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on
THE RENTAL HOUSING COMMISSION'S THIRD PROPOSED RULEMAKING
submitted to the Rental Housing Commission
on
September 20, 2021

OVERVIEW

These comments are submitted in response to the Rental Housing Commission's ("RHC") Third Proposed Rulemaking ("RHC's 3d PR"), released on August 20, 2021, and call for additional work by the RHC in two critical areas. Regarding the many areas of the RHC's 3d PR that these comments do not address, I commend the RHC and its staff for doing an excellent job in proposing updates to our ancient rent control regulations. And I should note that there are significant areas in which the D.C. Council has failed to act to clean up confusing and ambiguous laws or to undertake the serious reform effort that is inevitably required as the mistakes of prior Councils become apparent over time (*e.g.,* certificates of assurance).

In the areas where more work is required (primarily voluntary agreements), I have restated and updated concerns that generally have not been directly addressed in the RHC's 3d PR, leaving problems unresolved in areas that really should be resolved in this proceeding. I also have learned that landlords continue to implement "concession" leases despite rulings from the RHC that sharply curtailed that practice and the enactment of a new D.C. law in 2018 that makes clear that "rent charged" is the amount of rent the tenant the tenant is actually obligated to pay and not a higher amount that excludes a concession or reduction in rent granted to the tenant on a temporary basis that establishes the tenant's actual rent obligation:

Chapter 42: Rent Stabilization Program

4205 Implementation and Notice of Rent Adjustments

The D.C. government enacted legislation soon after the RHC's decision in the *Fineman v. Smith Prop. Holdings Van Ness, LP*, RH-TP-16-30,842 (RHC Jan. 18, 2018) (*Fineman*) case, which codified and ratified the *Fineman* holding. That law—the Rent Charged Definition Clarification Amendment Act of 2018—was enacted on January 16, 2019, and took effect on March 13, 2019 (D.C. Law 22-248; 66 DCR 973). The D.C. Code now simply and clearly defines rent charged as the amount of monthly rent charged to a tenant by a housing provider for a rental unit, making the tenant's actual monthly payments to the housing provider the rent charged for purposes of the Rental Housing Act ("RHA") and the basis for regulation and future rent adjustments. The RHC's proposed regulations (§ 3899.2) as set forth in the RHC's 3d PR track that definition.

[1] I am a long-time tenant activist and an officer of my tenant association since its formation in 2005.

I have recently learned that many D.C. housing providers ("HP") continue to implement concession leases regardless of the RHC's *Fineman* ruling and the new provisions of the D.C. code that define "rent charged" as the amount of rent actually paid by that tenant. HPs implement these concession leases by listing a "credit" equal to the concession amount on the tenant's bill, with an expiration date for that credit and a date on which the concession expires (and the rent for the unit reverts to the higher amount that has been reported to RAD as the "rent charged"). This practice undermines D.C.'s rent control laws by creating uncertainty as to the tenant's future rent and the tenant's ability to continue to live in his or her apartment. The regulations should do more to bring an end to this unlawful practice and preserve the tenant's statutory tenancy rights (concession leases effectively deny tenants the protections of the statutory tenancy by forcing the tenant to enter into a new lease every year in order to preserve the concession in whole or in part).

Proposed Addition to § 4205.4(d): This provision of the RHC's regulations spells out the items of information to be included in the HP's affidavit that is submitted to the Rental Accommodations Division ("RAD") along with the HP's Notice to Tenant of Adjustment in Rent Charged. That affidavit currently is required to contain the "names, unit numbers, date, and type of service provided" but does not require that the HP also attest to the lawfulness of the "rents charged" that are included in the RAD submission. ***Section 4205.4(d) should be modified to require that the HP attest that each of the "rents charged" listed in the RAD submission is the amount of rent actually paid by the tenant at the time of the submission and does not exclude from the rent charged filed with RAD any concession or other amount that reduces the tenant's obligation to pay rent.***

4213 Rent Adjustments by Voluntary Agreement

Site Control:

The proposed regulations do not include provisions specifying and limiting who is eligible to negotiate and sign voluntary agreements ("VA") despite the fact that the D.C. Code limits eligibility to "tenants" and "the housing provider" (D.C. Code § 42-3502.15(a); RHA § 215(a)). As a result of this omission, contract purchasers of apartment buildings are likely to continue to ignore the express terms of the D.C. Code and negotiate VAs with tenant associations in connection with Tenant Opportunity to Purchase Act ("TOPA") transactions before they become the "housing provider" referred to by the VA statute. ***The RHC's 3d PR did not address the critical site control issue even though it was raised in comments submitted in response to the RHC's Second Proposed Rulemaking ("RHC's 2d PR").***

The D.C. Code defines the housing provider as the person or entity that is entitled to receive rent payments for the occupancy of a building's rental units (D.C. Code § 42-3501.03(15); RHA § 103(15)). That definition clearly does not cover a prospective HP 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 HP VA applicants certify that the VA was proposed, negotiated, and executed by the actual HP for the building (and not by a prospective 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 involves a significant reduction in basic regulatory protections for tenants, 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 such basic protections as the prohibition on coercion kick in at the inception of the process under the existing regulations (existing §§ 4213.19(a), (b)) but would be delayed until 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 HP and tenants and RAD review would generally not begin until very late in the actual negotiation process (proposed § 4213.9). ***The RHC's 3d PR did not address this critical issue even though it was raised in comments submitted in response to the RHC's 2d PR.***

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 (D.C. 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 HP 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 HP 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 by requiring HP certification 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 (D.C. Code §§ 42-3502.24(c), (i); RHA §§ 224(c), (i)). The proposed regulations provide for an extension of the 30-day "cooling-off" 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 D.C. Code for claiming an exemption (proposed § 4213.8(d)).

While D.C. 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. The changes proposed in the RHC's 3d PR to § 4215.19 establish an incomprehensible process involving the transmission of a tenant application for protected status to an unspecified entity during review of the VA instead of establishing an upfront process for resolution of this critical threshold question before the merits of the VA are reached. ***The changes proposed in RHC's 3d PR for § 4215.19 are far afield from addressing this critical scheduling issue as was raised in comments submitted in response to the RHC's 2d PR. Further, the RHC fails to recognize that a tenant's protected status could easily be directly relevant to the approval or disapproval of the VA in terms of its impact on the required number of signatures and eligible signatories.***[2]

Proposed Modifications to Proposed §§ 4213.9 and 4213.13: The proposed regulations should be revised to establish a "cooling-off" 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 a "cooling-off" 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 "cooling-off" 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 HP of the status of exemption applications as follows:

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[2] The RHC confuses the picture by saying that a tenant's protected status will likely not be relevant to whether the Rent Administrator or OAH approves the VA. RHC's 3d PR, Part III, Major Revisions (Elderly and disability exemption) at 8.

(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 HP 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:

The RHC's 3d PR did not address this important issue even though it was raised in comments submitted in response to the RHC's 2d PR.

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 (D.C. 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 HP Agents and Employees (§ 4213.14):

The proposed regulations specify that HP agents or employees 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 HP to disclose to the tenants the names of its agents and employees who reside in the building. ***The RHC's 3d PR did not address this important issue even though it was raised in comments submitted in response to the RHC's 2d PR.***

Proposed Modifications to § 4213.14: Proposed § 4213.14 should be modified to require the HP 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.

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). ***The RHC's 3d PR addresses this issue but concludes that the Rent Administrator and OAH should have the authority to decide which factors to apply in assessing the reasonableness of rent increases because there will be cases in which not all factors will be relevant,[3] granting the reviewing entities unbridled and standardless discretion and not requiring the reviewing entity to consider all relevant factors.***

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 that is relevant to the VA. The final decision should do so based on an application to each factor that is relevant to the VA 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" (D.C. 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 that is relevant to the VA, 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 PR, 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 PR, Part III, Major Revisions (Chap 42 (Rent Stabilization Program), Voluntary agreements) at 16). ***The RHC's 3d PR did not revisit these critical equity-related issues even though they were raised in comments submitted in response to the RHC's 2d PR.***

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

[3] RHC's 3d PR, Part III, Major Revisions (Voluntary agreements) at 8.

RHC's 2d PR, this factor can be used to assess disparities in the treatment of current and future tenants (RHC's 2d PR, 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 (proposed § 4213.21(c)) but do not include express protections for tenants who decline to sign VAs. In its introduction to the RHC's 2d PR, the RHC indicates that the disparate treatment of VA non-signers is justified if the VA is otherwise "reasonable" (RHC's 2d PR, Part III, Major Revisions (Chap 42 (Rent Stabilization Program), Voluntary agreements) at 17). ***The RHC's 3d PR did not address this critical issue even though it was raised in comments submitted in response to the RHC's 2d PR.***

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 a VA.***