Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

Testimony of Beth Mellen Harrison
Supervising Attorney, Housing Law Unit
The Legal Aid Society of the District of Columbia

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

Hearing on B21-880
"Rent Concession and Rent Ceiling Abolition Clarification Amendment Act of 2016"

October 19, 2016

The Legal Aid Society of the District of Columbia[1] supports Bill 21-880, the Rent Concession and Rent Ceiling Abolition Clarification Amendment Act of 2016, which would clarify that the abolition of rent ceilings applies to any attempt by a housing provider to preserve a rent increase for future implementation, and would place tight restrictions on the practice of housing providers granting "rent concessions" by charging tenants less than the lawful rent charged.

Legal Aid recommends that the Council consider further amendments to the Bill to prohibit housing providers' current practice of using rent concessions to pressure tenants to give up objections to voluntary agreements and housing provider petitions.

The Bill's prohibition on landlords retaining approved rent increases for future implementation is a critical clarification of existing law.

Section 2b. of B21-880 would amend the rent stabilization law to make clear that housing providers may not preserve approved rent increases for future implementation.[2] This critical clarification of existing law will prevent housing providers from returning to a two-track rent system, in which the actual rent charged to a tenant and the maximum lawful rent are distinct, and tenants have to understand both in order to protect their rights. Such a system in many ways replicates the prior rent ceiling system. That system was abolished under the Rent Control Reform Amendment Act of 2006 – and with good reason.

---

[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 84 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] Bill 21-880 includes an important carve-out to ensure that a housing provider will not lose the right to implement an approved rent increase if the housing provider is not immediately eligible to take it due to the timing of a prior rent increase. In those situations, the approved rent increase will not expire until 30 days after the housing provider's first opportunity to take it. The Bill includes important new disclosure requirements to ensure that tenants facing such a future rent increase are fully advised.

Under the old system, the *rent ceiling* was a maximum rent level to which the actual rent could be raised. The rent ceiling could be increased by the landlord without taking the same increase in the actual rent charged to the tenant. The landlord had discretion to wait months or years to increase the actual *rent charged* to the tenants by the same dollar amount. The Rental Housing Act in fact enshrined the housing provider's right to save up future rent increases in this manner, guaranteeing that an unimplemented rent ceiling increase would "not expire . . . be deemed forfeited or otherwise diminished." D.C. Code § 42-3502.08(h)(2) (2001 ed.).

The "extreme complexity" of the rent control system in effect prior to 2006 "led to confusion among tenants." D.C. Council, Comm. on Consumer & Regulatory Affairs, *Committee Report – Bill 16-109, "Tenants' Right to Information Act of 2005"* 1 (2006) ("Comm. Rep."). More specifically, "while most tenants underst[ood] the concept of rent charged . . . very few tenants underst[ood] the concept of rent ceilings." *Id*. at 4. The resulting lack of transparency had real-world consequences for tenants and prevented them from making informed decisions about where to live. *Id*. at 2-4. A new tenant might move into a new unit, enticed by an affordable current rent and unaware of a high rent ceiling on the unit, only to be hit a year later with a dramatic rent increase, rendering the unit unaffordable. *See* Comm. Rep. at 1-4; *Committee Report – Bill 16-109, "Rent Control Reform Amendment Act of 2006"* 2-3, 7-10 (2006) ("Comm. Rep. Add."). It was not unusual for tenants to face large rent increases – on the order of $500 or even $1,000 or more – based on prior rent ceiling increases that the housing provider had been saving up for a future date. *See* Comm. Rep. Add. at 2-3, 7-10. These rent increases were neither transparent nor predictable and often were too large for tenants to bear. *See id*.

The D.C. Council enacted the Rent Control Reform Amendment Act of 2006 to address these problems (and others). "Rent ceilings are abolished," D.C. Code § 42-3502.06(a), and the statute's prior guarantee that increases would never "expire . . . be deemed forfeited or otherwise diminished" is eliminated, *id*. § 42-3502.08(h)(2). To help preserve affordability in rent-controlled units, the 2006 Act "replace[d] rent ceilings with a tight cap on rent charged increases." Comm. Rep. Add. at 12; *see also id.* at 2-3. In addition to helping to rein in rents, the elimination of rent ceilings also was intended to "make rent control more understandable and easier to administer." *Id*. at 14. This simplification in the law was combined with requirements for "full disclosure of pertinent information on rental properties" by housing providers to ensure that both rental applicants and existing tenants could forecast their future housing costs and make intelligent choices about where to rent, whether to continue an existing tenancy, and so on. Comm. Rep. at 1, 2-4.

Despite the 2006 Act, housing providers continue to claim the right to retain approved rent increases for future implementation. This practice results in a return to de facto rent ceilings. What is worse, existing law no longer requires housing providers to file both sets of numbers with the Rent Administrator for public inspection. A prospective tenant must receive disclosures that include the current applicable rent and any pending petitions that might increase the rent, but nothing requires disclosure of approved but unimplemented rent increases. *See* D.C. Code § 42-3502.22(b). The fact of the matter is the 2006 Act never contemplated that housing providers, despite the abolition of rent ceilings, would attempt to claim the right to preserve rent increases for future implementation. As a result, the de facto system created by housing

providers that do so is *markedly worse* than the broken system that the 2006 Act sought to address.

During the past two years, Legal Aid has represented several tenants living in a building in Southeast D.C. (Ward 8) that experienced exactly this problem. In 2009, the housing provider filed a hardship petition and ultimately won approval for a 46 percent rent increase. (At the time, the tenants were unable to find an attorney to represent them to fight the hardship petition.) Years went by without the housing provider implementing the increases. In fact, the housing provider's actions suggested it had just given up on those increases. Tenants continued to pay the lower rent amounts without incident. The housing provider took other rent increases, entered new leases, and even issued disclosure forms, always citing the lower rent amounts.

By 2014, the housing provider had allowed the building to become mostly vacant, with only five of thirteen units occupied. Perhaps hoping to encourage the remaining tenants to leave, the housing provider then issued a notice in September 2014 seeking to implement the hardship petition rent increases – rent increases that had been approved *nearly five years earlier*.

Two of the tenants came to Legal Aid for representation. After filing tenant petitions to challenge the rent increases, we were able to work out settlement agreements to roll back the rent increases. But as far as we know, the housing provider kept those rent increases in place for every other unit in the building; other tenants paid the increases. The housing provider argued strenuously that despite the abolition of rent ceilings under the 2006 Act, it could retain approved rent increases for as long as it wanted.

Bill 21-880 will remove any remaining doubt that the abolition of rent ceilings under the 2006 Act also abolished this type of two-track rent system. This is a much-needed clarification of existing law that will protect tenants' rights while ensuring fairness to housing providers.

Any allowance for rent concessions must be narrowly tailored to prevent a return to de facto rent ceilings.

For all of the same reasons, any allowance for rent concessions must be narrowly circumscribed. The concept of a rent concession appears to be a noble one – a housing provider is willing to accept less than the lawful rent from a tenant. Where such concessions stem from genuine concern about an individual tenant's circumstances and ability to pay, there may be good reason to allow such a practice.

The danger is that rent concessions can be used in more sinister ways. For example, housing providers can implement rent increases above current market rates, and then use rent concessions to hold on to the difference and implement it over time. This two-track rent system was abolished with abolition of rent ceilings under the 2006 Act. Such a system also allows housing providers to implement rent increases (by removing the concessions) at their whim and outside the requirements of the rent stabilization law. Besides being unregulated and unpredictable, this opens up the possibility that housing providers can use the threat of such increases to threaten tenants' rights and chill dissent.

Housing providers can use rent concessions to create de facto rent ceilings. The 2006 Act was intended to create a new rent stabilization system in the District in which there would be one rent number – the rent charged. Housing providers could increase the rent charged based on the annual CPI increase, the applicable vacancy increase when a unit turns over, or the amount of a rent increase approved under a voluntary agreement or housing provider petition. Such rent increases were intended to be implemented immediately, resulting in a new rent charged for the current tenant (or new tenant, in the case of a vacancy increase). For the reasons explained above, the 2006 Act did not contemplate that housing providers would be able to save approved rent increases for future implementation.

Unfortunately, rent concessions allow housing providers to do precisely that, but in a back-door manner. A housing provider wins approval for a large rent increase, often a rent increase that would take the current rent charged far above market rents. Under prior law, the housing provider would have banked this increase for future use via the rent ceiling. Under current law, the housing provider accomplishes the same thing by taking the entire rent increase now but offering a recurring rent concession to ensure that the current rent actually charged to the tenant tracks market rents and in sustainable.

The housing provider's ability to take this new rent increases – the difference between the lawful maximum and the actual rent being charged – is limitless. The Rental Housing Act's requirements on the timing and amount of rent increases simply do not apply. The risk of confusion to tenants – particularly new tenants – is substantial. A recent article in the *City Paper* ("Landlords Exploit D.C. Rent Control Laws, Jacking Up Prices After 'Concessions' Expire," Sept. 1, 2016) documents how one landlord used this difference between the rent control rent and the rent concession rent to entice tenants to enter leases, only to pressure them into new leases each year with increases higher than what the Rental Housing Act normally would allow.

Housing providers can use rent concessions to threaten tenants' rights and chill dissent. More concerning yet, housing providers also can use the threatened removal of rent concessions to threaten other rights. Legal Aid recently worked with a building in Northeast D.C. (Ward 5) in which the housing provider was using rent concessions in this manner. Tenants were told that they could only keep their concessions if they were "good" tenants. A tenant who allegedly paid rent late or violated some other lease provision – a "bad" tenant – would be threatened with removal of the rent concession.[3] These types of threats undermine the Rental Housing Act's numerous protections for tenants accused of violating their leases. Later, when a tenant association represented by Legal Aid fought rent increases at the property, the housing provider made it known that only tenants who were *not* members of the tenant association would continue to receive their rent concessions, an illegal threat undermining the tenants' right to organize.

---

[3] The housing provider's written policies priced violations of general house rules at a $50 rent increase per violation after the first violation. When it came to annual rent increases, tenants were classified as "great customers," "fair customers," and "non-compliant customers"; great customers were promised minimal rent increases, fair customers would receive the standard CPI annual rent increases, and non-compliant customers would receive a rent increase up to the maximum possible amount. All of this differentiation was allowed because of the rent concessions, which created a gap between the current rent actually being charged and the maximum allowable rent.

These were not idle threats – they were communicated to the tenants in writing and were implemented. And they were only made possible through the use of rent concessions.

The surest way to prevent this type of misconduct is to bar rent concessions in all but the most narrow of circumstances, in which a housing provider wishes to charge a lower rent based on individual hardship circumstances. Legal Aid recommends that the Council further amend the Bill to limit rent concessions to such circumstances, to require full disclosure by the housing provider both to the tenant and the Rent Administrator, and to ensure that any rent concession is not conditioned on the tenant's behavior or any other irrelevant factor.

The Bill should bar the current practice of using rent concessions to pressure tenants to waive objections to voluntary agreements and housing provider petitions.

In the ten years since the 2006 Act, housing providers increasingly are using rent concessions as a technique to win approval of voluntary agreements and petitions that call for dramatic rent increases. Here's how it works: a housing provider files a petition or proposes a voluntary agreement that includes substantial rent increases, often well above current market rents. The housing provider then offers current tenants in the building a deal they cannot refuse. The current tenants will have to agree to the rent increases, but *they won't have to pay them*. The agreement provides that only future tenants (or, at times, current tenants who are not members of the signing tenant association) will have to pay the increased rents. Current tenants will receive a permanent rent concession locking in their current rent levels. In some cases, the agreement also promises to protect the signing tenants from any future housing provider petition rent increases.

What this practice does is externalize the costs of rent increases, giving current tenants little to no incentive to challenge such increases. Housing provider petitions that may not be legally or factually sufficient are approved without objection when otherwise they would be challenged. At the end of the day, entire buildings of affordable units become unaffordable. Rent control still applies, but the law's restrictions are meaningless once the housing provider locks in rents far above current market levels.

Legal Aid is in the process of gathering data on this and other practices engaged in by housing providers since the 2006 Act. This spring and summer, Legal Aid received the results of several Freedom of Information Act (FOIA) requests to the Department of Housing and Community Development (DHCD) and the Office of Administrative Hearings (OAH) covering all hardship petitions and related orders since October 1, 2006. The documents produced numbered over 2,500 pages. Using intern and attorney time, we have created a database of the results. We currently have an outstanding FOIA request to DHCD for the same documents for all housing provider petitions types and for voluntary agreements during the same time period.

One startling finding is just how many hardship petitions are resolved with the type of rent concession settlement agreement described above. Since October 1, 2006, tenants filed objections and chose to fight the proposed rent increases in 26 of the hardship petition cases

filed.[4] Tenants proceeded through a full hearing in only four of those cases. Each time, the tenants defeated the hardship petition and no rent increase was granted.

In 16 of the remaining cases,[5] tenants entered settlement agreements with their housing providers. Settlement agreements are, of course, common in civil litigation and typically reflect a compromise between the two sides. In each of these 16 cases, the tenants withdrew their objections. In two of these cases, the approved rent increases were slightly lower than the amounts requested by the housing provider; in 14 of the 16 cases, the tenants agreed to rent increases in the amount requested by housing provider *or higher amounts*.

Why would tenants agree to give housing providers everything they are seeking? The final settlement agreements are available in 10 of the 16 cases. In each of those settlement agreements, current tenants receive rent concessions that protect them from the rent increases they are authorizing. Most of these agreements provide signing tenants with complete protection from the rent increases in question – the tenants will never have to pay them. Indeed, several of the agreements in question also protect the signing tenants from any future housing provider petition rent increases as well.

The 16 hardship petition cases that were settled in this manner cover over 500 affordable housing units in the District. These units each received rent increases that averaged nearly $500 per month under the approved settlement agreements. Units that had been renting for a little over $700 per month - affordable by District standards – increased to rents just shy of $1,200 per month. These units – and the hardship petition cases behind them – are but one piece of the larger story of how the District has lost half of its affordable housing units in the past 10 years.[6]

The Council has the power to stop this destructive practice. Legal Aid is part of an informal working group that is in the process of drafting suggested amendments to the Bill on this and other topics. We urge the Council to amend Bill 21-880 to bar housing providers from using rent concessions to pressure tenants to agree to substantial rent increases that will only apply to other tenants, and to enact the proposed legislation as amended.

Thank you for this opportunity to testify.

---

[4] During this same period, housing providers in the District filed 95 hardship petitions. In most of these cases, the tenants never filed objections to the hardship petition (47) or the Rent Administrator rejected the hardship petition in full (14). The low incidence of tenants challenging hardship petitions may speak to the general lack of attorneys available to represent low-income tenants, particularly in earlier years. Since mid-2009, tenants have secured counsel and filed objections in 21 of 34 hardship petitions filed (and no tenants filed objections without also securing counsel). In prior years, tenants filed objections in only 5 of 61 hardship petition cases filed.

[5] In four cases, the final outcome of the hardship petition is missing. In two more cases, tenants filed objections but their cases were rejected by the Office of Administrative Hearings.

[6] *See* Wes Rivers, D.C. Fiscal Policy Institute, *Going, Going, Gone: DC's Vanishing Affordable Housing* (May 2015).