Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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Public Hearing on:

Bill 24-0096, the "Eviction Record Sealing Authority Amendment Act of 2021"

and

Bill 24-0106, the "Fair Tenant Screening Act of 2021"

Committee on Housing and Executive Administration
The Honorable Anita Bonds, Chairperson

on

Thursday, May 20th, 2021
12:00 p.m.
Via Virtual Platform

Introduction

Good afternoon Chairperson Bonds, members of the Committee, and staff. I am Johanna Shreve, Chief Tenant Advocate at the Office of the Tenant Advocate. Today I offer my support for Bill 24-96, the "Eviction Record Sealing Authority Amendment Act of 2021" and Bill 24-106, the "Fair Tenant Screening Act of 2021." I wish to thank Councilmember Cheh for introducing Bill 24-96, and Councilmembers Trayon White, Nadeau, and Gray for co-introducing Bill 24-106 – and I thank you, Chairperson Bonds, for holding this hearing.

I note that I testified on predecessors to these bills last October, so today I am renewing my support for the thrust of these measures as well as providing further recommendations. I also note that emergency[1] and temporary[2] "Fairness in Renting" legislation now in place includes tenant screening and record sealing provisions. This hearing presents opportunities to address issues that have arisen in the implementation of the current law. I ask that the Council improve upon the emergency and temporary legislation and enact each of these permanent measures before the temporary legislation expires on October 27th. Doing so

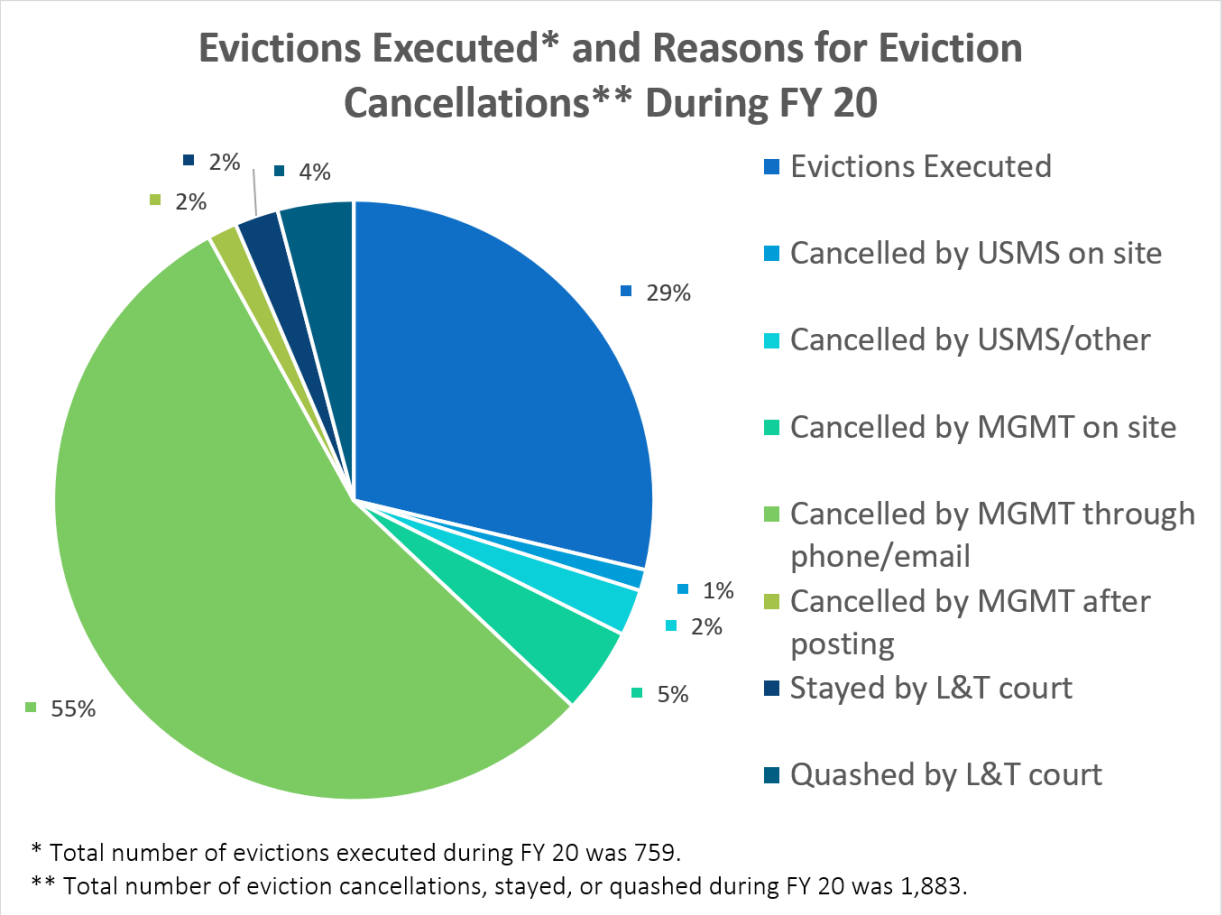
[1] Act 23-497, the "Fairness in Renting Emergency Amendment Act of 2020" (effective Nov. 10, 2020 to Feb. 7, 2021).
[2] Law 23-255, the "Fairness in Renting Temporary Amendment Act of 2020" (effective Mar. 16, 2021, to Oct. 27, 2021).

would further promote fairness and racial equity in the way our residents apply for and obtain rental housing.

***Discussion* on Bill 24-96, the "Eviction Record Sealing Authority Amendment Act of 2021"**

The importance of sealing eviction records

The following chart, which was part of my testimony for this year's OTA performance oversight hearing, helps illustrate the arbitrariness of maintaining eviction records in perpetuity for every tenant who is sued (even unsuccessfully) for eviction:



As you can see, the data demonstrates that the vast majority of eviction cases do not actually end with an eviction. Yet, even the record of an unsuccessful eviction filing can be an albatross around the neck of a prospective renter who could demonstrably be a good tenant. Moreover, the chart above reflects statistics for a year during which there was a moratorium on the filing and execution of evictions for over half the year. Typically, roughly 32,000 eviction actions are filed annually against approximately 18,000 renter households – meaning an eviction record is created on about one in ten renter households in the District each and every year.[3] The stigma of an eviction filing – which often is due to *de minimis* one-time arrearages, other nonrecurring circumstances, or indeed outright errors – should not bedevil District residents forever.

Many tenants will undoubtedly continue to experience unprecedented financial turmoil caused by the pandemic for some time to come. According to estimates made during the fall of 2020, there could be between 20,000 and 40,000 eviction filings within only the first few months after the moratorium expires.

[3] "Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability," Brian J. McCabe and Eva Rosen, Georgetown University McCourt School of Public Policy (Fall 2020), p. 5.

If the District were to enact this legislation, it would be following in the footsteps of other jurisdictions that have enacted eviction record sealing laws. Similar laws in California,[4] Colorado,[5] Virginia,[6] and other jurisdictions already provide record sealing protection at minimum where the tenant is the prevailing party in the eviction action. Interestingly, the California law requires record sealing immediately on filing; the record is unsealed only if the tenant does not prevail within 60 days. Our understanding of its purpose is to protect tenants against landlord actions that are frivolous or otherwise readily resolved in the tenant's favor. Bill 24-96, however, goes further than most of the other jurisdictions with record sealing laws by providing for automatic sealing in each and every instance of an eviction action – even where the landlord prevailed – after a maximum period of three years. This reflects a policy of eventual forgiveness of a tenant against whom an eviction was legally warranted sometime in the past, but who has subsequently maintained a clean record of rental payments for an appropriate period of time.

[4] See: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200320040SB345 (Sec. 2).
[5] See: https://leg.colorado.gov/sites/default/files/2020a_1009_signed.pdf (Sec. 1).
[6] See: https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1013.

New required eviction notices

I support the new requirement in Bill 24-96 for a 30-day notice of eviction for nonpayment of rent for several reasons. First and foremost, it would provide the tenant with a greater opportunity to set the record straight if the nonpayment claim has been made in error. The OTA has assisted clients who have faced arrearage claims made in error, and we know that error can have devastating consequences (for example, where securing that next job requires a security clearance).

Second, I support the bill's requirement that for any eviction, the landlord must provide the tenant with a 30-day notice of intent to file the eviction claim. This requirement also makes good sense. As noted, it is often the case that a Notice to Vacate does not result in the filing of an eviction action. Thus, this "notice of intent" is imperative so that a tenant is specifically apprised as to the housing provider's intentions, and as to his or her own legal jeopardy.

Recommendations on Bill 24-96

I would offer the following recommendations to improve upon this bill:

Sealing of pandemic-related eviction records

First, I recommend that the Council consider adding to the list of circumstances under which a tenant may move the Court to seal an eviction

record earlier than the time periods otherwise provided, under new section 509(b) of the Rental Housing Act of 1985[7]: where an eviction action for nonpayment of rent was solely the result of a tenant's pandemic-related financial hardship, the tenant deserves to have the case qualify for early sealing by motion.

Presumption in favor of sealing

Rather than providing that the Court *may* seal an eviction record where the tenant proves any of the circumstances listed in the new section 509(b), the legislation should *require* the Court to seal the records in those cases unless there is good cause not to do so. Where a tenant can prove that the eviction was, for example, retaliatory, we should not leave any further ambiguity suggesting that the Court still only *may* seal the record. My understanding is that similar language in the current temporary record sealing provision[8] has led the Court to apply a multi-factor test to make a further determination whether to seal a record, even after the tenant produces evidence that they have met the criteria for early sealing by motion.

[7] D.C. Official Code § 42-3501.01 *et seq.*
[8] D.C. Official Code § 42–3505.09(c)(1).

The legal hurdle for this determination should be much lower, especially given that the circumstances justifying the 509(b) motion include such matters as retaliation, the presence of housing code violations, and incidents of domestic violence. Therefore, there should be a clear rebuttable presumption in the law that the Court *shall* seal cases for which there is a successful 509(b) motion.

Allowing access to sealed eviction records for representation purposes

It is important that sealed eviction records remain as inaccessible as possible. However, the Committee should consider the needs of tenants and their attorneys in defending their own cases. My understanding is that under the current temporary record sealing law, ambiguity in the language has led the Court to consider holding hearings in some cases as to whether a person can access their own eviction record. Such access can be important when, for example, a settlement is reached and the case is sealed, but the defendant is later accused of violating the settlement agreement. In such a case, information in the sealed record can be important for the tenant and legal counsel in defending against the breach allegation and should be made available.

Therefore, I appreciate that the proposed permanent version we are discussing today plainly states that the Clerk of the Court shall provide the record

to the defendant upon a written request. The right of the defendant to access their own eviction record should be unambiguous.

One last point to consider on accessibility is that tenant attorneys often use language in pleadings and orders from past eviction records in mounting defenses for their clients. It is often the case that a previously used argument was persuasive in a similar case, or that the Court ruled in a particular way in the past that would suggest a current defendant should be treated similarly.

Implementing new eviction notices

I recommend that the now-standard lease clause whereupon the tenant waives the 30-day notice to vacate for nonpayment of rent be added to the list of prohibited lease clauses at Section 304 of Title 14 of the District of Columbia Municipal Regulations (DCMR). For the benefit of current tenants, the Committee should require a lease addendum, or at least notification from the landlord to the tenant, that any such waiver clause in an existing lease is nullified.

Discussion of Bill 24-106, the "Fair Tenant Screening Act of 2021"

Why fairness matters in the tenant screening process

While the OTA does not typically handle issues involving the tenant screening process – as a denied rental applicant is not yet a tenant and therefore falls outside of the scope of our representation – it is clear from our conversations

with advocate partners and others that too many landlords and tenant screening companies use unfair and irrelevant screening criteria to avoid renting to our most vulnerable residents. This includes of course voucher holders, but also tenants with any eviction record regardless of context. The applicant usually does not know the criteria used for screening an application, or the reasons why the application was denied. This can result in needless frustration, as well as the depletion of the applicant's scarce resources – in terms of both the time and the money it takes to continue submitting applications. Bill 24-106 would help address the inequities in this process by establishing a set of requirements to which landlords must adhere when determining whether to rent to a particular applicant. Importantly, the bill would also prohibit background screening companies from using or considering information that landlords are not allowed to consider. This is crucial as landlords rely on these companies in order to do much of the analysis for them – particularly for larger properties where significant numbers of applicants must be processed on an ongoing basis.

I believe that addressing the unfairness in tenant screening practices is crucial for achieving racial equity and for affirmatively furthering fair housing. Therefore, I offer my general support for all the components of this legislation, as

well as the following recommendations for improvement. I welcome continuing the conversation with the Committee as the bill moves forward.

Recommendations on Bill 24-106

Application fees and other up-front fees

In addition to the application fee restrictions provided, the Committee should specify that (1) if the applicant is approved, any unused portion of the fee must be applied towards the applicant's security deposit; and (2) the purpose of the fee and how it will be applied or returned should be explained to the applicant in writing up front.

Conformity

I would suggest that the Committee and the Council conform certain provisions having conceptual overlap between the two bills. For example, there is inconsistency between the prohibition on looking back more than two years at eviction history in Bill 24-106, versus the three-year record sealing provisions in both the "Fairness in Renting" legislation and in Bill 24-96. It would seem to make the most sense that the periods of time for across-the-board record sealing on the one hand, and categorical prohibition on looking at past eviction records on the other hand, should be aligned.

Placement within the law and enforcement

Although the Fairness in Renting temporary legislation places the currently effective tenant screening laws in the Rental Housing Act, there are advantages to the approach in B24-106 of placing these provisions in the Human Rights Act of 1977[9]. For one, the Human Rights Act provides for higher penalties, which is appropriate because at the end of the day the issues this bill addresses are related to unfair discrimination in the provision of a basic human need. Furthermore, these provisions would regulate interactions in which no one is yet a tenant – so, this is not so much regulation of a contractual relationship as it is meant to ensure that parties attempting to enter a contract for rental housing in the first place are treated fairly. Furthermore, the Office of Human Rights (OHR) already handles complaints related to criminal record screening in housing, and so these matters would be appropriate there as well.

Finally, I will note that under the Human Rights Act a denied applicant would likely have a private right of action via the courts, outside of the administrative process, providing an additional avenue for relief. Under the Rental Housing Act, however, a private right of action is not necessarily available in all cases, which may leave the tenant with only an administrative grievance process.

[9] D.C. Official Code § 2-1401.01 *et seq.*

More time for a denied applicant to respond

As introduced, Bill 24-106 only permits a tenant 72 hours to respond to a landlord's denial notice with mitigating circumstances or a factual dispute. The Committee should consider extending this time to five business days, as some tenants may need to consult a lawyer to prepare their response. This is especially important since under the legislation a factually sound and well-crafted response may in fact entitle the tenant to rent the next available unit of the type sought.

Notification of units that later become available

Where the tenant is entitled to rent the next available unit, the bill does not require the landlord to actually notify the applicant in a timely manner that a suitable unit has become available. The legislation only hints that this is what should happen.

Thus we recommend that the bill be amended to include a specific requirement that the landlord notify the applicant via the applicant's preferred method of communication when the next unit is available in each of the following circumstances: (1) the applicant sought a unit of a size or type not immediately available, and the landlord indicates that one will likely become available in the next 30 days or the next six months; and (2) a denied applicant submits a

response to the landlord's denial notice that sufficiently mitigates or corrects the basis on which the applicant was denied.

Conclusion

In conclusion, Chairperson Bonds, I thank you for holding this hearing on these important bills. This concludes my testimony and I am happy to answer any questions you may have at this time.