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**The Committee on Housing and Community Development  
Council of the District of Columbia**

**Budget Oversight Hearing on the Department of Housing and Community Development  
and the Rental Housing Commission**

**April 27, 2016**

The Legal Aid Society of the District of Columbia<sup>1</sup> welcomes this opportunity to testify about the impact of the Rental Housing Commission (RHC) and the Rental Accommodations Division (RAD) of the Department of Housing and Community Development on low-income tenants in the District of Columbia.

Legal Aid represents hundreds of low-income tenants in housing cases each year. Many of these cases involve eviction protections and rent control requirements found in regulations promulgated by the RHC. Legal Aid also litigates tenant petitions and housing provider petitions, cases which start at the Office of Administrative Hearings, are appealed to the RHC, and then are ultimately appealed to the D.C. Court of Appeals. Through its regulations and its appellate decisions, the RHC has a profound impact on the numerous laws that protect thousands of tenants in the District, including low-income tenants served by Legal Aid. Similarly, the RAD – as the clearinghouse for all rent control filings in the District – provides critical information for tenants living in rent control properties, providing them with the tools they need to understand and enforce their rights.

We are heartened that the RHC has made progress in the past year on one of the problems that has plagued the Commission, namely years-long delays in issuing final decisions in rental housing appeals. We also recently have engaged in some productive initial discussions with the RHC about ensuring that its current rulemaking process remains transparent and open to stakeholder input. While we are encouraged by the Commission’s initial response, we believe that more can and must be done in this regard to provide an effective and balanced rulemaking process.

With respect to the RAD, we applaud the Council for approving the creation of a Rent Control Housing Clearinghouse under the Budget Support Act last year, and we want to ensure that RAD implements this project well but also in a timely fashion. Without this database of rent

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<sup>1</sup> 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.” For more than 80 years, Legal Aid staff and volunteers have been making justice real for tens of thousands of the District’s neediest residents. Legal Aid currently works in the areas of housing, family law, public benefits, and consumer law.

control filings, too many tenants currently are left in the dark about the rent control status of their units.

**The Rental Housing Commission Should Continue to Take Steps to Hear and Resolve Appeals Expediently.**

The RHC is a quasi-adjudicatory body charged with issuing regulations to enforce the Rental Housing Act, certifying and publishing the annual rent adjustment of general applicability for units under rent control, and deciding appeals in tenant and housing provider petition cases involving enforcement of the rent control portions of the Rental Housing Act.<sup>2</sup> Tenant and housing provider petitions are filed with the Rent Administrator in the first instance, with contested hearings held at the Office of Administrative Hearings (OAH). OAH decisions in rental housing cases may be appealed to the RHC, and decisions made by the RHC in turn are appealable to the District of Columbia Court of Appeals.

Legal Aid has longstanding concerns about the length of time the Commission has taken to resolve cases in the past. Just this past year, in 2015, we finally received a decision in an appeal that had languished at the Commission since 2008. Working with pro bono counsel at a law firm, we have made several Freedom of Information Act (FOIA) requests to the RHC. Our review of the resulting data showed that many cases sat at the RHC without a final disposition for years. Last year, we provided Chairwoman Bonds with feedback on some of our concerns.

For a number of years, the RHC has struggled with clearing its backlog of long-pending cases. As of Fiscal Year 2014, the RHC reported that the average number of calendar days between the receipt of a case by the Commission and the final decision was 471 days.<sup>3</sup> The RHC also reported that there were 12 cases pending that were more than three years old.<sup>4</sup> The results of our FOIA requests, covering cases disposed of between 2010 and 2015, provide a bleaker picture. The RHC took an average of 888 calendar days – well over two years – to render a final decision in those cases.<sup>5</sup> Looking at all cases still pending before the RHC as of early April 2015, they were filed on average 813 days ago.<sup>6</sup>

Justice delayed is justice denied. Swift resolution of cases is vital to private enforcement of the Rental Housing Act, and thus to the preservation of affordable housing in the District. Delays to this extent are unjust, unreasonable, and negatively affect all parties, especially the tenants intended to be protected by the Rental Housing Act. The inevitability of lengthy delays prevents tenants from asserting their rights, makes it difficult for tenant associations to organize

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<sup>2</sup> See D.C. Code § 3502.02.

<sup>3</sup> DHCD Performance Measures FY 2014, Track DC, available at <http://dc.gov/trackdc>. Similar but slightly different data were provided in response to the Committee's performance oversight questions. See Ltr. from P. Donaldson to A. Bonds, at 42-50 (2/17/15).

<sup>4</sup> DHCD Performance Measures FY 2013, Track DC, available at <http://dc.gov/trackdc>.

<sup>5</sup> DHCD FOIA Responses, Ltr. from V. Orders to T. Sanders (4/2/15), Ltr. from V. Orders to J. Becker (7/24/13).

<sup>6</sup> DHCD FOIA Responses, *supra*.

and stay unified, and discourages attorneys – including legal services providers and pro bono counsel – from taking on these cases.

The good news is that the data for FY 2015 show an improved picture. The Commission reports that it has reduced its overall backlog of cases pending final decision from 20 to 5 cases.<sup>7</sup> The RHC also has reduced its backlog of pending cases that are more than three years old from 9 to 2 such cases.<sup>8</sup> Finally, the Commission has reduced processing time and the time to final decision in new cases, again positive developments.<sup>9</sup>

We are pleased with what we hope are fundamental changes that will have a lasting positive impact, namely, staffing two additional attorney advisors to assist with drafting and an attorney mediator to help expedite resolution of cases. While we applaud these efforts, and the commitment to bringing resolution to each individual case, it remains a concern that the RHC is operating without having a full bench of commissioners, with only two of the three positions currently filled. Furthermore, one of the current Commissioner's term expires in June, creating a second vacancy. As the RHC itself identifies, past periods in which positions on the Commission have been vacant have been a primary contributing cause to case back-logs. It is our understanding that the Mayor has not yet nominated a new Commissioner for the open seat. With a second vacancy fast-approaching, appointing new RHC Commissioners should be an area of focus for the Mayor and the Council. If at all possible, we would hope that any Commissioner nominated by the Mayor and confirmed by the Council be a high-quality candidate with a demonstrated interest in serving the public interest.

Another concern we have is that the RHC utilizes a Key Performance Indicator of cases older than three years as the baseline for cases that are too old. While it is commendable that this indicator has improved significantly since last year, we think this is setting the bar too low. Resolving a case after a delay of two years and eleven months should not be counted as a “win.” The RHC should set a higher standard – barring highly unusual circumstances, cases pending for more than one year have languished for too long. We recommend that the RHC instead adopt a Key Performance Indicator for “number of appeals cases greater than one year old.” The RHC should continue to strive to keep the number of cases pending for that long at zero or be in a position to explain the unusual circumstances necessitating a one year delay in rendering a decision.

We understand that the backlog battle is ongoing, and requires continued diligence. At the same time, we also caution that attempts to achieve statistical goals should not come at the expense of achieving justice. For example, a reasonable length of time to allow a tenant's new counsel to get up to speed on a case should override the desire to keep a case duration lower than a certain number of days. The RHC previously has reported that it is scheduling hearings within three days of receiving the certified record below. While this expediency is laudable, it also raises concerns about whether parties without counsel in particular – but even those with counsel

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<sup>7</sup> DHCD Responses to Questions in Advance of the Performance Oversight Public Hearing on Fiscal Years 2014/2015, at 29 (2/25/16).

<sup>8</sup> *Id.* at 30.

<sup>9</sup> DHCD Performance Measures FY 2015, Track DC, available at <http://dc.gov/trackdc>.

– have adequate time to prepare for the hearing. The RHC may want to seek stakeholder feedback about appropriate benchmarks for the scheduling of cases, to ensure that parties and their attorneys will have adequate time to meet deadlines.

**The Rental Housing Commission Should Have Greater Transparency and Stakeholder Input in Its Rulemaking Process.**

All of the Commission’s recent improvements are commendable. However, we are profoundly concerned that long-overdue amendments to the RHC’s regulations are being formulated with insufficient stakeholder input prior to publication for comment. This is disappointing – and very different from our experience with other agencies.

The RHC last issued comprehensive regulations in 1986, despite numerous changes in the Rental Housing Act itself, decisional case law, and the rental housing market in the District in the intervening years. To cite but one example, the Commission has yet to issue regulations implementing legislative changes nearly 10 years ago – under the Rent Control Amendment Act of 2006 – that significantly changed the District’s rent control law. Current regulations also do not reflect transfer of the Rent Administrator’s adjudicatory functions to the Office of Administrative Hearings, a change that dates to the same time period. Housing providers, tenants, and judges are left to make their best judgments as to how to implement these and other legislative changes. We understand that regulations have been drafted that will address not only the rent control portions of the regulations, but also those relating to eviction. These regulations are vital to protecting tenants’ rights and preserving affordable housing in the District.

The RHC has been promising to draft amended regulations for years. But even more troublesome than this delay is that the current draft does not reflect *any* non-governmental stakeholder input on the scope of the draft regulations or the key policy issues to be addressed. To date, the RHC has sought input from only the Rent Administrator and the Office of Administrative Hearings. While these agencies certainly have jurisdiction over many of the topics to be addressed, they are not “stakeholders,” nor do they have any experience (or, as far as we know, expertise) in eviction law, which is a particularly technical and complex area. What is missing from the process to date is consideration of the views of the individuals and businesses most affected by the regulations, as well as the organizations that practice in this area every day.

We reached out to the Commission to express our concerns about this rulemaking process. Those initial discussions have been productive. Commissioner Szegedy-Maszak has informed us that the Commission’s next step will be sharing a revised draft of the regulations with the Office of the Tenant Advocate and the Housing Provider Ombudsman, two government agencies designed to represent tenant and housing provider interests respectively. The hope is that those agencies will be able to share feedback and views that represent the interests of the individuals and community group that each agency represents. The Commission has indicated that it hopes to complete this step within six weeks, followed by legal sufficiency review and then formal publication in the August to October 2016 timeframe.

While receiving feedback from the Office of Tenant Advocate and the Housing Provider Ombudsman is an important next step, we do not believe it will be sufficient to capture the interests of either tenants or housing providers, nor is this process the best one to produce our

common goal of high-quality, well-drafted, internally-consistent regulations. Even six weeks is a short period to allow full consideration of 170 pages of proposed regulations that were last updated 30 years ago. We also understand that the RHC is planning on extending the ultimate public comment period on these important regulations from 30 days to at least 60 days. Again, this a good step, but unfortunately it does not fully address our concerns about the type of stakeholder input or the timeframe that is needed.

Other agencies that we work with often seek input from Legal Aid and other providers before publishing proposed regulations for notice and comment. This type of informal stakeholder review serves two key functions. First, it maximizes transparency and ensures input early in the process from the parties who will be most affected. Second, we believe it results in a more efficient and effective rulemaking process, because many points of concern and possible contention can be resolved informally, avoiding a lengthy notice-and-comment process. Input through the public comment process often may come too late, after the scope of the rules has been determined and key policy decisions have been made. The public comment stage can be an effective tool for fine-tuning new rules, but the affected community should have an opportunity to provide insight into the scope of the amendments and key policy decisions at the formative stage of drafting the amendments.

It has been our experience in many other rulemaking processes that the best possible feedback and revisions emerge when agencies convene a series of in-person stakeholder meetings, where representatives from all sides – here, government agencies as well as housing provider and tenant interests – can engage in an open, dynamic, and collaborative process. While such a process may appear to be time-consuming, it is a wise investment of resources to ensure high-quality, balanced rulemaking, and it typically avoids a lengthy notice-and-comment process in which multiple rounds of subsequent revisions may be required. We have frequently been able to make suggestions which clarify the intent of the government drafters, thereby avoiding unnecessary future litigation. As we have pointed out when contacting the Commission, the concerns we are expressing are shared not only by other legal services providers who work with low-income tenants, but also by the Apartment and Office Building Association, which represents housing provider interests. We welcome a process that gathers all of these voices together in one room. We hope to continue our discussions with the RHC about how to improve its current plans for this important rulemaking process.

**The Rental Accommodation Division Should Ensure That All Rent Control Filings Are Accessible to the Public.**

RAD oversees the District's rent control regime and is the depository for all rent control filings by housing providers and tenants. This includes rent increase notices, registration forms, and claims of and approval for exemptions. RAD also is the initial filing place for all tenant and housing provider petitions. Many of these petitions are forwarded on to the Office of Administrative Hearings for resolution, but other petitions are resolved by RAD.

For a tenant living in a rent control property – including many of the low-income tenants that Legal Aid serves – access to all of this information is vital in order for the tenant to understand and enforce his or her rights. For an attorney trying to help, investigating a tenant's claims of an illegal rent increase or a wrongful exemption or lack of registration is close to

impossible without easy access to these filings. Broad public access to this information supports private enforcement, incentivizes housing providers to comply with the law, and ultimately promotes the preservation of affordable housing.

For a number of years, RAD has maintained public access computer terminals where individuals can conduct searches for scanned filings. The system is not complete – exemption filings and tenant filings have not been included, and petitions of all kinds are kept separately. Moreover, tenants or their representatives have to visit the physical office in person to access the filings. But in the past, the public access computer terminals at least have provided access to rent increase and registration notices.

Unfortunately, Legal Aid has found in the past few years that the public access system no longer functions well, and other means of requesting documents also have significant problems. We have a number of examples from the past year (and before) of instances in which RAD has been unable to provide important rent control filings to our attorneys or our clients.

- In August 2015, we were informed that RAD currently has a backlog of exemption filings that stretches back for several years. These more recent documents have not been scanned and therefore are not readily-available. It is our understanding that other rent control filings face a similar scanning backlog.
- Because more recent documents are not scanned, we have experienced delays in trying to obtain these records. For example, in August/September 2015, our legal assistant had to visit the RAD office several times over a period of a few weeks before the right staff person was available to find relevant exemption documents for a particular property.
- We have submitted multiple FOIA requests in individual cases – often seeking a relatively small set of documents – without receiving any documents in response; ultimately, we have stopped following up and simply given up on receiving the requested information or obtained it from a different source.

We are currently awaiting results from a FOIA request that we submitted in January 2016 seeking copies of hardship petitions filed since 2006. We understand the volume of this request is higher than our average request, but it is disappointing that it has taken this long (nearly 15 weeks to date) to receive any documents in response. We have offered to have someone from our office come down to review the files and assist with scanning or making copies, but so far RAD has not taken us up on this offer. These records are being sought to inform an ongoing discussion about rent control reforms contained in current, pending legislation (B21-146, the Rent Control Hardship Petition Limitation Amendment Act of 2015) as well as ideas for future legislation. It is worth noting that we simultaneously submitted a request to the Office of Administrative Hearings for their hardship petition filings during the same period, and we received a complete response within about five weeks.

The Council already has enacted legislation to address these challenges. The Rent Control Housing Clearinghouse Amendment Act of 2015, enacted as part of the Budget Support Act of 2015, requires RAD to establish an online searchable database of all rent control filings

that housing providers submit to RAD. It is our understanding that RAD has begun implementation of this initiative, and we hope there will be a report to the Committee today on this important project. We urge RAD – working with the Office of Tenant Advocate and the Chief Technology Officer, as the legislation requires – to prioritize full implementation of this initiative. While this is an urgent need, RAD nonetheless should consult with stakeholders carefully along the way to ensure that they get this right. The ultimate goal should be ensuring that all members of the public can receive timely access to rent control information about specific units.

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In sum, while we commend the RHC for improving its handling of cases and for finally tackling updating its regulations, we nevertheless remain both cautious and concerned. The RHC must continue to strive to eliminate the remaining backlog of cases and prevent such a backlog from occurring in the future. Ensuring a full complement of Commissioners is vital in this regard. Of even greater concern, however, is the RHC's apparent decision to move forward with rulemaking without sufficient input from tenant or housing provider stakeholders, the very individuals and businesses that will be most affected by the amended regulations. We hope that as the RHC moves forward on updating its regulations, it will invite Legal Aid and other stakeholders to the table to ensure that the amended regulations actually accomplish the policy objectives of the Rental Housing Act. We hope to continue our dialogue with Commissioner Szegedy-Maszak and others on how to ensure meaningful stakeholder input in this important rulemaking process.

We also urge RAD to take all necessary steps to ensure that all rent control filings are readily-accessible to the public, including prioritizing full implementation of a Rent Control Housing Clearinghouse.

Thank you for this opportunity to testify.