Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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Public Hearing on:

Bill 22-949, the "Rental Housing Smoke Free Common Area Amendment Act of 2018"

Bill 22-998, the "Rent Charged Clarification Amendment Act of 2018"

Bill 22-999, the "Rent Charged Definition Clarification Amendment Act of 2018"

Committee on Housing and Neighborhood Revitalization
The Honorable Anita Bonds, Chairperson
Council of the District of Columbia

on
Monday, October 29, 2018
10:00 a.m., Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Good day, Chairperson Bonds, and members of the Committee and staff. I am Johanna Shreve, Chief Tenant Advocate at the Office of the Tenant Advocate (OTA). I am here to testify in support of two of the bills being considered today: Bill 22-998, the "Rent Charged Clarification Amendment Act of 2018," and Bill 22-999, the "Rent Charged Definition Clarification Amendment Act of 2018."

Context

In October of 2016, when I testified before the Council about rent concession legislation, I reported that this issue has been among the most controversial the agency has confronted in terms of tenant complaints and inquiries. Two years later that is still the case. The typical scenario is that a prospective tenant is lured into applying for a rental controlled unit that appears to be affordable due to the advertised monthly rate. If the rental applicant knows that the building is rent controlled, the natural expectation is that future rent increases will be based on that amount – the actual *"rent charged"* -- and thus will be manageable.

Regardless, the lease or lease addendum that the applicant is about to sign sets forth a second rent amount, one that is hundreds or even thousands of dollars higher than the advertised rate and the rate on the

face of the lease. Somewhere hidden in the fine print associated with that higher amount is the term "rent concession." Generally, a tenant who may think to ask about this mysterious higher number receives assurances that the "concession" will continue into the future, or that affordability will be preserved since rent control will continue to apply.

Then, when the initial lease term is about to expire and the time comes for a rent increase, the tenant is in for a rude awakening. The rent increase may equal the entire amount of the "concession," but if the tenant agrees to sign a "renewal" lease, the unit will be somewhat more affordable. Frequently the tenant feels coerced into signing the renewal lease. The pressure on the tenant is all the more intense where the lease requires 60 days-notice of tenant's intent to vacate, but the tenant has received notice of the rent increase after that 60 day period has expires. (I note that the Law 21-210, the "Residential Lease Amendment Act of 2015," effective February 18, 2017, now requires that where the lease requires 60 days-notice of tenant's intent to vacate, the tenant must be given 75 days-notice of a rent increase – or 15 days more.) Regardless, the tenant is left to wonder what happened to (a) the rent increase cap based on the current rent charged; and (b) the right to stay in the unit as a month-to-month

tenant after the initial lease term expires – a right the tenant suddenly cannot afford to exercise.

In effect, these rent concession practices establish a "*de facto*" rent ceiling regime, which the District had as a matter of law from 1975 to 2006. Starting in 1993, at least the housing provider was prohibited from increasing the rent charged by more than the amount of a single "rent ceiling" adjustment at any one time (DC Law 9-191, effective March 16, 1993). Over time, however, it became clear that the rent ceiling system -- even with the 1993 "anti-stacking" measure -- was starting to render the term "rent control" meaningless. In December of 2005 the Office of the Inspector General at the Council's request submitted a report showing that rent control units were rapidly becoming unaffordable due to the implementation of rent charged increases equal to rent ceiling adjustments in virtually unlimited amounts.

That is why the Council expressly abolished rent ceilings in 2006 -- because so many tenants were experiencing the scenario I just described (D.C. Official Code § 42-3502.06 ("Rent ceilings abolished")). The Council replaced the rent ceiling system with a system of rent increases that are supposed to be calculated solely on the basis of the "rent charged." Certain

rent concession practices are creating "*de facto*" rent ceilings, nullifying the affordability protection that rent ceiling abolition was intended to ensure. Indeed, because there is no "anti-stacking" provision or any other formal control on rent concessions, today's "*de facto*" rent ceilings are *less* protective of tenants than the old abolished system was.

The OTA has long understood that this practice violates the 2006 law abolishing rent ceilings. We have helped numerous tenants file tenant petitions challenging rent increases based on these practices at the Office of Administrative Hearings (OAH). Many of these cases resulted in settlements, while a few others resulted in decisions upholding rent concession practices as not being inconsistent with the law.

Finally, in January of this year, the Rental Housing Commission issued a seminal ruling reversing the administrative law judge and holding that the term "rent charged" – pursuant to the legislative history – can only mean the actual amount of rent the tenant must actually pay, not a *de facto* rent ceiling created though a rent concession. Accordingly, the law requires the housing provider to report the actual rent charged amount on the relevant Rental Accommodations Division (RAD) forms, including Form 8 ("Notice to Tenant of Adjustment in Rent Charged") and Form 9 ("Notice to RAD of

Adjustment in Rent Charged"). *Fineman v. Smith,* RH-TP-16-30842, January 18, 2018. That ruling was followed by another Commission decision holding that reporting a *de facto* rent ceiling as "rent charged" on the form could constitute an unlawful demand for rent, entitling the tenant to damages. *Tonica Washington v. A&A Marbury, LLC/UIP Property Management,* RH-T-11-30,151, September 28, 2018. However, the Commission has also indicated – particularly in the former Chairperson's concurring opinion in *Fineman* -- that gray areas in the law remain, thus clarifying legislation would be helpful.

Bill 22-998, the "Rent Charged Clarification Amendment Act of 2018"

The heart of the Bill 22-998, the "Rent Charged Clarification Amendment Act of 2018," is a trio of requirements aimed squarely at re-stabilizing the rent in affected rent controlled apartments. First, for as long as a tenant with a discounted rent remains in the unit, that discounted rent must be the sole basis for calculating increases in the rent charged. Second, the discount must last for the duration of the tenancy. Third, the discount must be granted to the tenant unconditionally.

In the spirit of the *Fineman* decision, the bill includes comprehensive but specific requirements regarding notices to the Rent Administrator and the tenant. All relevant notices must include:

- Current and new rent charged;
- The amount of any rent discount;
- Any approved or authorized but as yet unimplemented rent charged adjustments, and
- The expiration date for each.

The bill would permit a housing provider who complies with all requirements to impose the discount amount on the next tenant – who is in no worse a position than if the discount never happened. Thus the housing provider can be "made whole." But that is only true to the extent that the market will bear that increase. The housing provider forfeits any amount of the discount not immediately implemented at the expiration of the discount tenancy. Thus the rent level for that unit must be "reset" *at a rate less than* the pre-discounted rent charged amount, to the extent the discount is not implemented at the end of the discount tenancy.

This ensures that the housing provider is not discouraged from providing tenants with discounts. But it also ensures that a discount can only be used in a way that promotes the affected unit's affordability for the

current tenant, and does not create a *de facto* rent ceiling that may destabilize the rent, whether for the current tenant or any future tenant.

Data provided by DHCD's Housing Provider Ombudsman supports the premise of such "good rent concessions." She reports that in 2012, a typical year, she received approximately two dozen inquiries from smaller housing providers who want to give, say, an elderly or disability tenant a break on a rent increase, but without losing the ability to impose that increase at the commencement of the next tenancy. In other words, the purpose of the concession is truly to give the current tenant a break, not to create *de facto* rent ceilings.

The bill addresses numerous other problems associated with "rent concessions." Specifically it:

- Clarifies that the abolition of rent ceilings applies to all unimplemented, expired rent increases;

- Defines the terms "rent ceiling" and "rent charged" (neither of which is a defined term in the 2006 reform law);

- Clarifies -- in accordance with current regulations -- that for any rent increase that by operation of law cannot be implemented immediately, the rent increase will be forfeited if not implemented within 30 days after the date the housing provider is first eligible to do so;

- Requires that the definition of "rent charged" be included on all forms that include the phrase "rent charged";

- Regulates discounted rents and defines a discounted rent as rent charged that is at least 10 percent less than the rent charged a prior or current tenant;

- Permits a housing provider who has complied with all "discount" requirements to "claw back" the discount by way of charging the next tenant the full amount of the pre-discounted rent charged;

- Requires the landlord to do so within 30 days after a tenant with the discount tenant vacates the unit, or forfeit the right to do so;

- Requires that late fees for a tenant with a discounted rent be based on the actual rent charged;

- Requires that rental advertisements include the proposed rent charged, any rent surcharge in effect, and any unexpired rent surcharges; and

- Provides for penalties for violations of these provisions.

Bill 22-999, the "Rent Charged Definition Clarification Amendment Act of 2018"

I will now discuss the second "rent concession" bill. Bill 22-999, the "Rent Charged Definition Clarification Amendment Act of 2018," defines the term "rent charged" in manner consistent with both Bill 22-998 and the recent Rental Housing Commission decisions. It would also require the definition of "rent charged" to be included on all RAD forms that include the phrase "rent charged."

I encourage the Committee to consider further stream-lining and simplifying Bill 22-998 to the maximum extent possible for the sake easier comprehension by the public and to avoid difficulties in adjudicating relevant claims. However I strongly support both measures and believe they are thoughtful solutions to long-standing problems with the District's key affordable housing tool – our rent control law.

Bill 22-949, the "Rental Housing Smoke Free Common Area Amendment Act of 2018"

Finally, let me say a brief word about Bill 22-949, the "Rental Housing Smoke Free Common Area Amendment Act of 2018." I appreciate the goal of eliminating from rental accommodations the avoidable health risks associated with second-hand smoke, while also providing for designated smoking areas to accommodate tenants who do smoke. I do have concerns including uncertainties as to how the penalty provisions would be enforced.

Also, our understanding is that multifamily dwellings in the District are increasingly "self-regulating" in this regard through "house rules" prohibiting smoking in the common areas. Accordingly, we have reached out to the National Apartment Association and AOBA to try to determine how prevalent policies and practices may be in terms of no smoking policies in common areas. The aim of our inquiries is to inform the need for a

government prohibition especially in light of general concerns shared by legal service providers regarding the potential problems for tenants who smoke. Our office is also looking into relevant "best practices" from other jurisdictions. Accordingly, I would respectfully recommend that the Committee consider suspending further action on Bill 22-949 pending more relevant data.

Conclusion

In closing, I wish to thank you, Chairperson Bonds, for convening a longstanding working group, of which the OTA is a member, on the issue of rent concessions, and for moving the legislation. I also wish to thank Councilmember Cheh for having introduced related legislation in the past. Finally, I wish to thank the Office of the Attorney General for challenging rent concession practices that violate of the Consumer Protection and Procedure Act (D.C. Official Code § 28-3901 *et seq.*) by misleading rental housing consumers as to the rental unit's longer-term affordability.

This concludes my testimony and I am happy to answer any questions you may have at this time.