Code for vacant units and are in need of reworking.

The proposed regulations treat the effective date of a vacancy increase as the date the housing provider regains possession of a unit (proposed § 4204.10(b)(2)). *See also* proposed § 4205.6(b)(1) (the "effective date" of a vacancy increase is the date on which the housing provider takes possession of the unit; this rule applies even if there is no new tenant) and proposed § 4207.4 (a vacancy adjustment is deemed effective on the date that the housing provider takes possession of the unit).

The proposed rules implement this interpretation of the vacancy increase law by requiring the housing provider to file a Certificate of Notice of Adjustment in the Rent Charged with RAD within 30 days of taking possession of the unit (proposed §§ 4204.10 and 4207.4). The proposed regulations incorrectly require that the "rent charged" for a vacant unit be filed with RAD even if the unit is unoccupied (proposed § 4204.10). In fact, the "rent charged," which is always tied to an obligation assumed by a particular tenant (D.C. Code § 42-3503(29A); RHA § 103(29A)), cannot be known until there is a tenant who has entered into a lease or similar agreement to the pay the "rent charged."

In reality, the DC Code states that the deadline for a housing provider to file a Certificate of Notice of Adjustment in the Rent Charged with RAD for a vacant unit is within 30 days of the commencement of a new lease term that establishes a new "rent charged" for a new tenant (DC Code § 42-3502.05(g)(1)(B); RHA § 205(g)(1)(B)). In certain periods, that statutory deadline could end up falling many months after the housing provider takes possession of the unit, especially in economically challenging times such as in a pandemic when housing providers struggle to fill their units and maintain prior rent levels.

The proposed regulations also specify the date of "administrative approval" of a petition- or VA-based increase as the effective date of the increase (proposed § 4204.10(b)(3)). First, it should be made clear that the administrative approval of a petition- or VA-based rent increase is not

final until appeal rights have been exhausted and the decision is actually an enforceable "final decision." Second, the "effective date" is delayed well beyond the date of final administrative approval in petition or VA cases involving the temporary displacement of tenants to accommodate construction as follows:

- Capital improvement rent surcharges: must be implemented within 12 months of the date of the final order (an order is not final until rights of appeal have been exhausted) but also no earlier than the later of 12 months after the most recent rent increase or the reoccupation date if the unit is made uninhabitable by the construction work (proposed § 4210.27)
- Services/facilities rent adjustments: must be implemented within 12 months of the date of the final order but also no earlier than 12 months after the most recent rent increase and implementation of the change in services or facilities (proposed § 4211.12)
- Substantial rehabilitation rent surcharges: must be implemented within 12 months of the date of the final order but also no earlier than the later of 12 months after the most recent increase or the reoccupation date if the unit is made uninhabitable by the construction work (proposed § 4212.30)
- VA-based rent adjustments: must be implemented within 12 months of the final order but also no earlier than the later of 12 months after the most recent rent increase or the reoccupation date if the unit is made uninhabitable by the construction work and implementation of any change in services or facilities (proposed § 4213.30)

The proposed regulations also do not distinguish new "rent surcharges" from increases in the "rent charged," instead treating both as "rent adjustments" (proposed § 4204.10). Where the rent adjustment is actually a temporary "rent surcharge," the housing provider's RAD submission should note that it is a temporary rent surcharge and specify its expiration date.

Finally, the proposed regulations do not require the housing provider to report the legal basis for each rent adjustment to the Rent Administrator. That is essential information that should be a part of RAD's records as it is now through RAD Form 9, which requires the disclosure of the legal basis for each rent adjustment or surcharge.

Proposed Modifications to §§ 4204.10 and 4207.4: Proposed §§ 4204.10 and 4207.4 (and any related regulation) should be modified to delete the link between the new "rent charged" for a vacant unit and the date on which the housing provider takes possession of the unit. The regulations should make clear that the new "rent charged" for a vacated unit is the rent that a new tenant agrees to pay to occupy the unit in a lease or similar agreement and that that new "rent charged" is the only rent that the housing provider is required to report to RAD on the Certificate of Notice of Adjustment in the Rent Charged. The proposed regulations should be clarified to

indicate that the effective date for a rent increase approved via a VA or a petition is generally the date on which the rent adjustment receives final administrative approval after the exhaustion of appeal rights and may be an even later date than the date of administrative approval in any case where the regulations authorizing petitions and VAs delay the effective date if construction displaces tenants or there is a change in services and facilities in the case of a services/facilities petition or VA.

An effective alternative to ensure that housing providers comply with vacancy adjustment limits would be to require housing providers to register the maximum placeholder vacancy increase with RAD within the 30-day period of gaining possession of the unit. This special notice requirement would require the submission to RAD of a "maximum vacancy adjustment placeholder notice" that states the maximum possible rent increase and, if filed within 30 days of the housing provider taking possession of the unit, preserves the housing provider's right to attempt to rent the unit at that amount. The RHC submission would note that the vacancy increase is a temporary, placeholder amount that is not the "rent charged" for the unit and will be superseded by a new amount when a new tenant agrees to rent the unit and to pay a particular "rent charged." That amount then becomes the new baseline rent for the unit and the basis for future rent adjustments and is subject to the notice requirements that apply to implemented rent adjustments.

The proposed regulations should also be modified to require "rent surcharges" to be reported separately to RAD and their temporary nature to be noted on the RAD submission, including their scheduled expiration dates. Finally, the regulations should be modified to make clear that the housing provider continues to be required to disclose the legal basis for all rent adjustments, including rent surcharges.

4205 Notice and Implementation of Rent Adjustments (Notice to Tenant of Adjustment to Rent Charged)

The proposed regulations governing notices of rent increases to tenants ("Notice to Tenant of Adjustment to Rent Charged"—proposed § 4205.4(a)) depart from the requirements of the DC Code in ways very similar to the proposed regulations governing notices of rent increases to RAD (discussed above in the preceding section) and are similarly flawed.

For vacant units, the DC Code unambiguously requires that notices to the tenant of the applicable rent adjustment be provided after the "rent charged" has been established in the new lease (DC Code § 42-3502.13(d)(1); RHA § 213(d)(1)). The proposed regulations generally do not track this statutory requirement, repeating the flawed "effective date" regulations for RAD notices that designate the date on which the housing provider takes possession of the unit as the "effective date" (proposed § 4205.6(b)). In fact, the new "rent charged" is not a known amount at the moment of taking possession and will be an unknown amount until the unit has been rented to a new tenant and the new tenant has agreed to lease terms and assumed the obligation to pay a particular amount of "rent charged."

The proposed regulations further confuse the picture regarding the rent increase rules applicable to vacant units where a petition- or VA-based rent increase has been approved for the unit. The proposed regulations allow the housing provider to implement the petition- or VA-based increase for a vacant unit on a date that meets each of the following three timing requirements: (1) it is more than 12 months after implementation of a vacancy increase; (2) it is within 12 months of the order approving the petition- or VA-based rent increase; and (3) it is prior to, or simultaneous with, the commencement of the new tenancy (proposed §§ 4205.6(b)(2)(A)-(C)). It is unclear how all three of these requirements could be met. Is the reference to a "vacancy adjustment" in proposed § 4205.6(b)(2)(A) a reference to a vacancy adjustment for the prior tenant? If so, the regulations should so state as a petition- or VA-based increase cannot be implemented both more than 12 months after the effective date of a vacancy adjustment for the new tenant (proposed § 4205.6(b)(2)(A)) ***and*** "simultaneous" with the commencement of a new tenancy (proposed § 4205.6(b)(2)(C)).

The proposed regulations tap into the same regulations that spell out the effective date for purposes of RAD submissions by requiring that the legal authorization for the rent adjustment be in effect (proposed § 4205.2). In practical terms, this requirement means that the rules set forth in proposed § 4204.10(b)(3) for the effective date also govern timing for tenant notices. As discussed above, the effective date under those regulations is the date of "administrative approval" of a petition- or VA-based rent increase (proposed § 4204.10(b)(3)).

Just as with the Certificate of Notice of Adjustment in the Rent Charged submitted to RAD, the effective date for notices to tenants is not necessarily easy to pinpoint due to two important caveats that are likely to make this date much later than the date of OAH approval of a petition or VA. First, the regulations governing tenant notices should make clear that the administrative approval of a petition- or VA-based rent increase is not final until appeal rights have been exhausted and the decision is actually an enforceable "final decision." Second, the regulations governing tenant notices should also make clear that the "effective date" will be delayed well beyond final administrative approval in petition or VA cases involving the temporary displacement of tenants to accommodate construction as follows:

- Capital improvement rent surcharges: must be implemented within 12 months of the date of the final order (an order is not final until rights of appeal have been exhausted) but also no earlier than the later of 12 months after the most recent rent increase or the reoccupation date if the unit is made uninhabitable by the construction work (proposed § 4210.27)
- Services/facilities rent adjustments: must be implemented within 12 months of the date of the final order but also no earlier than 12 months after the most recent rent increase and implementation of the change in services or facilities (proposed § 4211.12)
- Substantial rehabilitation rent surcharges: must be implemented within 12 months of the date of the final order but also no earlier than the later of 12 months after the most recent increase or the

reoccupation date if the unit is made uninhabitable by the construction work (proposed § 4212.30)

- VA-based rent adjustments: must be implemented within 12 months of the final order but also no earlier than the later of 12 months after the most recent rent increase or the reoccupation date if the unit is made uninhabitable by the construction work and implementation of any change in services or facilities (proposed § 4213.30)

The proposed regulations also do not require the housing provider to specify the legal basis for the planned increase and the maximum allowable percentage increase in the tenant notices as current RAD Form 8 does.

Finally, the proposed regulations describe the new rent as "rent" throughout the regulations instead of "rent charged" as is required by the DC Code (proposed §§ 4205.4(a)(2), (3)). Similarly, the proposed regulations do not require that "rent surcharges" be separately disclosed or listed as temporary in notices to the tenant.

Proposed Modifications to § 4205: Proposed § 4205 should be modified to parallel the changes proposed for RAD notices of rent increases and should make clear that the new "rent charged" for a unit that has been vacated is the rent that a new tenant agrees to pay to occupy the unit in a lease or similar agreement and that there cannot be a "rent charged" for an unoccupied unit. Similarly, proposed § 4205 should be clarified to indicate that the effective date for a rent increase approved by a petition or VA is generally the date on which the rent adjustment receives final administrative approval after the exhaustion of appeal rights and may be an even later date than the date of final administrative approval in cases where the regulations authorizing petitions and VAs delay the effective date if construction displaces tenants or there is a change in services and facilities in the case of a services/facilities petition or a VA.

The proposed regulations should be modified to require that the tenant notice specify the legal basis for the planned rent increase and the maximum allowable percentage increase. Finally, the proposed regulations should be modified to require that "rent surcharges" be reported separately in tenant notices and that their temporary nature be noted on those tenant notices, including their scheduled expiration dates.

4207 Vacancy Rent Adjustments
4205

The proposed regulations governing vacancy increases incorrectly designate the date the housing provider takes possession of the vacant unit as the "effective" date for the vacancy increase and require the housing provider to file a vacancy increase with the Rent Administrator within 30 days of taking possession even if the unit has not been rented to a new tenant (proposed § 4207.4). Under the DC Code, the notice to be filed with the Rent Administrator pertains only to the amount of the "rent charged" to the new tenant (DC Code § 42-3502.05(g)(1); RHA §

205(g)(1)). The DC Code does not require the housing provider to report the maximum allowable vacancy increase to the Rent Administrator. Rather, it requires only that the housing provider include a copy of the notice to the tenant of the "initial rent charged" in the tenant's new lease in its submission to the Rent Administrator (DC Code § 42-3505(g)(1)(B); RHA § 205(g)(1)(B)).

Similarly, the proposed regulations governing notice and implementation of rent increases incorrectly treat the effective date of a vacancy increase as the date on which the housing provider takes "possession" of a unit instead of the date on which the "rent charged" is established by renting the unit to a new tenant (proposed § 4205.6(b)(1)) (*see also* proposed § 4204.9(d); § 4204.10 (timing for submission of housing provider's notice of a vacancy increase to the Rent Administrator)).

Under the DC Code, the "rent charged" is the amount "a tenant must actually pay to a housing provider" to occupy a unit (DC Code § 42-3501.03(29A); RHA § 103(29A)). It is not a higher amount that the housing provider is authorized by the DC Code to seek but does not necessarily obtain. ***If the housing provider is unable to rent the unit at the full vacancy increase and ends up renting the unit for a lower amount, that amount then becomes the new "rent charged" for the unit and the maximum rent that can be charged for the unit until such time as a new increase is authorized and implemented in the future.***

The proposed regulations also authorize the housing provider to "take" an increase in the "maximum, lawful rent" for a vacant unit but do not establish any filing or disclosure requirements with regard to that theoretical maximum (proposed § 4207.3). In reality, the only way in which the housing provider may "take" such an increase is by attempting to rent the unit at that maximum amount. If the housing provider fails to find a new tenant willing to pay that maximum amount, it typically lowers the proposed rent until it finds a tenant willing to rent the unit at the proposed lower amount, causing the "rent charged" for the unit to be that lower amount ultimately agreed to by a tenant and establishing that lower amount as the new maximum for the unit.

Proposed Modifications to §§ 4207 and 4205: Both proposed §§ 4207 and 4205 should be modified to remove any notion that vacancy increases can be "taken" or become "effective" on the date the housing provider takes possession of the newly vacant unit or that an increase in the "maximum, lawful rent" can be taken at the time the vacancy occurs (proposed § 4207.3). Rather, the proposed vacancy-related regulations should state something like the following: "The housing provider may attempt to increase the rent charged for a vacant unit following the occurrence of a vacancy by no more than the amount of the vacancy adjustment applicable to the unit but the new baseline rent charged for the unit will be the amount that the new tenant agrees to pay as the rent charged, provided that the vacancy adjustment is equal to or less than the authorized vacancy adjustment for the unit."

As discussed above under proposed § 4204, an effective alternative to ensure that housing providers comply with the limits on vacancy adjustments and that tenants know what those limits are would be to require housing providers to register the maximum placeholder vacancy increase

with RAD within the 30-day period that applies to other rent adjustments under proposed § 4204.10. This special notice requirement would require the submission to RAD of a "maximum vacancy adjustment placeholder notice" that states the maximum possible rent increase and, if filed within 30 days of the housing provider taking possession of the unit, would preserve the housing provider's right to attempt to rent the unit at that amount.

4210 Petitions Based on Capital Improvements

The introduction to the proposed regulations states that "stacking" multiple capital improvement petition surcharges is "generally prohibited" by the Rent Stabilization Program but does not cite an existing regulation or law that prohibits the stacking of overlapping capital improvement petition surcharges (RHC's 2d NPR, Part III, Major Revisions, Chapter 42 (Rent Stabilization Program), Capital improvement petitions at 12).

In the absence of a stacking prohibition, housing providers will have the ability to circumvent the percentage caps on capital improvement surcharges of 15% for unit-specific improvements and 20% for building-wide improvements by filing a series of capital improvement petitions, with the only clear-cut limit being the statutory requirement that only one non-vacancy rent increase may be implemented every 12 months (DC Code § 42-3502.08(g); RHA § 208(g)). Under such a scenario, a tenant could be subject to rent increases of 60%, for example, if three capital improvement surcharges were in effect at the same time. Such an outcome would be at odds with the public policy objective of the modest statutory 20% cap (DC Code § 42.3502.10(c)(2); RHA § 210(c)(2)), which is to significantly limit the impact of capital improvement surcharges on tenants' ability to pay the new rent and continue to live in their apartments.

Proposed Addition to § 4210: Proposed § 4210 should be modified to add an anti-stacking prohibition, which expressly states that only one capital improvement surcharge may be in effect at a time. Under this framework, capital improvement petitions would continue to provide a vehicle for making modest capital improvements that would not cause dramatic financial disruption for the building's tenants. Voluntary agreements will remain available as a vehicle to allow for the development of larger capital projects by agreement between the housing provider and the tenants while substantial rehabilitation petitions will remain available for the most intrusive, disruptive, and costly top-to-bottom renovations of existing apartment buildings.

4213 Rent Adjustments by Voluntary Agreement

Site Control:

Neither the existing nor the proposed regulations include provisions specifying and limiting who is eligible to negotiate and sign voluntary agreements despite the fact that the DC Code limits eligibility to "tenants" and "the housing provider" (DC Code § 42-3502.15(a); RHA § 215(a)). As a result of this omission from existing regulations, contract purchasers of apartment buildings often ignore the requirements of the DC Code and negotiate VAs with tenant associations in

connection with Tenant Opportunity to Purchase Act ("TOPA") transactions before they have completed the purchase of the property and before they have become "the housing provider."

The DC Code defines housing provider as the person or entity that is entitled to receive rent payments for the occupancy of a building's rental units (DC Code § 42-3501.03(15); RHA § 103(15)). That definition clearly does not cover a would-be housing provider who has not yet purchased the building and acquired the right to collect rents from a building's tenants.

Proposed Addition to § 4213: The proposed regulations should be modified to require that all housing provider VA applicants certify that the VA was proposed, negotiated, and executed by the actual housing provider for the building (and not by a would-be purchaser seeking to secure more favorable purchase terms by increasing rents via a VA or to use a VA to secure financing).

Initial or Preliminary Negotiations:

The proposed regulations do not regulate VA negotiations prior to the submission of a formal VA to the Rent Administrator. This is due to the fact that, in the proposed regulations, regulation of the VA process is tied to initiation of the "administrative" approval process, which typically occurs well after initiation of VA negotiations (proposed § 4213.2). This delayed application of regulation represents a significant paring back of basic regulatory protections, which, under existing regulations, kick in when either party "initiates" the process by submitting a proposal to the other party (existing §§ 4213.3, .5). This means that measures such as the prohibition on coercion kick in at the inception of the process under the existing regulations (existing §§ 4213.19(a), (b)) but would kick in much later in the process under the proposed regulations.

The proposed regulations limit tenant protections by defining the "negotiation" process as not beginning until the "proposed voluntary agreement" is filed with the Rent Administrator even though the proposed VA is likely the product of prior negotiations between the housing provider and tenants and the RAD review phase of the process would generally not begin until very late in the actual negotiation process (proposed § 4213.9).

Proposed Addition to § 4213: The proposed regulations should be tightened to prevent preliminary negotiations with select tenants and selective disclosure of information about a possible VA to tenants by:

(1) Authorizing tenants to designate a tenant association to serve as the sole VA bargaining agent for the tenants, provided that the tenant association represents at least 50% of the building's tenants and is certified by RAD as doing so via a process similar to that applicable under TOPA (DC Code § 42-3404.11(1); TOPA § 411(1)) and the tenant association certifies that it has complied in full with fiduciary duties to represent the interests of all tenants and has provided all tenants with equal access to information and opportunities to participate in the VA process;
(2) In cases where there is no qualified tenant association, requiring the housing provider and any tenants participating in preliminary negotiations to share

information equally with all tenants and notify all tenants of meetings and their right to attend any meeting involving VA negotiations or development;
(3) Requiring the housing provider to certify that it has shared information equally with all tenants and notified all tenants of meetings and their right to attend any meeting involving VA negotiations or development; and
(4) Prohibiting any side deals with select tenants requiring certification by the housing provider that no side deals with tenants have been made or promised.

Procedures for Qualifying as Exempt Senior Citizens Tenants with Disabilities:

The proposed regulations do not establish clear-cut procedures or a schedule for low-income senior citizens and tenants with disabilities to qualify for the statutory exemption from rent increases established by a VA or to waive their rights to that exemption (DC Code §§ 42-3502.24(c), (i); RHA §§ 224(c), (i)). The proposed regulations provide for an extension of the 30-day negotiation period if additional time is needed to review or receive applications from senior citizens or tenants with disabilities for an exemption from the VA (proposed § 4213.9). The proposed regulations also state that tenants should follow the process established by § 42-3502.24 of the DC Code for claiming an exemption (proposed § 4213.8(d)). While DC Code § 42-3502.24 establishes detailed eligibility requirements for the exemption, it does not establish a schedule or deadlines and is not designed to mesh with the VA process.

Proposed Modifications to Proposed §§ 4213.9 and 4213.13: The proposed regulations should be revised to establish an initial negotiation period for the proposed VA that is long enough to provide time for tenants to qualify for the exemption from VA-based rent increases. The proposed regulations establish an initial negotiation period of at least 30 days (proposed § 4213.9). That 30-day period should be extended to 40 days to accommodate the steps required to qualify for the exemption for low-income senior citizens and tenants with disabilities. Similarly, the proposed "signature period" (proposed § 4213.13), which follows the negotiation period, should either be shortened to 50 days if the RHC concludes that the process for negotiating and signing a VA should be limited to a total of 90 days (and not extended to 100 days) or left as is at 60 days for a combined total of 100 days for negotiations and signature collection.

Proposed Addition to § 4213: The proposed regulations should be revised to add new provisions that establish clearer procedures and deadlines for approval of exemption applications for low-income senior citizens and tenants with disabilities and disclosure to the affected tenants, the tenant association, and the housing provider of the status of exemption applications as follows:

(1) The tenants submit applications for exemption to the Rent Administrator within 10 days of the submission of the proposed VA to the Rent Administrator;
(2) The Rent Administrator rules on each exemption application within 10 days of the submission of tenant applications for exemption to the Rent Administrator;
(3) A tenant applicant whose exemption application is rejected has 10 days following receipt of a notice of denial to submit a challenge to the Rent Administrator to a rejection of his or her application; and

(4) The Rent Administrator issues a final determination on any such tenant challenge within 10 days of receipt of the challenge and discloses to the tenants, the tenant association, and the housing provider the final list of tenants who are eligible to sign the VA and those who are eligible for the exemption for qualified senior citizens and tenants with disabilities.

Waiver of Exemption for Qualified Senior Citizens and Tenants with Disabilities:

Proposed Addition to § 4213: The proposed regulations should also be revised to add a provision establishing a deadline of 10 days following receipt of the final list of eligible tenants for exemption as a qualified senior citizen or tenant with a disability for any such tenant to waive his or her right to be exempt from VA-based increases (DC Code § 42-3502.24(c); RHA § 224(c)). This modification would reach about 10 days into the signature period (assuming the negotiation period is extended to 40 days). An extension into the signature period is warranted for waivers for qualified senior citizens and tenants with disabilities in order to ensure that they have sufficient time to review the VA in final form before deciding to waive their rights to be exempt from the VA.

Exclusion for Agents and Employees of the Housing Provider (§ 4213.14):

The proposed regulations specify that agents or employees of the housing provider may not participate in VAs, either as signatories or as part of the count for determining whether the 70% threshold has been reached (proposed § 4213.14). But the proposed regulations do not require the housing provider to disclose to the tenants the names of its agents and employees who reside in the building.

Proposed Modifications to § 4213.14: Proposed § 4213.14 should be modified to require the housing provider to disclose to the tenants the names of its agents and employees who live in the building, with the deadline for such disclosure to be no later than the initial submission of the proposed VA to the Rent Administrator, thereby ensuring that ineligible tenants do not participate in the final round of negotiations.

Binding Construction Schedules (§ 4213.3(g)):

Under the proposed regulations, the timeline for commencing and completing VA-required construction may only be "nonbinding" and "estimated" (proposed § 4213.3(g)), implicitly removing from tenants the ability to negotiate and include in the VA what may be an essential provision for many tenants: binding timetables for completion of VA-based construction and renovation work.

Proposed Modifications to § 4213.3(g): Proposed § 4213.3(g) should be modified to clarify that VAs may include construction-related timetables and that those timetables may be either binding or nonbinding and that construction deadlines may include either dates certain or estimated dates depending on what the parties agree to specify in the VA.

Reasonableness Standards for Assessing Proposed Rent Increases under VAs:

The proposed regulations include ambiguous "reasonableness" standards (proposed § 4213.22) for determining whether rent increases authorized by VAs are unreasonable (proposed § 4213.21(c)), making a tenant challenge to a VA with large rent increases difficult and granting broad discretion to OAH judges to decide whether to approve VAs regardless of the size of the planned rent increases. Under the proposed framework, the reasonableness of the planned rent increases is to be "determined in consideration of [the nine listed] factors" with no particular factor to be treated as dispositive (proposed § 4213.22).

Proposed Modifications to § 4213.22: Proposed § 4213.22 should be modified to require that a final decision approving or disapproving of a VA include findings of fact and conclusions of law regarding each of the nine statutory factors. The final decision should do so based on an application to each factor of the RHA's central legislative purposes regarding "protect[ing] low- and moderate-income tenants from the erosion of their income from increased housing costs" and "prevent[ing] the erosion of the supply of moderately priced rental housing while providing housing providers and developers with a reasonable rate of return on their investments" (DC Code §§ 42-3501.02(1), (5); RHA §§ 102(1), (5)). These findings of fact and conclusions of law should be made as to each of the nine factors, with a justification for the weight the decision-maker assigned to each factor in applying the two legislative purposes and making a final decision to approve or disapprove a VA.

The Inequitable Treatment of Particular Tenants or Rental Units or Classes of Tenants or Rental Units:

While the proposed regulations include a general prohibition on the inequitable treatment of specific tenants or rental units or classes of tenants or rental units (proposed § 4213.21(c)), they do not include express restrictions against shifting the cost burden of a VA to new tenants (RHC's 2d NPR, Part III, Major Revisions (Chap 42 (Rent Stabilization Program), Voluntary agreements) at 16). Rather, the reasonableness of burden shifting to future tenants is to be determined based on an ambiguous "totality of the circumstances" standard (RHC's 2d NPR, Part III, Major Revisions (Chap 42 (Rent Stabilization Program), Voluntary agreements) at 16).

Generally speaking, the justification for a disparity in the percentage rent increase between particular tenants or rental units or classes of tenants or rental units is to be assessed as one of the nine reasonableness factors (proposed § 4213.22(i)). According to the introduction to the proposed regulations, this factor can be used to assess disparities in the treatment of current and future tenants (RHC's 2d NPR, Part III, Major Revisions (Chap 42 (Rent Stabilization Program), Voluntary agreements) at 16).

Proposed Addition to § 4213: The proposed regulations should be modified to go a step further than their weak limits on targeting particular tenants or rental units or classes of tenants or rental units for inequitable treatment by adding a new provision that establishes a rebuttable

presumption that the disparate treatment of current and future tenants or of any particular tenant or rental unit or class of tenants or rental units is inequitable.

The Inequitable Treatment of Tenants who Refuse to Sign the VA:

The proposed regulations include a general limit on the inequitable treatment of particular tenants or rental units or classes of tenants or rental units (§ 4213.21(c)) but do not include express protections for tenants who decline to sign VAs. In its introduction to the proposed regulations, the RHC seems to state that the disparate treatment of VA non-signers is justified if the VA is otherwise "reasonable" (RHC's 2d NPR, Part III, Major Revisions (Chap 42 (Rent Stabilization Program), Voluntary agreements) at 17).

Proposed Addition to § 4213: Proposed § 4213 should be modified to expressly preclude the disparate treatment of VA non-signers. The failure to include such a basic protection is to expressly sanction the coercive treatment of tenants who exercise their right not to sign VAs.

4216 Requirement to Maintain Substantial Compliance with Housing Regulations

4200.9

The proposed regulations generally do not require substantial violations of the housing code to be corrected until the evidentiary hearing phase is reached in petition and VA cases (proposed § 4216.4). The proposed regulations provide an even longer period for substantial rehabilitation petitioners to abate housing code violations (until the substantial rehabilitation work is done) (proposed § 4200.9). Both the basic abatement period and the longer abatement period for substantial rehabilitation petitions are unnecessarily long when viewed in the context of other requirements of the DC Code and should be significantly shortened.

The DC Code does not establish clear-cut deadlines for mandatory petition- or VA-related abatements of housing code violations (DC Code §§ 42-3502.08(a), (b); RHA §§ 208(a), (b)). But the DC Code does signal urgency in its required inspection of the building within the 30-day period prior to filing a petition or VA with the Rent Administrator (DC Code §§ 42-3502.08(b)(2); RHA § 208(b)(2)). At a minimum, this mandatory inspection should establish the starting point for measuring the abatement period. The DC Code speaks with additional urgency on the abatement question in the context of implementing rent increases of general applicability, requiring that abatement occur within 45 days of a notice of infraction (DC Code § 42-3502.08(b)(1); RHA § 208(b)(1)).

Proposed Modifications to §§ 4200.9 and 4216.4: Proposed §§ 4200.9 and 4216.4 should be modified to require abatement of substantial housing code violations within a specified number of days (perhaps 90 days or a doubling of the 45-day abatement period applicable to rent increases of general applicability) of a notice of violation following the required inspection for all petitions and voluntary agreements submitted to RAD. This abatement period should apply to all petitions and VAs, including substantial rehabilitation petitions, so that time and resources are not wasted on a petition proceeding involving a recalcitrant housing provider who may end up

abandoning the proceeding before abating the housing code violations. Such a modification to the proposed regulations would ensure the establishment of compliance with gateway requirements sufficiently early in the process to avoid wasting time on reviewing a petition that does not qualify for approval due to the failure to abate substantial code violations.