AOBA'S COMMENTS AND RECOMMENDATIONS

on the
RENTAL HOUSING COMMISSION
NOTICE OF PROPOSED RULEMAKING

Submitted on: October 31, 2019

1. **AOBA Comment:** Page 18, Section 3805.1 – The proposed rule amendment would automatically stay, pending appeal to the Commission, all petition-based increases as well as tenant petitions. This proposed amendment is contrary to *Cafritz Company v. District of Columbia Rental Housing Commission*, 615 A.2d 222 (D.C. 1992). The DC Court of Appeal's interpretation of this to the contrary was based on a construction of the statute, which has not been amended. The Court's judgment specific stated that it "found that there was nothing which required the automatic stay of a rent increase such as the one that was ordered in this case on behalf of the landlord. Indeed, the statutory provisions governing capital improvement rent increases indicated that the rent increase should have been implemented once the improvements were completed." Additionally, the Court's judgment stated that a more appropriate path would have been to require tenants to "purchase a supersedeas bond, or make monthly payments in the amount of the increase into an escrow account." The Court went on to state that the Commission's conclusion, which was used to justify the automatic stay of rent increases, was unsupported and the Court opted to reverse the Commission's finding.
   AOBA Recommendation: Strike the proposed language in section 3805.1 that would require an automatic stay pending appeal, and replace with language that follow the Courts guidance, which requires tenants to purchase a supersedeas bond, or make monthly payments in the amount of the increase into an escrow account.

2. **AOBA Comment:** Page 30, Section 3815.3 – The proposed rule amendment is not clear. Is the language stating that the Commission can extend the time for filing a Notice of Appeal, but only under specific circumstances such as equitable tolling, unexplained or undue delay by the appellant, and no prejudice to the appellee.
   AOBA Recommendation: Please clarify the language in section 3815.3 by providing more detail.

3. **AOBA Comment:** Page 50, Section 3899.2 "Rent" – The meaning of the word "Rent" includes language not present in the relevant statutory definition of the same word (DC Code § 42-3501.03). The proposed amendment to the definition of rent includes the following language: *"…including mandatory move-in, move-out, amenity, utility, appliance, facility, service, and other*

fees however described, other than late fees." The additional language appears to expand the definition of "rent" beyond the D.C. Code. By including the abovementioned fees under the definition, the proposed rule would be increasing "rent" beyond what the maximum allowable rent. The proposed rule would also be changing the legislative intent and impact of the word, pursuant to the Act. AOBA believes that this is a substantive change to the definition of "rent" and should go through the appropriate legislative process to be added to the code.
AOBA Recommendation: Strike the following proposed language in section 3899.2 defining "rent": ", *including mandatory move-in, move-out, amenity, utility, appliance, facility, service, and other fees however described, other than late fees"*.

4. **AOBA Comment:** Page 51, Section 3899.2, "Rent Charged" – The meaning of the phrase "Rent Charged" should align with the statutory definition, D.C. Code § 42-3501.03(28). Particularly, since the definitions for the word "rent" and "rent charged" are almost identical in the D.C. Code D.C. Code § 42-3501.03.

   AOBA Recommendation: Strike the proposed language in section 3899.2 defining "rent charged" in its entirety and replace it with the following: "Rent Charged – rent, as defined by D.C. Code § 42-3501.03(28), that is pursuant to the Rent Stabilization Program."

5. **AOBA Comment:** Page 51, Section 3899.2, "Rent Surcharge" – The meaning of the phrase "Rent Surcharge" should align with the statutory definition, D.C. Code § 42-3501.03(29C). This could lead to confusion since the proposed rule does not clearly seem to refer to petition-based rent increases, which are treated as rent surcharges, and that rent is not calculated inclusive of such surcharges.
   AOBA Recommendation: Strike the proposed language in section 3899.2 defining "rent surcharge" in its entirety and replace it with the following: "Rent Surcharge – a charge added to the rent charged for a rental unit pursuant to a capital improvement petition, hardship petition, or a substantial rehabilitation, and not included as part of the rent charged."

6. **AOBA Comment:** Page 84, Sections 4103.1 and 4103.2 – The proposed rules do not consider how to handle an exempt rental unit that is able to maintain its exemption status, despite a change in tenancy. Such as, in circumstances when a rental unit has an irregular lease or unplanned turnover. An example would be when a tenant who receives a short-term rent subsidy (less than a year) for emergency transitional housing or a tenant with a voucher that may need to break his/her lease early. In these circumstances the rental unit would be able to retain its exempt status, because the previous tenant would be replaced with a new tenant who is also receiving a federal or local rent subsidy.
   AOBA Recommendation: Include a provision under either section 4103.1 or 4103.2, which even is deemed most appropriate, that that allows for an amendment to the Rent Stabilization Registration Form, when a rental unit experiences a change in tenancy, but not a change in its exemption status.

7. **AOBA Comment:** Page 90, Section 4106.8 – The proposed rule states that if a notice of exemption is not given to a tenant, the unit will not be exempt "until thirty (30) days after the

tenant is provided with a required notice." The inclusion of this new language does not align with the relevant statutory requirement (D.C. Official Code § 42-3502.22(b)(1)), and in fact we are concerned that the added language is outside the intent and scope of the code. Particularly, since this is the only disclosure requirement listed in the Act that would carry this obligation. AOBA believes that this is a substantive change to the tenant disclosure requirements, pursuant to the Act, and should go through the appropriate legislative process to be added to code.
AOBA Recommendation: Strike the following language in section 4106.8: "As provided in §§ 4111.7 – 4111.9, for any rental unit that could otherwise be properly claimed as exempt but for which a tenant did not receive notice of the exempt status prior to execution of the rental agreement, the housing provider shall be deemed to have not met the registration requirements of this chapter until thirty (30) days after the tenant is provided with the required notice."

8. **AOBA Comment:** Page 103, Section 4200.6 – The proposed rule limits the number of petition-based rent increases that occur in the a twelve (12) month period. Our chief concern is that the statute does not place a time limit on implementing a petition-based rent increase or voluntary agreement rent increase. In fact, the only statutory restriction on any type of rent adjustment/increase, is on annual increase and vacancy increase (D.C. Code 42-3502.06(b)). There the code only restricts those type of adjustments from being implemented within 12 months of the previous adjustment. However, the code does not require that you forfeit the adjustment after a set time period. There is nothing in the code that supports this type of restriction on petition-based rent increases. Therefore, we believe there is no statutory basis for this proposed rule. AOBA believes that this section proposes a substantive change to the implementation of petition-based rent increases, pursuant to the Act, and should instead go through the appropriate legislative process to be added to code.
   AOBA Recommendation: Strike section 4200.6 in its entirety.

9. **AOBA Comment:** Page 104, Section 4200.12 – The proposed rule requires that petition-based rent increases to be implemented within twelve (12) months after the date they become authorized by the order of the Rent Administrator or Office of the Administrative Hearings, or be forfeited. The first concern is that the statute does not place a time limit on implementing a petition-based rent increase or voluntary agreement rent increase. In fact, the only statutory restriction on any type of rent adjustment, is on annual increase and vacancy increase (D.C. Code 42-3502.06(b)). There the code only restricts those type of adjustments from being implemented within 12 months of the previous adjustment, however the code does not require that you forfeit the adjustment after a set time period. Other than abovementioned circumstance there is nothing in the code that supports the authority of this rule. Therefore, we believe there is no statutory basis for this proposed rule. Secondly, this proposed rule does not take into consider the common provision included in petitions and/or agreements that intentionally defer petition-based rent increases until the agreed upon rehabilitation work is completed. The proposed rule does not consider the time to needed to do the rehabilitation work, which often takes longer than 12 months to complete. The impact of the proposed rule would mean housing providers would either be forced to forfeit the rent increases, which is

infeasible for the housing provider or be forced into to petitions or voluntary agreements which would require the rent increase be implemented before the agreed upon rehabilitation is completed, which is infeasible for the tenants. If this proposed rule were to be included, it would essentially prohibit the benefit of deferring petition-based rent increases in those circumstances where both parties agree it would be mutually beneficial. This places an unnecessary and arbitrary administrative restriction on reasonable and practical timelines and mutually agreed upon contracts. AOBA believes that this proposed rule is a substantive change to the implementation of petition-based rent increases, pursuant to the Act, and should instead go through the appropriate legislative process to be added to code.
AOBA Recommendation: Strike section 4200.12 in its entirety.

10. **AOBA Comment:** Page 110, Section 4204.9 – The proposed rule requires that rent adjustment be implemented within twelve (12) months after the date they become authorized by the order of the Rent Administrator or Office of the Administrative Hearings, or be forfeited. Our chief concern is that the statute does not place a time limit on the implementation of rent adjustment. In fact, the only statutory restriction on these type of rent adjustments is outlined in code (D.C. Code 42-3502.06(b)), but only restricts an adjustment from being implemented within 12 months of a previous adjustment, but does not require that you forfeit the adjustment after a set time period. There is nothing in the code that supports this type of restriction on rent adjustment. Therefore, we believe there is no statutory basis for this proposed rule. AOBA believes that this section proposes a substantive change to the implementation rent adjustment, pursuant to the Act, and should instead go through the appropriate legislative process to be added to code.
AOBA Recommendation: Strike sections 4204.9(a), (d), and (e) in their entirety.

11. **AOBA Comment:** Page 120, Section 4208.15 – The proposed rule requires that all petition-based rent adjustments must be implemented within twelve (12) months after the authorized by a final order approving a petition, or be forfeited, by reference to section § 4205. The first concern is that the statute does not place a time limit on implementing any petition-based rent increases. In fact, the only statutory restriction on any type of rent adjustment/increase, is on an annual increase or a vacancy increase (D.C. Code 42-3502.06(b)). There the code only restricts those types of rent adjustments from being implemented within 12 months of the previous adjustment. However, the code does not require that you forfeit the adjustment after a set time period. Other than abovementioned circumstance there is nothing in the code that supports the authority of this proposed rule. Therefore, we believe there is no statutory basis for this proposed rule. Secondly, this proposed rule does not take into consider the common provision included in petitions that intentionally defer rent increases until the agreed upon rehabilitation work is completed. The proposed rule does not consider the time needed to do the rehabilitation work, which often takes longer than 12 months to complete. The impact of the proposed rule would mean housing providers would either be forced to forfeit the rent increases, which is infeasible for the housing provider; or be forced into to petitions which would require the rent increase be implemented before the agreed upon rehabilitation is completed, which is infeasible for most tenants. If this proposed rule were to be included, it would essentially prohibit the benefit of deferring petition-based rent increases in those

circumstances where both parties agree it would be mutually beneficial. This places an unnecessary and arbitrary administrative restriction on reasonable and practical timelines and mutually agreed upon contracts. AOBA believes that this proposed rule is a substantive change to the implementation of petition-based rent increases, pursuant to the Act, and should instead go through the appropriate legislative process to be added to code.
AOBA Recommendation: Strike section 4208.15 in its entirety.

12. **AOBA Comment:** Page 136, Section 4210.25 – The proposed rule states that the failure of the Rent Administrator to take action or the Office of Administrative Hearings to issue a final order within sixty (60) days of the filing of a capital improvement petition shall not authorize the implementation of any rent charge under this section, notwithstanding the authorization to begin work to make the improvement. This proposed rule is in direct conflict with the statute (D.C. Official Code § 42-3502.10(e)(2)), which states the following: *"(e)(2) Failure of the Rent Administrator to render a decision, pursuant to D.C. Official Code § 42-3502.10, within the 60-day period shall operate to allow the petitioner to proceed with a capital improvement."* Though, it seems apparent that clarification is necessary, it is not allowed to amend statute through the rulemaking process. If the Commission needs clarification on the intent and scope of the statute, then AOBA believes that the Commission should go through the appropriate legislative process to obtain that clarification.
AOBA Recommendation: Strike the language under section 4210.25 in its entirety and replace with the following: "Failure of the Rent Administrator or the Office of Administrative Hearings to render a decision or issue a final order within the 60-day period of the filing of a capital improvement petition shall allow the petitioner to proceed with a capital improvement."

13. **AOBA Comment:** Page 149, Section 4213.3 **–** The proposed rules state that a proposed voluntary agreement is required to be filed with documentation demonstrating comparable rents of housing accommodations proximate to the subject housing accommodation; and a timeline of any work to be performed through voluntary agreement. The proposed rule includes additional requirements, not included in the statute, which seem to be arbitrary and burdensome for the housing provider. Both the estimated rehabilitation timeline and the comparable rents documentation will require the housing provider to take on additional costs to be compliant. These two requirements will likely need the expertise and services from an outside vendor. Also, the inclusion of an estimated work timeline raises concerns for housing providers that this information could carry liability concerns if a project were to inadvertently overshoot its estimated schedule and take longer than expected. Additionally, the inclusion of the proximate comparable rent documentation, could mislead the conversation about rent increases to focus too heavily on potential amenities and individual unit finishes, and not about the improvements of the building systems and major repairs to the build structure, which represent the largest percentage of cost for the voluntary agreement work. The comparable rents documentation does not consider the unseen yet costly systems, materials, and structural building-wide improvements of different housing accommodations.
AOBA Recommendation: Strike sections 4213.3(e) and (h) in their entirety.

14. **AOBA Comment:** Page 153, Sections 4213.21 and 4213.22 – The proposed rule states that a voluntary agreement may be disapproved if it results in unreasonable adjustments to the rent charged for a rental unit or inequitable treatment of the tenants or rental units. The first concern is that the statute (D.C. Official Code §42-3502.08) does not provide the Commission with the authority to disprove a voluntary agreement based on an arbitrary definition of "reasonableness" and "unequitable treatment". Another critical concern is that the criteria to define "reasonableness", outlined in section §4213.22, uses the housing providers rate of return as measure to consider for the sake of disapproval. Why? If a criterion is necessary the rate of return should not be a factor in determining reasonableness of a rent adjustment, especially if it's not related to a hardship petition. Otherwise it seems to be an attempt to establish an undefined cap on a housing provider's rate of return through the voluntary agreement process. Therefore, AOBA believes that there is no statutory basis for this proposed rule. Seeking to amend the statute through the rulemaking process, is not allowed. The proposed rule aligns itself with similar language and intent to a bill that was introduced in the D.C. Council (B22-100) in 2017. The bill sought to prohibit the type of voluntary agreement outlined in the proposed rule. However, AOBA successfully challenged that bill by explaining that these agreements prevent displacement of existing tenants who may be unable to affordable an across the board voluntary agreement rent increase. These types of voluntary agreements allow tenants to agree to rent increases on vacant units in exchange to keep occupied units at lower rents. The higher rents of the vacant units subsidize the rents of the existing tenants to maintain affordability of those units during the remainder their tenancy, while supporting the critical improvements to the building. The bill did not move forward and instead, the Council and a diverse group of stakeholders (which AOBA is apart) have been actively engaging in the development of a new legislative proposal for the last year and half that looks to find a compromise and address the issue of "inequitable treatment" and "reasonableness". A draft proposal was circulated to the stakeholders and the relevant Council staff as late as this month (October 2019). This proposed rule would undercut this ongoing legislative process. For these reasons, AOBA believes that this proposed rule is a substantive change to the statute governing the voluntary agreement and should instead go through the appropriate legislative process.
    AOBA Recommendation: Strike sections 4213.21(c) and 4213.22 in its entirety.

15. **AOBA Comment:** Page 155, Section 4213.33 – This proposed rule states that a rent adjustment on a final voluntary agreement must be used within twelve (12) months after the date of the Order or result in a forfeiture of the rent adjustment. The first concern is that the statute does not place a time limit on implementing a rent adjustment via a voluntary agreement. In fact, the only statutory restriction on any type of rent adjustment, is on annual increase and vacancy increase (D.C. Code 42-3502.06(b)). There the code only restricts those types of adjustments from being implemented within 12 months of the previous adjustment, however the code does not require that you forfeit the adjustment after a set time period. Other than abovementioned circumstance there is nothing in the code that supports the authority of this rule. Therefore, we believe there is no statutory basis for this proposed rule. Secondly, this proposed rule does not take into consider the common provision included in petitions and/or agreements that intentionally defer voluntary agreement rent adjustments until the agreed upon work is completed. The proposed rule does not consider the time to needed to do the rehabilitation

work to the building, which often takes longer than 12 months to complete. The impact of the proposed rule would mean housing providers would either be forced to forfeit the rent increases, which is infeasible for the housing provider or be forced into voluntary agreements which would require the rent increase be implemented before the agreed upon rehabilitation is completed, which is infeasible for most tenants. If this proposed rule were to be included, it would essentially prohibit the benefit of deferring voluntary agreement rent adjustment in those circumstances where both parties agree it would be mutually beneficial. This places an unnecessary and arbitrary administrative restriction on reasonable and practical timelines and mutually agreed upon contracts. AOBA believes that this proposed rule is a substantive change to the implementation of voluntary agreement rent adjustment and should instead go through the appropriate legislative process to be added to code.
AOBA Recommendation: Strike section 4312.33 in its entirety.

16. **AOBA Comment:** Page 161, Section 4214.10 – This proposed rule addresses the statute of limitations, which AOBA would like flag for further discussion with the Commission. Preliminarily, subsection (2) states that the statute of limitations for failure to comply with an obligation under a voluntary agreement begins on the date of which "the obligation reasonably should have been completed, if no date is other stated." The injects into the voluntary agreement a vague provision not agreed upon by the parties and does not fit all iterations of voluntary agreements.
AOBA Recommendation: Flag for further discussion with the Commission.

17. **AOBA Comment:** Page 181, Section 4217.7 – The proposed rule permits a finding of bad faith where a housing provider "deliberately failed to perform a duty without a reasonable excuse, heedlessly disregarded a duty, or had a dishonest intent or sinister motive in the performance of an act or the failure to perform a duty." This language is vague, which opens it to interpretation and low bar for a burden of proof without further guidance or details. AOBA would like flag this section for further discussion with the Commission.
AOBA Recommendation: Flag for further discussion with the Commission.