Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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Public Hearing on:

Bill 21-420, the "Residential Lease Amendment Act of 2015"

Committee on Housing and Community Development
The Honorable Anita Bonds, Chairperson
Council of the District of Columbia

Tuesday, December 7, 2015
11:00 a.m.

Room 120
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Good morning, Chairperson Bonds and members of the Committee and staff. I am Johanna Shreve, Chief Tenant Advocate for the District of Columbia at the Office of the Tenant Advocate (OTA). I am here today to testify in support of Bill 21-420, the "Residential Lease Amendment Act of 2015." I will submit separate testimony offering my comments on Bill 21-443, the "Condominium Owner Bill of Rights Amendment Act of 2015."

Bill 21-420, the "Residential Lease Amendment Act of 2015"

I will now discuss the Bill 21-420, the "Residential Lease Amendment Act of 2015." I thank Councilmember Cheh for introducing this bill and a similar bill in the last Council Period, and for working closely with the OTA on the legislation. I also wish to thank you, Chairperson Bonds, for your leadership and for moving this bill forward today. And I thank you and the other members of this Committee for working so closely with the OTA on tenant rights matters.

Let me say a word about the context for this legislation. District law does regulate residential leases but only sparingly. The "Housing" title of the D.C. Municipal Regulations codifies the "implied warranty of habitability," which the courts have held is implicit in every residential

lease.[1] There is a prohibition on certain lease clauses that would be contrary to the public interest -- including automatic tenant liability for owner's court costs and attorney fees in the event of a dispute, limitations on housing provider liability for housing code violations, and tenant waiver of the housing regulations.

Beyond these regulations and a few others, the housing provider is generally free to determine the conditions of renting out what is after all his or her property. If a prospective tenant finds a lease term or terms unacceptable, he or she may choose to rent elsewhere. Once the landlord and a prospective tenant agree on the conditions of tenancy and execute the lease, however, it becomes a contract that is equally binding on both parties. Thus, the landlord may not unilaterally change its terms.

In the nine (9) years since the OTA was created and began helping tenants regarding disputes with landlords, certain lease-related issues have reoccurred with enough regularity to warrant legislative attention. While the provisions of Bill 21-420 may appear to be somewhat scatter-shot, the common thread is lease-related reform primarily aimed at better protecting the tenant's reasonable contractual expectations.

[1] D.C. Official Code 14 D.C.M.R. § 301

Mandatory services and facilities fees

The legislation would amend section 208 of the Rental Housing Act of 1985 to prohibit mandatory fees for any service or facility in a rent-controlled unit, except to the extent that they are included in the lawful rent amount.[2] Section 211 of the Rental Housing Act requires government approval before the landlord may increase the rent to reflect a substantial increase in related services and facilities.[3]

Bill 21-420 would clarify that if the fee for an amenity is mandatory – i.e., the tenant may not "opt out" of the amenity or the fee -- the landlord is required to secure government approval through the "housing provider petition" process. The petition must meet certain statutory and regulatory criteria, and tenants must be given the opportunity to challenge the petition.

An example of the need for this clarification is a building in Ward 3 where the owner imposed a mandatory $500 monthly air conditioning fee. We can be fairly sure no tenant used air conditioning during the winter months – indeed AC probably wasn't even available. Nevertheless, the fee was mandatory year-round. More generally, we see an increasing reliance

[2] D.C. Official Code § 42-3502.08
[3] D.C. Official Code § 42-3502.11

on “amenity fees” and other fees and charges to supplement rental revenue, including a non-refundable fee in lieu of a security deposit.

Charging an amenity fee may be perfectly appropriate -- that is, if the tenant may freely choose not to use the amenity, for example, a gym or pool, and thus not incur the fee. Otherwise, the amenity fee may well simply be an end-run around rent control and a ploy to increase the rent by other means. The rules on such fees need to be clarified.

Recommendation:

1. The language at lines 38 through 40 of the bill does not make the legislative intent sufficiently clear. Thus, the bill should be amended to read as follows: “A housing provider shall not impose on the tenant a mandatory fee for any service or facility that has not been approved pursuant to this section.” Instead of amending section 208 of the Act, as this recommended language itself indicates, it should be added at the end of the existing section 211.

2. While the legislation clarifies current law regarding mandatory amenity fees for services and facilities in the rent control context, further consideration should be given to regulating the use of fees that may be as

onerous as they are creative. As noted, a non-refundable fee in lieu of a security deposit is of particular concern.

TOPA rights and "personal use and occupancy" notices to vacate

The legislation would extend a tenant's TOPA rights for twelve (12) months after he or she has timely vacated a unit pursuant to a "Notice to Vacate" for the owner's personal use and occupancy.[4] In too many instances, a tenant has dutifully complied with such a notice, only to discover thereafter that the unit is being sold rather than actually being used for the owner's personal use and occupancy. In some instances, an owner has acted in good faith and simply has had a change in plans. But in other instances, the owner has acted in bad faith with the intent of depriving the tenant of his or her TOPA rights.

Regardless, we believe that the simplest and fairest solution to this problem is to require the owner to offer the tenant who has complied with a section 501(d) Notice to Vacate with the opportunity to purchase the unit, if the property is to be sold within twelve months of the date the tenant vacated the unit.

[4] D.C. Code § 42-3505.01(d)

Recommendations:

1. We recommend adding a provision specifying that the owner may prove compliance with this new TOPA requirement through a certified mailing to the tenant's most recent known address. It is always important for the landlord to be given a forwarding address for purposes of returning the security deposit. Thus, the tenant should be advised (a) to provide the owner with his or her new address as soon as possible, and (b) to alert the owner to any subsequent change in address within twelve months after vacating the unit.

2. Discussion with the title insurance industry should be undertaken to address any industry concerns and to determine what the current procedures are.

Landlord entry

During my nine-year tenure as Chief Tenant Advocate, unreasonable landlord entry has been the subject of continuous tenant complaints. The bill would amend the Rental Housing Act to establish a "reasonableness" standard regarding a landlord's inspection of a unit. A tenant may now claim in court that the landlord has breached his or her contractual right to

the "quiet enjoyment" of the premises. But there is no statutory or regulatory guidance as to the relevant "reasonableness" standard.

In researching best practices in other jurisdictions, the OTA discovered that a majority of states already have relevant notice requirements on the books. Twenty-two (22) specify how much notice is required in non-emergency situations: one requires twelve (12) hours-notice; thirteen (13) require 24 hours-notice; and eight (8) require 48 hours-notice.[5]

Bill 21-420 would adopt the 48 hour standard in non-emergency situations. It would also limit entry hours to between 9 a.m. and 6 p.m., and not on a Sunday or federal holiday, or as otherwise agreed upon by the tenant and the landlord. We believe this kind of regulatory specificity will help housing providers who experience difficulty gaining access to some units, and will help avoid disputes regarding landlord entry generally.

Tenant Notice of Intention to Vacate

The OTA receives numerous complaints from tenants regarding the amount of notice he or she must give the landlord when planning to vacate the unit. It is becoming increasingly common for the lease to require 60

[5] *NOLO Every Tenant's Legal Guide*, 8th edition 2015, Portman Stewart

days-notice. For month-to-month tenancies, this violates old but still valid law which limits the required notice period to 30 days.[6] There is no such limitation in current law regarding tenancies for a term certain. Many tenants in the initial lease term **assume** that the notice period is 30 days and are unaware that the lease actually requires 60 days-notice. The OTA hears from many tenants in this situation who have been charged an extra month's rent.

There is a fundamental imbalance about this. Generally a tenant receives little more than 30 days advance notice of a rent increase. Where the lease requires 60 days-notice of an intention to vacate the unit, the tenant must decide whether to stay or leave the unit without knowing what the new rent amount will be.

The legislation would amend section 3202 in three ways. First, it separates the residential lease from the commercial lease context for purposes of the "tenant notice of intent to vacate," so that the old law remains the same as it pertains to commercial tenancies. Second, for month-to-month tenancies, it would prohibit lease provisions requiring more than 30-days-notice of a tenant's intent to vacate a unit. Third, for a

[6] D.C. Code 42-3202 ("Notice to quit – Month to month or quarter to quarter tenancy; expiration of notice")

tenancy under a lease term, a lease provision requiring more than 30 days-notice of the tenant's intent to vacate the unit would be void and unenforceable, unless two things have happened: (a) the tenant must have explicitly agreed to the provision in writing using initials; and (b) it must be clear in the lease that the provision no longer applies if and when a month-to-month tenancy commences. Requiring such "conspicuous notice" during the execution of the lease will avoid unnecessary confusion and disputes at the end of the tenancy.

Recommendations:

1. For the sake of consistency and simplicity, consideration should be given to an across-the-board rule that the maximum amount of time the landlord may require for the "Tenant Notice of Intent to Vacate" is 30 days. We are unaware of any reason why a housing provider may need a longer notice period.

2. Consideration should be given to relocating section 3202 -- and other sections of Chapter 32 ("Landlord and Tenants") that are relevant residential tenancies -- to Chapter 35 ("Rental Housing Generally").

Subletting

The bill would establish a "reasonableness" standard for denying subletting, unless the lease explicitly prohibits subletting. This addresses another common tenant complaint. Where the landlord chooses not to permit subletting and has stated as such in the lease, the contractual expectation is clear and there should be no problem.

Problems arise where the lease appears to permit subletting – sometimes with the landlord's consent -- but then the landlord unreasonably withholds consent causing hardships for a tenant who must move out due to a change in life circumstances. Let me be clear -- in no way would this provision abridge the landlord's right to require consent or prohibit subletting altogether. The landlord has the right to set forth the rules regarding subletting. Rather the intention is to codify the "reasonable contractual expectations" of the parties, where the lease explicitly or implicitly permits subletting.

Capital Improvement Addendum

I will now discuss the "Capital Improvement rent adjustment notification addendum." A Capital Improvement petition is one of five "housing provider" petitions by which the landlord may request rent

increases that are larger than the standard annual increase.[7] Unlike rent adjustments for the other petitions, approved Capital Improvement surcharges are temporary and cannot be factored into the calculation of any subsequent rent increase. Too often both of these principles are violated – the surcharges have not been timely lifted and they have not been separated from the base rent for purposes of calculating rent increases.

Accordingly, where a Capital Improvement surcharge has been imposed on the tenant, this legislation would require the landlord to provide a lease addendum that explains the statutory limitations on the surcharge. It is true that another section of the Act ("Disclosure to tenants") already requires the housing provider to provide a rental applicant – and to a current tenant upon request -- with some of the same information.[8] This information gives a rental applicant a better idea as to the affordability of the unit over the longer run, including after the surcharge expires. But it does not specify the respective portions of the total rental payment upon which a rent increase may and may not be

[7] D.C. Official Code 42-3502.10

[8] D.C. Official Code 42-3502.22(b)(1)(C) ("Any surcharges on rent for the rental unit, including capital improvement surcharges and the expiration date of those surcharges.")

calculated. The lack of specific and timely information when a surcharge is actually imposed creates an ambiguity that leads not only to miscalculations of rent increases, but also the failure to timely lift surcharges upon expiration.

Accordingly, we believe the "CI addendum" requirement is the best way to avoid possible illegality as to the most basic lease term – the amount of rent of the tenant must pay.

Recommendations:

1. Lines 68 through 79 of the bill should be amended (a) to clarify when the housing provider must provide the tenant with the addendum; and (b) to include the conditions upon which the housing provider may continue to impose the surcharge after the statutory expiration date. Please see the footnote in my written testimony for our recommendation.[9]

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[9] "The housing provider shall provide to any tenant who is subject to a capital improvement surcharge pursuant to this section a written addendum to the rental agreement, which shall contain the following information:

> "(1) The amount of any temporary rent adjustment;
> "(2) The expiration date of each temporary rent adjustment;
> "(3) The conditions upon which the housing provider may continue to impose the surcharge after the statutory expiration date;
> "(4) The amount of rent charged not including the temporary rent adjustment; and

2. On Line 77 the phrase "and any rent increase thereafter" should be added at after the phrase "temporary rent adjustment" to clarify that only the base rent, not including any temporary surcharge, should be used to calculate any subsequent rent increase.

3. This provision should amend section 210 of the Act ("Petitions for capital improvements") rather than section 208 ("Increases above base rent"), as reflected in our revision to lines 68 – 79.

4. In order to promote the timely lifting of expired surcharges, the Rent Administrator's office should be required to monitor expiration dates; timely notify housing providers just prior to those dates; and, for housing

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"(5) The fact that, under section 210(c)(3) (D.C. Official Code § 42-3502.10(c)(3)), the temporary rent adjustment shall be calculated solely on the basis of the actual rent charged, exclusive of the amount of any temporary rent adjustment.

"The notice shall be provided:

"(1) To a prospective tenant upon the execution of the rental agreement;
"(2) To a current tenant who, as of the effective date of this Act, is already subject to a capital improvement surcharge within 30 days of that date; and
"(3) To a current tenant who, after of the effective date of this Act, is newly subject to a capital improvement surcharge at least 30 days before the surcharge is first imposed."

providers who may be entitled to continue to impose the surcharges, provide information as to the relevant process.

Landlord Duty to Mitigate

When the tenant wrongfully vacates the premises prior to the lease's expiration date, the tenant is "on the hook" to pay rent for the remainder of the lease term. Under basic contract law, the landlord has a duty to "mitigate damages" – that is, the landlord may not simply collect rent for the remainder of the lease term without making a reasonable effort to re-rent the unit. Rather, to the extent feasible, the tenant is relieved of the obligation to pay avoidable damages.

The prevailing attorney opinion is that there is a landlord duty to mitigate in the District as a matter of common contract law. Nevertheless, at least one major state-by-state legal guide[10] has called this into question by referencing District case-law – drawn from the commercial context – that was decided on the basis of particular lease language and circumstances.[11]

[10] *NOLO Every Tenant's Legal Guide*, 8th edition 2015, Portman Stewart
[11] See *International Commission on English in the Liturgy v. Schwartz*, 573 A.2d 1303 (DC 1990).

Other jurisdictions, including both Maryland and Virginia, have eliminated any uncertainty by codifying the landlord's duty to mitigate damages. This legislation would do the same for the District of Columbia.

Prohibited lease clauses

To better enforce the prohibition on certain lease clauses, the legislation amends the relevant regulatory provision to provide tenants with treble damages when a landlord is found to have violated its provisions in bad faith.[12]

Other possible amendments

Finally, the OTA has discussed related issues with a number of attorney and community advocates. I recommend that the Committee give consideration to these issues, including: (1) unfairly onerous late fees; and (2) the calculation of damages for normal wear and tear as a reason not to return all or a portion of the security deposit.

This concludes my testimony. Thank you again, Chairperson Bonds, for holding this hearing on these important issues. I am happy to take any questions you may have at this time.

[12] 14 D.C.M.R. 304 ("Prohibited Waiver Clauses in Lease Agreements")