Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

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Committee on Housing & Community Development
Council of the District of Columbia

B21-146: "Rent Control Hardship Petition Limitation Amendment Act of 2015"

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The Legal Aid Society of the District of Columbia[1] supports the Rent Control Hardship Petition Limitation Amendment Act, which would limit potential abuses in the hardship petition process and create important protections for tenants in rent-controlled properties.

In our experience, hardship petitions have appeared with increasing frequency in the District in recent years. When it is difficult to sell a building or convert it to condominiums, a hardship petition is one of the most straightforward ways to increase the property's income potential. The Rental Housing Act guarantees landlords a 12 percent rate of return on their investment, and if a building's current rents do not result in that return, the law permits increases up to a level that would support the 12 percent figure.[2]

The resulting rent increases on tenants under the hardship law can be drastic. Legal Aid has had cases in which landlords have sought increases ranging from 60 percent to well over 100 percent of the existing monthly rents. For the low-income tenants that Legal Aid represents, rent increases at this level inevitably result in displacement and the loss of affordable units.

Legal Aid also has litigated cases in which the landlord's purpose in submitting the hardship petition is not to increase the landlord's rate of return, as the Rental Housing Act contemplates. It is to empty the building of some or all of its tenants.

The bill under consideration addresses these concerns by focusing on the "conditional increase," the most serious potential for injustice and abuse in the current statutory scheme. If the Rent Administrator fails to rule on a hardship petition within 90 days, then the increase sought in the petition automatically goes into effect on a "conditional" basis, authorizing the landlord to take immediate rent increases. Tenants then must pay the increase pending review,

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[1] The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the last 82 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of housing, family law, public benefits, and consumer protection.

[2] *See generally* D.C. Code § 42-3502.12; 14 D.C.M.R. § 4209. It should be noted that, at least in the current economic climate, 12 percent is a far greater rate of return than one might reasonably expect for an investment.

and if the agency ultimately disapproves the petition, the landlord must return the overpaid rent to the tenants.[3]

It is important to understand that this rent increase typically goes into effect without any review from the agency at all. In a number of cases, 90 days passes before the District's auditor has finished its review of the numbers. The auditor reviews – which may catch basic math or accounting errors – can cut the approved increase by anywhere from 20 to 25 percent or more.[4] The conditional rent increase also typically goes into effect before tenants are given an opportunity to file written objections to the landlord's proposed increase, at a point when a final hearing on those objections is months away.[5]

This setup, which might work in some properties where most tenants could absorb the increase, is wholly unworkable for tenants of low and moderate incomes. For those tenants, the requested hardship increases are typically well beyond what they can afford.[6] This means that when the conditional increase takes effect, they cannot simply pay the increase while waiting for the agency to make a decision. But if they do not pay it, they may be forced to leave.

Notice of the conditional rent increase can cause panic for low- and moderate-income tenants, some of whom will simply move out. Landlords seeking a hardship rent increase often are waiting to offer deals in which tenants move out and waive any right to challenge the hardship rent increase in exchange for relatively small payments.

Tenants who choose to stay may face eviction lawsuits for failure to pay the increased rents. While those lawsuits typically are stayed pending the final outcome of the hardship petition, landlords can ask the Landlord Tenant Court to require tenants to pay the higher rents into the court registry or face immediate eviction. By guaranteeing the landlord the requested rent increase within 90 days, before any adjudication on the merits, and then guaranteeing the landlord that this increased rent must be paid immediately to the court registry on penalty of eviction, the system is stacked against low- and moderate-income tenants with valid defenses to the hardship rent increases.

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3 *See* D.C. Code §§ 42-3502.6(c), 42-3502.12(c).

4 Auditors catch some but not all errors. Legal Aid has seen audit reports in which the auditor applied the wrong accounting method, included expenses clearly outside the reporting period, and missed other relatively straightforward errors. The opportunity for tenants to raise objections and have these issues adjudicated is the only effective means to test the landlord's claims.

5 Tenants are not provided the opportunity to file objections until the audit report is completed, which can be up to 90 days (or occasionally longer) after the initial hardship petition was filed. *See* 14 D.C.M.R. § 4209.20.

6 Rent increases during the last decade have outstripped income gains, especially for renters in the bottom 40 percent; these tenants saw their incomes stagnate as rents increased by double-digit percentages. *See* D.C. Fiscal Policy Institute, *Going, Going, Gone: D.C. Vanishing Affordable Housing* 2-3 (March 2015). During the same period, the District lost about half of its low-cost rental units. *See id.* at 4. As a result of these trends, more than one in four of the District's renters spend more than half of their household income on rent. Among the lowest-income tenants – those at or below 30 percent of the area median income – 66 percent spend more than half their income on rent. *See* Urban Institute, *Housing Security in the Washington Region: District of Columbia* 4 (July 2014).

The result of this process is that tenants may be displaced based on rent increases that the Rent Administrator and/or OAH have never reviewed and that ultimately may be declared unlawful.[7] At best, this situation creates unfairness. At worst, it poses great potential for abuse: landlords who may have motives other than increased rental profit – i.e., a desire, for whatever reason, to empty the building – can submit a wholly unsupported hardship petition, secure in the knowledge that many tenants will be displaced as a result of the conditional increases before the petition ever gets reviewed on its merits.

The best solution to these challenges is to eliminate the conditional rent increase altogether. Eliminating the conditional rent increase is the only way to remove this tool for emptying buildings. This would simply put hardship petitions in the same position as all other landlord-initiated petitions for rent increases: tenants will have to pay the increases once a petition has completed agency review and tenants have had a chance to be heard on their objections. It also would put hardship petitions on par with any other civil litigation, where the party bringing a claim is seldom entitled to up-front security from or a preliminary order against the defending party.

An alternative would be to set the conditional rent increase at the amount of the annual increase of general applicability for that year – also known as the CPI rent increase – with a maximum cap of 5 percent. Because landlords must elect to file a hardship petition instead of the annual CPI increase for a particular year, setting the conditional increase at this amount would ensure the rents keep pace with inflation while the parties await a final decision on the hardship petition. It would impose the kind of burden that most tenants in rent-controlled units would have expected to face that year and would incorporate existing statutory protections for tenants who are elderly or have disabilities.[8]

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[7] Once tenants have the opportunity to challenge a hardship petition, it is not uncommon for the administrative review (or, ultimately, review by the Court of Appeals) to find the increase partially or wholly invalid. Reasons for rejecting the petition include insufficient documentation of expenses; impermissible calculations regarding equity; inclusion of capital improvements as annual expenditures; improper claims of vacancy loss; and unremedied housing code violations at the premises. *See, e.g.*, *Kates v. D.C. Rental Hous. Comm'n*, 630 A.2d 1131, 1133, 1135 (D.C. 1993) (holding that landlord could not use prior owner's equity to support hardship petition and that he could not take a vacancy loss on a unit not offered for rent); *McCulloch v. D.C. Rental Hous. Comm'n*, 584 A.2d 1244, 1246-47 (D.C. 1991) (affirming decision that a hardship increase was invalid because of substantial housing code violations); *Wire Props., Inc. v. D.C. Rental Hous. Comm'n*, 476 A.2d 679, 682-83 (D.C. 1984) (holding that certain expenses were capital and not annual expenditures and that prior year's water and sewer bills did not sufficiently document current expenses); *Costley & Leebart v. Garber*, TP 23,340 & 23,341, at 18 (RHC Aug. 14, 1997) (finding hardship increase invalid because landlord failed to abate substantial housing code violations); *Phifer v. Tenants of 2732 Minnesota Ave. SE et al.*, HP 20,486 et al. (RHC May 17, 1990) (reducing allowable rent increase because landlord failed to document all claimed expenses).

[8] Landlords are allowed to increase their rents every year by a percentage that includes the CPI factor for the Washington, DC metropolitan area for the past year plus two additional percentage points. *See* D.C. Code § 42-3502.06(a). For tenants who are elderly or have disabilities, the increase is limited to the CPI factor, with a maximum cap of 5 percent. *See id.* 42-3502.08(h)(2)

The current bill strikes a different compromise by keeping the conditional rent increase in place but limiting it to 5 percent. While not our preferred option, we also support this proposal, which would prevent abuses while providing some measure of relief to landlords if the petition process drags on for some time.

We recognize that any of these changes would transfer the cost of delay from tenants to landlords, and we agree with landlords that the hardship petition process in its current state is dysfunctional for all parties. A large part of this problem is attributable to the Rental Housing Commission, which takes years – not months, but years – to adjudicate most rental housing disputes. But as between landlords and low-income renters, we believe that the balance falls in favor of preventing tenants' displacement while the parties litigate the increase.

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Legal Aid also supports the bill's proposal to require landlords to return any excess rent paid under the conditional increase within 21 days of a final decision on the hardship petition. This is a gap in the current statutory provisions and regulations, which can leave tenants waiting with uncertainty to receive back the overpaid rent. Rent overpaid under the conditional rent increase amounts to an interest-free loan to the landlord, and there is no reason to delay returning this money to the tenants.

We urge the Council to enact the Rent Control Hardship Petition Limitation Amendment Act of 2015. Thank you for the opportunity to testify today.