Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

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Via email only

Daniel Mayer, General Counsel
Rental Housing Commission
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Washington, DC 20001
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Re: Second Proposed Rulemaking, 14 D.C.M.R. Chapters 38 to 44

Dear Mr. Mayer:

We are writing to provide comments on the second proposed rulemaking prepared by the Rental Housing Commission to revise 14 D.C.M.R. Chapters 38 to 44. As you know, these regulations are vital to achieving the goals of the Rental Housing Act, and specifically the rent stabilization program – including to preserve affordable housing and protect tenants' rights. We commend the Commission for the work and time already invested to bring this rulemaking to publication and for allowing an extended period for stakeholders to submit comments on both rounds of proposed regulations. We look forward to the Commission completing this process and publishing final regulations.

In October 2019, Legal Aid – joined by eight other non-profit organizations that provide technical assistance and legal representation to tenants and advocate for their interests – provided comments on the Commission's first proposed rulemaking. We appreciate the changes the Commission made in response to comments received from us and other stakeholders. To the extent the Commission did not make changes that we recommended, we stand by our original comments and will not repeat them here.

Legal Aid now writes separately to provide comments on specific changes made in the second proposed rulemaking that we believe may be harmful to tenants or may not create clear guidance. Our comments are based on our experience working with District tenants.

The Commission Should Adopt a More Equitable Rule on Stays Pending Appeal

In its first proposed rulemaking, the Commission had adopted an across-the-board automatic stay of tenant or housing provider petition decisions, pending any appeal filed by either party with the Commission. The second proposed rulemaking reverses this decision based on comments received from stakeholders. The proposed regulations now would automatically stay any monetary award to either party – which, for practical purposes, largely impacts awards to tenants of rent refunds, treble damages, and attorney's fees. Other decisions such as approval of rent increases or ordered rent rollbacks would not be stayed automatically, though a party could

move for a discretionary stay. We are concerned this rule unnecessarily disadvantages tenants and potentially puts them at risk of eviction when they seek to challenge rent increases.

For tenants who win monetary relief from landlords, prevailing case law appears to require an automatic stay, as the Commission notes. *See Strand v. Frenkel*, 500 A.2d 1368 (D.C. 1985) (applying primary jurisdiction doctrine to hold that a tenant may not bring an action in Superior Court to collect a monetary award until judicial review of that award is complete); *Hanson v. D.C. Rental Hous. Comm'n*, 584 A.2d 592 (D.C. 1991) (finding that this holding dictates an automatic stay pending appeal for monetary awards).

On the question of whether landlords can implement an approved rent increase while a tenant's appeal of that approval remains pending, however, the case law is more mixed. In *Cafritz v. D.C. Rental Housing Commission*, 615 A.2d 222, 228-29 (D.C. 1992), the Court of Appeals held that *Strand* and *Hanson* do not require an automatic stay of an approved capital improvement petition rent increase pending an appeal by a tenant. This ruling was based in part on the Commission's own regulations on capital improvement petitions, as well a statutory provision, D.C. Code 42-3052.16 - both of which, it should be noted, the Commission is free to clarify as part of the current rulemaking effort. On the other hand, in *Akassy v. William Penn Apts.*, *L.P.*, 891 A.2d 291, 306-07 (D.C. 2006), the Court of Appeals held that an eviction action based a tenant's failure to pay a rent increase that was currently being challenged by the tenant through the administrative process must be stayed, based on the same doctrine of primary jurisdiction.

Given this case law, we think the Commission could restore balance in the rulemaking by applying an automatic stay to approved rent increases pending appeal. Just as *Strand* and *Hanson* require an automatic stay to prevent any Superior Court action to collect a monetary award pending appeal, *Akassy* requires an automatic stay to prevent a Superior Court action to evict a tenant for failure to pay a rent increase pending appeal. *Akassy* clarifies the earlier ruling in *Cafritz* and provides the Commission with ample room to require an automatic stay of a rent increase, at least to the extent the landlord seeks to bring a Superior Court action to enforce the order by evicting the tenant. We urge the Commission to adopt an amended regulation imposing an automatic stay on rent increases. We also note this may require changes in other parts of the regulations, including specifically the language in section 3806.3 about the potential to obtain a protective order for a disputed rent amount in Superior Court.

The Commission Should Clarify the Use of the Terms "Rent," "Rent Charged," and "Maximum Lawful Rent"

The second proposed rulemaking makes changes to the use of the term "rent charged", substituting "rent" for "rent charged" in various places. The revised draft also introduces a new concept, "maximum lawful rent."

With respect to the terms "rent charged" and "rent," we believe that in order to avoid confusion and to ensure proper implementation of the Rent Charged Definition Clarification Amendment Act of 2018 (D.C. Law 22-248, codified at 42 D.C. Code § 42-3501.03), the term "rent charged" should be used throughout the regulations. The entire point of adding a definition for "rent

charged" to the Rental Housing Act was to ensure that this number would be the only relevant number for purposes of rent stabilization. In other words, the "rent charged" is both the amount the tenant actually must pay to rent the unit and the maximum rent the landlord lawfully can charge, with the only exception being allowable surcharges. To the extent those numbers differ – e.g., if a new tenant has agree to rent a unit for a lower amount that a prior "rent charged" recorded with the Rent Administrator – the landlord must adjust the "rent charged" by filing a Form 9 with the Rent Administrator and serving the tenant with a form 8.

An early example of this comes up in section 4200.6, which now says the "rent" may only be adjusted once every 12 months. But when it comes to the required notices for any such rent increase, the regulations direct the landlord to report the new "rent charged", *see, e.g.*, 14 D.C.M.R. §§ 4200.5, 4205.6. This discrepancy in terminology begs the question whether there is a meaningful, legal difference in the two terms and the two numbers, and for example, whether a landlord can increase the "rent" without increasing the "rent charged" and being required to report this change to the Rent Administrator and the tenant. We understand this is not the Commission's intent, but we fear that using different terms in different places inevitably will lead to this type of confusion and – candidly – potential room for mischief.

Put another way, we believe "rent charged" can exist in the absence of a current tenant in occupancy of the unit. While we agree that it would be helpful for the Commission to use the regulations to clarify this point (and avoid any problems that might result otherwise), we do not believe the Council intended the concept of "rent charged" to apply only to occupied units. This means that a landlord who is calculating the new rent for a previously-exempt unit, or calculating a vacancy increase in the absence of a current tenant, is calculating the "rent charged," not a different concept known as the "maximum lawful rent." To give one example, section 4200.4, which now refers to the "initial, maximum lawful rent," instead can and should refer to the "rent charged."

To the extent, the Commission wants to move forward with using the term "maximum lawful rent," we believe it is critical for the Commission to define the term and to explain the limited examples in which that concept applies. Otherwise, the addition of this concept might lead to exactly the result the Council sought to foreclose – a difference between the "rent charged" (what the tenant currently is required to pay) and the "maximum lawful rent" (some higher, fictive number that the landlord can seek to charge in the future without any further approval required), leading to a return to rent ceilings. The history of the challenges of enforcing the abolition of rent ceilings, and the Council's intent in adopting the definition of "rent charged," are set forth in the Housing Committee's report on the Rent Charged Definition Clarification Amendment Act of 2018, including testimony presented at the hearing on the bill.

The term "rent" may still be an appropriate term for units not covered by the rent stabilization program. To give one example, in section 4105.3, it might be appropriate to say "rent" in subsection (b) when referencing the amounts that have been demanded outside the rent stabilization program, but section (d) referencing the proposed amounts to be charged under the rent stabilization program should be referred to as "rent charged." However, the plain language of "rent charged" also would work in 4105.3(b), and while the definition was added with rent-stabilized units in mind, the amendment applies to all rental units.

The Commision Should Ensure That Public Housing Tenants Receive the Same Protections From Eviction As Other Tenants

The second proposed rulemaking adds important tenant protections to the rules governing notices to cure or quit. For example, the proposed regulations clarify that in order to be the basis for eviction, a violation of the housing code regulations must be substantial. The proposed regulations also clarify that a landlord has to include enough detail in a notice to cure or quit to put the tenant on notice of what they allegedly did wrong and how it can be fixed.

After adding in these important clarifications, the regulations go on to exempt tenants of the DC Housing Authority (DCHA) from these protections. This means that all residents of public housing are exempt from the protection of these regulations. The second proposed regulations seem to justify this extreme departure from current law by referring to 14 D.C.M.R., section 6404, DCHA regulations governing, in part, notices to cure or vacate. However, section 6404 is less robust than the regulations adopted pursuant to the Rental Housing Act (both as the RHA regulations exist now and how they will read once the proposed changes are adopted). It also is worth noting there is nothing in section 6404 or any other provision in the local public housing regulations that suggest any attempt to supplant (as opposed to supplement) the more general regulations under the RHA.[1]

Additionally, it is unnecessary to exempt public housing residents from these regulations because federal law is clear: all public housing authorities must comply with local law was carrying out evictions. For example, the DC Court of Appeals has explicitly held that, except for in one very limited circumstance (federal criminal one-strike cases), local DC law surrounding the issuance of notices to cure or quit applies to all public housing residents. *See D.C. Hous. Auth. v. Pratt*, 942 A.2d 656 (D.C. 2008) ("Should DCHA still wish to evict appellant for the same April 2002 activity, it must first provide her with a notice in accordance with § 42-3505.01 (b)"). Federal law also contemplates that public housing authorities must issue notices in accordance with local law. *See* 24 CFR § 966.4(l)(3)(iii) ("A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (l)(3)(i) of this section.").

Finally, it is important to note that exempting public housing tenants from the protections of these regulations is a racial and economic justice issue. The District of Columbia is 46 percent white and 46 percent Black. *See* U.S. Census Bureau, *Quick Facts: District of Columbia*, *available at* https://www.census.gov/quickfacts/DC. The median household income in DC is $86,420. *Id.* However, 98 percent of the District's public housing residents are Black and 86 percent make below 30 percent of the Area Median Income (AMI). *See Centering DC Public Housing Residents in COVID-19 Response Can Help Address Racial Inequities*, Elsa Falkenburger, Eona Harrison (June 15, 2020).[2] *See also* HUD's House of Cards, DC Housing Authority, Proublica, *available at* https://projects.propublica.org/hud/owners/DC001. By excluding public housing residents from the protections of these regulations, the RHC would be excluding over 8,000 District families that are disproportionately poor and Black compared to the District's population as a whole. This result is not compelled by either federal or local law and should be rejected by the Commission.

Other Recommended Changes

While we do not intend this letter to be a comprehensive set of comments on all changes made (or not made) in the second proposed rulemaking, we do want to highlight a few other recommended changes stemming from the second proposed rulemaking:

- Section 4213.2 requires the voluntary agreement form to include contact information for legal services and technical assistance providers that may be available to assist tenants. We recommend the Commission also mandate that this same information be provided on the other petition forms – hardship, substantial rehabilitation, capital improvement, and services and facilities.

- Section 4300.9 now adds language that a landlord who takes back a unit for personal use and occupancy merely has to aver that they "intend in good faith" not to demand or receive any rent for the unit for the 12 months after they regain possession. We believe this addition is confusing and may only encourage bad faith uses of this exception, a problem we already see. The change also is contrary to and made unnecessary by the more recently-enacted Housing Conversion & Eviction Clarification Amendment Act of 2019 (D.C. Law 23-72), which imposes fines on landlords for violation of the statute and also contains a good faith exception for any subsequent claim for damages. We believe these statutory provisions – rather than a more general good faith free pass for landlords – is the right approach.

Looking Ahead, Legal Aid Supports Further Legislative Changes

Finally, as we noted when we submitted our comments on the first proposed rulemaking, the conclusion of the current rulemaking process will provide an opportunity for the D.C. Council to consider possible statutory changes to the rent stabilization program, particularly in those areas where the Commission feels its hands are tied. Legal Aid looks forward to providing more detailed thoughts on areas for possible legislative changes at the upcoming Commission oversight hearing.

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Thank you again for this opportunity to provide comments. We look forward to continuing our work with the Commission on this and other projects.

Sincerely yours,

Beth Mellen and Amanda Korber
Supervising Attorneys