D.C. Office of the Tenant Advocate
Comments on the Rental Housing Commission's Third Proposed Rulemaking
for 14 D.C.M.R. Chapters 38 through 44
September 20, 2021

Overview

Please see below the OTA's comments on the Commission's Third Proposed Rulemaking (PRM) for 14 D.C.M.R. Chapters 38 through 44. Once again the Chief Tenant Advocate and the OTA wish to commend the Commission for a highly responsive, thorough, and balanced rulemaking process.

1. Section 4210.25- Capital Improvements – Horizontal Stacking

Concern: In its comments on the Second PRM, the OTA recommended that section 4210.25 be modified to permit tenants to contest a Capital Improvement (CI) petition where the landlord engages in "horizontal stacking" – i.e., where the landlord separates out what should be a single CI project into multiple projects and files a separate CI petition for each. Accordingly, for any petition that is approved, the landlord could impose separate surcharges in successive years, thus effectively evading the statutory 15 / 20 percent per unit cap on CI surcharges pursuant to a single petition. We appreciate the Commission's acknowledgement that this scenario appears to violate the Act. The Commission declined to address this matter in the rulemaking due to a lack of a readily apparent, useful delineation between what ought to be a single petition versus what may be appropriate for multiple petitions. Instead, the Commission concludes that these issues should be resolved on a case-by-case basis. Absent the articulation of an applicable principle, our concern is that there may be no basis, or only a questionable basis, (a) upon which a tenant might seek redress for this kind of violation, or (b) upon which an Administrative Law Judge (ALJ) might grant relief.

Recommendation: We believe that the articulation of an applicable principle in the rulemaking not only would be very helpful, but also would be consistent with the Commission's judgment that this matter should be decided on a case-by-case basis. Indeed, we believe the Commission does allude to an articulable principle in its introductory comments ("nothing in the Act suggests that a housing provider is prohibited from recouping the costs of multiple, *plainly unrelated* capital improvements" (p.7)(emphasis added).

Thus, the OTA urges the Commission to consider articulating such a principle in the rulemaking itself. One possibility is to add a provision at 4210.25 along the following

lines: "Whether the proposed improvements are substantially related to those in a separately approved or pending petition, such that the simultaneous implementation of the requested surcharge would violate the statutory cap on the per unit surcharge at section 210(c)(1) or (2) of the Act." Another possibility is to condition approval of the petition on (a) a requirement that the housing provider defer implementing the surcharges until after the approved surcharges are no longer being imposed, where those approved surcharges are for improvements deemed to be substantially related to those in the instant petition; or (b) the consolidation of the petition with another pending petition that may include improvements deemed to be substantially related to those in the instant petition.

2. **Sections 4210.29(c) and 4210.32- Capital Improvements – Selective Implementation and Surcharge Continuation**

Concern: Similarly, the OTA recommended in its comments on the Second PRM that the Commission expressly disallow continuation of surcharges on the basis of "selective implementation," where the housing provider's need to continue surcharges beyond the recovery period is due to its own decision to selectively implement the surcharge on some units at the expense of others. Towards this end, we appreciate the Commission's acknowledgement that this practice raises significant "fairness and equity" concerns, and its incorporation of the "good cause" requirement for granting continuation.

Our concern is that absent relevant disclosure requirements or the articulation of a relevant operating principle, an ALJ could conclude that the practice for whatever reason is in itself "good cause" for failing to recoup the total cost of the improvements – despite the fact, as we previously argued, that the practice could defeat a core statutory purpose: "To protect low- and moderate-income tenants from the erosion of their income from increased housing costs." DC Official Code 42-3501.02(1).

Recommendation: Accordingly, the OTA urges the Commission to consider incorporating appropriate disclosure requirements and an explicit operating principle by which an ALJ can and should consider whether the CI petition, or the housing provider's implementation of approved surcharges, undermines that core purposes of the Act.

Specifically, we ask the Commission to consider (1) requiring that the housing provider disclose in the petition / application form itself (4210.7) any intention to selectively or unequally implement the surcharges between units; (2) requiring the housing provider to disclose in the Certificate of Continuation request (4210.29(c)) whether there was any selective or unequal implementation of surcharges between units during the recovery period, and the reasons for it; and (3) amending 4210.32 to indicate that "good cause" does not include any selective or unequal implementation of approved surcharges that serves to

defeat the *pro rata* per unit cap on the amount of a surcharge as determined pursuant to DC Official Code 42-3502.10(c)(1) or (2), or otherwise results in inequitable treatment of units and/or tenants -- except as authorized pursuant to section 224(b) of the Act – or runs contrary to the purposes of the Act.

3. Sections 4213.22- Voluntary Agreements – Factors Considered in Determining Reasonableness of Rent Adjustments

Concern: Section 4213.22 includes a list of nine factors for determining the reasonableness of rent adjustments under a voluntary agreement (VA) pursuant to section 4213.21(c). The OTA previously suggested that the ALJ be required to issue findings of fact and conclusions of law with respect to each of the nine factors. The Commission determined following the Second PRM that this would not be appropriate, as in many cases not all nine of the reasonableness factors necessarily apply.

Recommendation: We agree that not all nine reasonableness factors may be relevant in a given case. However, we also believe that this consideration is reconcilable with the position that all factors should be considered, to the extent that an ALJ could simply conclude upon consideration that one or more factors are not relevant. Accordingly, we ask the Commission to consider requiring findings of fact and conclusions of law for any of the nine factors that are deemed to be relevant.