

**Testimony of Laurie Ball Cooper  
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**Before the Committee on Housing and Community Development  
Council of the District of Columbia:  
“Residential Housing Late Fee Fairness Amendment Act of 2016”**

**May 16, 2016**

The Legal Aid Society of the District of Columbia<sup>1</sup> supports the Residential Housing Late Fee Fairness Amendment Act of 2016 (“Late Fee Fairness Amendment Act”), which provides critical protections for tenants in the District of Columbia. Two provisions of the bill are especially important for District tenants: the limitation on late fees to no more than five percent of any amount unpaid and due from the tenant and the prohibition on directing tenants’ future rent payments toward prior late fees. In addition, Legal Aid encourages the Council to add another protection to the bill that would prohibit landlords from evicting tenants based solely on a tenant paying rent late when the tenant has paid all required rent and late fees.

**Legal Aid applauds the bill’s limitation on late fees to five percent of amounts due and owing from the tenant.** As Legal Aid has previously testified, many landlords currently impose a late fee that is a percentage of the *total* monthly rent under the lease, regardless of how much has been paid. This can provide an unwarranted windfall for landlords in cases in which the tenant pays most of the rent due and owing or in which the tenant has a subsidy.

Currently, landlords’ practices regarding late fees vary widely in the District, and some of them are unfair. Many landlords impose a late fee that is a percentage of the total rent, for example, 5% of the monthly rent. Other landlords impose a flat fee that may equal or exceed the 5% level. For low-income tenants, such late fees can be an extraordinary burden. In many situations, these fees also provide an unnecessary windfall to landlords. For example, if the rent is \$2000 and the tenant pays only \$1900 in one month, a landlord may attempt to charge the tenant 5% of the total rent (\$100) – even though the landlord still received the vast majority of the rent in a timely fashion. The late fee then becomes a 100% penalty for the amount past due – a \$100 late fee for a missed payment of \$100.

This provides the landlord with a windfall completely disconnected from any harm the landlord may have suffered due to late payment of a small portion of the rent. It also imposes an

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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.” Over the last 83 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, public benefits, consumer, and appellate law. More information about Legal Aid can be obtained from our website, [www.LegalAidDC.org](http://www.LegalAidDC.org), and our blog, [www.MakingJusticeReal.org](http://www.MakingJusticeReal.org).

unnecessary, and often unmanageable, burden on tenants. Under the Late Fee Fairness Amendment Act, this same tenant would be responsible for a \$5 late fee – an amount proportionate to the harm caused to the landlord by the late payment of only \$100.

The need for the Late Fee Fairness Amendment Act is further apparent when considering cases involving subsidized housing. Even when tenants receive subsidies for significant portions of the rent, many landlords still attempt to charge late fees as a percentage of the total rent rather than as a percentage of the tenant's portion of the rent. An individual with low income may pay only \$100 in her portion of the rent while the government provides a \$1900 subsidy to the landlord. If the tenant is late paying that \$100 portion, the landlord often will impose a fee of 5% (or more) of the *total rent*, even though most of the rent was timely received from the government subsidy. In this example, a \$100 late fee (5% of the full rent of \$2000) for a tenant's failure to pay her \$100 share represents an extraordinary burden on the subsidized tenant and an unnecessary windfall to the landlord. By limiting a late fee to 5% of the amount actually past due (here: \$5), the Late Fee Fairness Amendment Act compensates landlords for the difficulties caused by late payments in an amount proportional to the actual harm.

It is also fundamentally unfair for a tenant to be penalized if a subsidy program is late in paying its share of the rent to the landlord. Under current law, landlords can and do seek to impose late fees on tenants when, through no fault of the tenant, the subsidy program pays late or does not pay at all. The Late Fee Fairness Amendment Act provides a critical protection to tenants by limiting late fees that may be charged to tenants to fees based on amounts due *from the tenant*. To impose a fee on the tenant for a payment over which the tenant has no control, and for which the tenant is not legally responsible, is fundamentally unfair and should be prohibited.

**Another critical protection in the Late Fee Fairness Amendment Act is the prohibition on applying future rent payments to previously assessed late charges, rendering the tenant perpetually "late" in rent payments.** Under current law, many landlords employ an accounting practice in which they credit each new payment made to the oldest outstanding balance on the tenant's account. Where a tenant is carrying a prior late fee on the account and neglects to pay it, a landlord can use this accounting practice to justify late fees month after month, even in months when the tenant has been paying on time and in full. To use an example: assume a tenant pays \$1900 instead of the \$2000 monthly rent in January, but then in February pays \$2100 (\$2000 for February, plus \$100 for rent outstanding from January) but neglects to pay a \$100 late fee imposed by the landlord. A landlord may credit \$200 of the February payment to the outstanding rent and late fees from January. The tenant then is \$100 short for the month of February, and the landlord may impose an additional late fee, even though all rent for that month has actually been paid. When landlords engage in this accounting practice, tenants end up perpetually behind in rent and vulnerable to eviction. The Late Fee Fairness Amendment Act ensures that landlords cannot use this kind of accounting with regard to late fees. In the example above, the tenant would still owe \$5 in late fees from January but would not be assessed another late fee for February, provided the February payment was in full and on time.

Just recently, Legal Aid represented a tenant who was sued for non-payment of rent when her landlord rejected her monthly rental payment because her rent check did not include

allegedly owed late fees (assessed at a rate of nearly 16% of her rent). Eventually the landlord accepted the payment but applied it to the late fees allegedly owed first. The landlord then sued the tenant for eviction for non-payment of rent, even though only the late fees actually were unpaid. This tenant was elderly and had disabilities, and without Legal Aid's assistance she quite possibly could have been evicted from her subsidized housing as a result of this unfair accounting practice.

**Legal Aid also urges the Council to adopt an additional protection in the Late Fee Fairness Amendment Act that would protect tenants who pay all outstanding rent and late fees from eviction for consistent late payment of rent.** Currently, if a tenant pays late, but pays the entire amount of rent due, plus a late fee, the landlord can still seek to evict the tenant for consistent late-payment of rent. What is more, the judgment a landlord can seek in that case is a non-redeemable judgment for possession – meaning that even if the tenant becomes current in all rent and late fees, she still cannot stay in her home.

If the tenant has paid all rent due and owing plus all late fees, the landlord has already been made whole. The late fees compensate the landlord for the late payment. Eviction is unwarranted in these circumstances. Legal Aid has seen an increase in cases in the Landlord and Tenant Branch of D.C. Superior Court in recent months seeking non-redeemable judgments for possession in precisely this situation – including in public housing and subsidized housing cases where the tenant stands to lose not only a particular rental unit, but also the subsidy that makes it possible for the tenant to afford living in the District.

In light of these cases, Legal Aid proposes the following addition<sup>2</sup> to the Late Fee Fairness Amendment Act of 2016, which we suggest inserting into the Bill as Section 509(d):

(d) No tenant shall be evicted on the basis of late payment of rent so long as the tenant pays all rent due together with any late fees allowable under this Chapter. Any judgment entered in a complaint for possession filed based on late payment of rent shall be redeemable by the tenant paying all rent and any late fees due, consistent with this Chapter.

Such an addition recognizes that tenants who pay late, but pay reasonable late fees, have already made the landlords whole; as a result, the landlord needs no additional remedy. If a tenant consistently pays late rent without paying the late fee, the landlord would remain free to seek to evict that tenant unless and until that tenant comes current in all rent and late fees. This modification to the bill therefore protects low-income tenants in the District from eviction actions when the landlord has not been harmed while also recognizing that landlords who are not receiving late fees – and whose tenants are tendering their portions of the rent late – may still require a remedy. This result is fundamentally *fair* to all parties – achieving the critical goal of the Late Fee Fairness Amendment Act of 2016.

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<sup>2</sup> This basis for eviction is not clearly articulated in the D.C. Code but was established by the D.C. Court of Appeals, which noted that nothing in the Rental Accommodations Act then in force (and now the Rental Housing Act) prohibited such an action. *See Kaiser v. Rapley*, 380 A.2d 995, 996-997 (D.C. 1977). As a result, this addition does not require modification of any other section of the D.C. Code.