October 31, 2019

Via email only

Daniel Mayer, Attorney Advisor
Rental Housing Commission
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Re: Proposed Rulemaking, 14 D.C.M.R. Chapters 38 to 44

Dear Mr. Mayer:

We are writing to provide comments on the proposed regulations 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 – to preserve affordable housing and protect tenants' rights, while also ensuring that housing providers are able to maintain and rehabilitate the District's existing housing stock. 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. We look forward to ongoing dialogue with the Commission and other stakeholders in the coming months.

Our organizations provide technical assistance and legal representation to tenants and advocate for their interests – and, in the case of the Coalition for Nonprofit Housing & Economic Development, for the interests of housing providers as well. Our comments are based on our collective experience working with rent-stabilized rental housing in the District. In this letter, we first highlight what we believe are the most important clarifications and updates in the regulations for preserving affordable housing and protecting tenants' rights. We urge the Commission to keep these provisions in place in the final rulemaking. We then summarize key areas where we see opportunities for the regulations to provide more guidance. We hope the Commission will consider further amendments to the regulations on these issues.

We also are attaching detailed section-by-section comments. These comments range from broader policy concerns to technical suggestions. We have bolded the headings of comments that we believe warrant particular attention and further discussion.

The Proposed Regulations Contain Critical Clarifications and Updates

The proposed regulations contain a number of important clarifications and updates to reflect existing statutes and case law. Some of these new rules may face opposition. We believe strongly that the Commission should ensure that the following provisions remain in the final rulemaking, because they are vital to preserving affordable housing and protecting tenants' rights.

1. Incorporating Statutory Changes That Preserve Affordable Housing and Protect Tenants' Rights.

As an initial matter, the proposed rulemaking provides significant, helpful clarifications and updates by incorporating a number of statutory changes enacted by the Council in the past two decades. In particular, we want to highlight the following laws, which contain critical protections for tenants that are now reflected in the regulations:

- OAH Establishment Act of 2001 – transferring adjudicatory functions in rent stabilization cases to the Office of Administrative Hearings

- Rent Control Reform Amendment Act of 2006 – eliminating rent ceilings, limiting vacancy rent increases, and limiting rent increases to once every 12 months

- Rent Control Hardship Petition Limitation Amendment Act of 2016 – limiting conditional rent increases in the context of hardship petitions

- Elderly Tenant and Tenant with a Disability Protection Amendment Act of 2016 – further limiting annual rent increases for protected elderly tenants and tenants with disabilities, exempting protected tenants from housing provider petition and voluntary agreement rent increases, simplifying the application process for protected tenants, and ensuring that petition rent increases are treated as surcharges

- Rental Housing Late Fee Fairness Amendment Act of 2016 – limiting late fees to 5 percent and ensuring late fees are not stacked or form the basis for eviction

- Rent Charged Definition Clarification Amendment Act of 2018 – ensuring housing providers do not book large rent increases beyond market rent

- Rental Housing Affordability Re-establishment Amendment Act of 2018 – ensuring formerly exempt units with subsidies remain affordable when they re-enter the rent stabilization program

- Vacancy Increase Reform Amendment Act of 2018 – limiting vacancy increases to 10 or 20 percent, depending on the length of the prior tenancy

In particular, implementation of the Elderly Tenant and Tenant with a Disability Protection Amendment Act is vital to ensure that low-income tenants who are perhaps most at risk of displacement from rent-stabilized housing are protected. By implementing the exemption for

petition and voluntary agreement rent increases for these tenants, and ensuring that petition rent increases are treated as surcharges for all tenants, the proposed regulations will promote stable, affordable rents for low-income District residents living in rent-stabilized units.

2. Ensuring Rent Increases Are Implemented Timely and Not Booked for Future Implementation.

The proposed regulations clarify that housing providers must take an approved or eligible rent increase within 12 months or waive their right to do so. This time limit will ensure that tenants have predictability in their rents, and that housing providers no longer can book large rent increases to be taken at a later date, as the Council directed when it eliminated rent ceilings under the Rent Control Reform Amendment Act. Our organizations have seen housing providers attempt to take large rent increases years after they have been approved, despite the 2006 reforms, and clarification of the law is needed.

The 12-month rule also will prevent another practice that has grown increasingly common since 2006 and already has eliminated thousands of affordable rent-stabilized units. Increasingly, housing providers have used voluntary agreements or settlements in petition cases to have current tenants agree to dramatic rent increases that only future tenants will have to pay. Housing providers then book these large increases and implement them over time, ensuring that rent-stabilized units remain at market levels or higher and evading rent stabilization protections for all practical purposes. An analysis by Legal Aid and the Coalition for Nonprofit Housing & Economic Development of voluntary agreements filed since 2006 has found that these agreements alone have resulted in average increases of $986 per month per unit for 5,941 total units, resulting in the loss of 2,377 low-cost units during this time period. Voluntary agreements that shifted costs to future tenants had average increases of $1,198 per month, compared to $688 for agreements that did not. Similar practices in the context of housing provider petition settlements have done similar damage.

The 12-month rule is essential to ensuring that tenants face predictable, stable rent increases, and that landlords no longer can book large rent increases for future implementation and evade rent control. We appreciate the Commission's efforts to clarify the law in this respect.

3. Clarifying That Tenants May Challenge Housing Provider Petitions Based on Substantial Housing Code Violations.

The proposed regulations also clarify that tenants may challenge any housing provider petition, aside from a substantial rehabilitation petition, based on the existence of substantial housing code violations. The Rental Housing Act is clear that a tenant may challenge a rent increase based on the existence of housing code violations, and the Commission's regulations long have stated that petitions are to be treated as rent increases in this regard. While many judges have applied these rules to housing provider petitions, at least where the violations persist at the time of a hearing on the petition, others have not. The regulations provide an important clarification on this point that also is consistent with the Act. A housing provider should not be able to seek approval via a petition for a rent increase that cannot currently be implemented, and such a housing provider should not be rewarded for its failure to follow District law.

We believe the Commission should clarify and strengthen the regulations in this area in two respects. First, the Commission should make clear that a petition is subject to dismissal if it is filed at a time when substantial housing code violations exist, even if those violations later are abated. A housing provider should not be able to file a petition seeking a dramatic rent increase until it can show that it is currently in compliance with District law. Second, with regard to substantial rehabilitation petitions, the Commission should add a provision barring housing providers from including the costs of repairing housing code violations in what the tenants will have to pay through higher, future rents. We look forward to discussing these suggestions further.

The Proposed Regulations Should Be Strengthened

We have identified a number of ways in which the proposed regulations can and should be strengthened to better achieve the goals of the Rental Housing Act, especially the goals of preserving affordable housing and protecting tenants' rights. Our detailed comments are attached. We want to draw particular attention to the following suggestions.

1. The Regulations Should Clarify That Retaliation Is a Defense to All Housing Provider Petitions and Proposed Rent Increases.

The District's retaliation statute protects tenants from any action by a housing provider that seeks to increase a tenant's rent if that action – even if otherwise lawful – is motivated by retaliation against the tenant for exercising his or her rights. Despite the sweeping language of the retaliation statute, and clear guidance from the D.C. Court of Appeals that the anti-retaliation provisions must be interpreted broadly, tenants whom the legal service providers among us represent continue to face opposition when raising retaliation as a defense to housing provider petitions and implementation of other rent increases. In part, this opposition results from the Commission's regulations not listing retaliation among the defenses that may be raised to housing provider petitions and rent increases.

The Commission should clarify, consistent with the Rental Housing Act and prevailing case law, that retaliation is always a viable defense to a housing provider petition or implementation of any rent increase (sections 4209.37, 4210.24, 4212.23, 4213.26, and 4214.4).

2. The Regulations Should Require the Rent Administrator to Send Copies of Housing Provider Petitions and Voluntary Agreements to Relevant Advocates.

To ensure that housing provider petitions are properly vetted, we recommend that the Rent Administrator send copies of any properly-filed housing provider petition or voluntary agreement to the Office of the Tenant Advocate, the Housing Provider Ombudsman, and community organizers funded by the Department of Housing and Community Development and legal services providers that provide free technical and legal assistance to tenants in rent-stabilized housing (sections 4209.31, 4210.23, 4211.9, 4212.20, and 4213.4). The Commission may want to require housing providers to provide electronic copies of filed petitions and voluntary agreements to facilitate this process. The Rent Administrator already shares some information related to housing provider petitions with tenant organizers and legal services providers, and the proposed regulations now require a copy of each voluntary agreement to be shared with the Office of the Tenant

Advocate and the Housing Provider Ombudsman. Our proposal would expand and standardize these practices.

Information-sharing helps to ensure that both housing providers and tenants receive available technical assistance and legal representation, and ultimately helps the parties in these cases to understand their rights and focus on avenues for negotiation and settlement. Many tenants in the District do not have ready access to technical assistance or legal representation and are not aware of the free resources that exist. Giving notice of housing provider petitions and voluntary agreements to tenant organizers and legal services providers will allow them to perform outreach to tenants in need and is consistent with the Council's commitment to fund free services for tenants in these types of cases. This type of information-sharing and outreach is critical in the context of petitions and voluntary agreements, which often request large rent increases that can lead to displacement of tenants and the loss of affordable housing.

3. <u>The Regulations Should Reform the Process for Approval of Hardship Petitions to Ensure Adequate Government Review and Better Protect Tenants' Rights.</u>

Hardship petitions often allow housing providers to take dramatic rent increases, potentially fueling displacement and the loss of affordable, rent-stabilized units. Our detailed comments included several recommendations for reforms to the hardship petition process, to ensure adequate government review, avoid protracted litigation, and better protect tenants' rights. For purposes of this letter, we want to highlight two specific reforms.

First, the regulations should include provisions to ensure that tenants and their representatives receive timely access to the documentation underlying proposed hardship petitions (section 4209). Currently, housing providers serve the hardship petition itself on tenants, but all of the underlying documentation is filed with the Rent Administrator and not the tenants. In recent years, tenants and their representatives have been asked by the Rent Administrator to submit Freedom of Information Act (FOIA) requests to obtain access to this information, resulting in delays and unhelpful redactions of key information. Without reviewing the underlying documentation, tenants and their representatives are unable to determine, for example, whether the housing provider's claimed expenses fall within the requisite 12-month period, are properly documented, are tied to the property at issue, do not fall within an excluded category, and are ordinary rather than capital or extraordinary. Tenants simply cannot assess and put together objections without access to the underlying documentation filed by the housing provider with the Rent Administrator.

Second, audits performed on hardship petitions can be improved by specifying the standards that the auditors must follow in reviewing hardship petitions and the qualifications that auditors must meet (section 4209.32). The government audit is the first step in ensuring that hardship petitions are properly vetted and only rent increases justified by existing law are approved. When the audit process fails, tenants have no choice but to seek legal representation, file objections, and litigate their defenses. A stronger audit process will ensure that tenants without access to legal representation are protected, and should help narrow – or, in some cases, even eliminate – objections to proposed hardship petitions.

4. The Regulations Should Reform the Process for Approval of Voluntary Agreements to Ensure Adequate Government Review and Better Protect Tenants' Rights.

As noted above, voluntary agreements also have been a key driver in the past decade-plus in fueling dramatic rent increases in rent-stabilized housing in the District. Our detailed comments include several recommendations for reforms to the voluntary agreement process, to ensure adequate government review and better protect tenants' rights. For purposes of this letter, we want to highlight two specific reforms.

First, the regulations should include provisions that ensure that all terms and documentation related to a proposed voluntary agreement are disclosed and that the Rent Administrator has a full picture of the proposed agreement (sections 4213.3 and 4213.18). Voluntary agreements often are tied to the sale or redevelopment of a property. We recommend adding a requirement that the housing provider submit to the Rent Administrator any documents related to the sale or redevelopment of the property, to include any TOPA notices, contracts of sale, development agreements, or any other related agreements negotiated by the housing provider and the tenants or tenant association. Similarly, we recommend adding a provision requiring the housing provider to affirm that all such documents have been provided already to the tenants.

Second, the regulations should include additional provisions to ensure that only tenants who will pay any proposed rent increase and are not related to the housing provider can vote on a proposed voluntary agreement (sections 4213.1 and 4213.16). The regulations already make clear that agents or employees of the housing provider cannot vote. We recommend adding three additional categories: 1) the housing provider, 2) any relatives of the housing provider, and 3) any tenants who will be exempt from paying the proposed rent increase because of their status as a low-income elderly tenant or tenant with a disability. Tenants who will not be required to pay a proposed rent increase or who have a conflict of interest due to close ties to the housing provider should not be allowed to vote to approve a proposed voluntary agreement. In a number of buildings, tenants in these categories will be able to swing the vote on a proposed voluntary agreement if they are allowed to vote.

5. The Regulations Should Clarify Existing Eviction and Retaliation Protections.

Finally, the Commission should use the proposed regulations to clarify existing eviction and retaliation protections.

First, the Commission should clarify in its regulations that a housing provider serving a 30-day notice to correct for an alleged lease violation must include enough detail to allow the tenant to respond (section 4301.4). Too often, tenants receive vague 30-day notices alleging "loud and boisterous activity" or "noise," leaving them in the dark about what the housing provider is alleging and how to address it. Housing providers should be required to include 1) details about each alleged violation, such as the date, time, location, and a detailed description as to each incident, and 2) detailed instructions about how a tenant can cure the alleged violation. These requirements will ensure that tenants receiving a notice can understand exactly what conduct the landlord finds problematic and how to fix it to avoid eviction.

Second, the Commission should clarify that a housing provider cannot act against a tenant with a retaliatory motive, even when taking an otherwise lawful action (section 4303.2). The D.C. Court of Appeals has reached this conclusion in several cases, but nonetheless some housing providers continue to argue that if an action is otherwise lawful, it cannot be found to be retaliatory. The regulations should clarify this point. We also recommend removing language in the current draft requiring a tenant to show that a housing provider acted "with the intent to injure a tenant" in order to prove retaliation (section 4303.1). A retaliatory motive may stem from a housing provider wanting to prevent a tenant from exercising their rights, for example, and does not necessarily involve an intent to injure. The regulations instead should use the phrase "retaliatory motive," which is broad and flexible and is the language used by the Court of Appeals.

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We look forward to working with the Commission and other stakeholders, including those representing housing provider interests, to provide ongoing input and ensure these regulations become final. As part of that process, we also recommend that the Commission consider making recommendations to the Council about appropriate legislative changes. For example, the statutory timeframes for the Commission to decide pending appeals are quite limited and unrealistic, and the inclusion of the phrase "not otherwise permitted by law" in the retaliation statute remains confusing. The Commission is uniquely positioned to identify and make recommendations on necessary statutory changes to align the Rental Housing Act with existing practices and needs.

We appreciate this opportunity to provide our perspective on the regulations governing rent control and eviction in the District of Columbia. If you have any questions, you can reach us through Beth Mellen Harrison at Legal Aid, bharrison@legalaiddc.org.

Sincerely,

Bread for the City

Cynthia Pols, Briarcliff Tenants Association

Coalition for Nonprofit Housing & Economic Development

D.C. Tenants' Rights Center

Housing Counseling Services

Latino Economic Development Center

Legal Aid Society of the District of Columbia

Legal Counsel for the Elderly

Neighborhood Legal Services Program

Rising for Justice