Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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Public Hearing on:

B21-0647, the "Rental Housing Late Fee Fairness Amendment Act of 2016"

And

B21-0646, the "Property Rehabilitation for Affordable Housing Act of 2016"

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

Monday, May 16, 2016, at 10:00 AM
John A. Wilson Building, Room 500
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 on B21-0647, the "Rental Housing Late Fee Fairness Amendment Act of 2016," and B21-0646, the "Property Rehabilitation for Affordable Housing Act of 2016."

B21-0647, the "Rental Housing Late Fee Fairness Amendment Act of 2016"

I will now address Bill 21-0647, the "Rental Housing Late Fee Fairness Amendment Act of 2016." I wish to thank you, Chairperson Bonds, (you removed Cheh, Nadeau, and Silverman?) for introducing Bill 21-0647 and for moving it forward today, and for working with the OTA and other advocates in developing the bill's concepts.

Context

First, let me say a word about the context for this legislation. Currently, District law does not regulate the amount that a landlord may charge a tenant for the late payment of rent, nor does it establish a minimum "grace period" before a late fee may be imposed. In practice, as reported to the OTA, the amount of the late fee varies substantially, and it

may be imposed even within a few days of the due date. A late fee may be imposed even where the rental payment is merely a day late due to no fault of the tenant but due to a delay in mail service for example.

It should be noted that judgments for possession may be nonredeemable if the court finds that the tenant habitually pays rent late. (*See* Suggs v. Lakritz Adler Mgmt., LLC, No. 06-CV-182 (DCCA 2007); Giddings v. Wilkerson, LTB034659 (DC Sup. Ct. 2014)). Usually, when the court issues a writ for eviction in a non-payment case, the tenant may still pay the landlord all amounts owed, and thus redeem the tenancy at any time up until the day of the eviction. A writ that is "non-redeemable," however, means that the tenant does not have this option and that eviction is inevitable. This bill does not upset the case law, and indeed the OTA strongly encourages tenants to timely pay rent. Nevertheless, this case law in stark terms does call attention to the need for standardization and clarity regarding late fee practices in the District.

Even where it may be fair for the landlord to charge the tenant a late fee, a common practice in terms of accounting for an unpaid late fee is not. Typically, the landlord deducts the amount of any unpaid late fee from the tenant's next payment of rent in full. This unfairly creates a record of an

ongoing rental delinquency, and causes an escalation in late fees and the tenant's housing costs, where there has been a single late payment in actual rent.

Advocates raised some of these concerns last December at the Committee's hearing on Bill 21-420, the "Residential Lease Amendment Act of 2015." Subsequently, OTA participated in a series of working group meetings with Committee staffers and other tenant advocates to discuss a fair and uniform policy regarding late fees in the District.

What the bill does

B21-0647 would establish common sense standards both regarding a minimum grace period and a cap on the late fee. Regarding a minimum grace period, the bill defines the term "late payment" as rent that remains unpaid within 10 days of the due date; and it caps the amount of the late fee at five (5) percent of the unpaid amount of rent. The bill also (a) prohibits the imposition of a late fee for the same late payment of rent more than once; (b) prohibits deducting the late fee from a future rental payment to create a new delinquency; (c) requires the disclosure of the late fee policy in writing; and (d) provides for penalties including civil fines and treble damages to the tenant in the event of bad faith.

Best practices

The standards set forth for the amount of late payment in Bill 21-0647 are in line with those of other jurisdictions. OTA conducted a statewide comparison which it shared with the working group for this Bill. There is a five (5) percent cap on late fees in both Maryland and Delaware, and a four (4) percent cap in Maine. The cap in Iowa is $10 per day with a $40 maximum per month, and in North Carolina it is $15 or five (5) percent, whichever is higher. The remaining states appear to be silent on this issue.

Regarding the grace period, OTA is aware of the length of a grace period varying nationally. There is a five (5) day grace period in federal guidelines and in standard GCAAR leases in the Washington Metropolitan region.[1] At the other end of the spectrum we have the law in Massachusetts. Under the law in the state of Maine a late fee cannot be imposed unless it is 15 days late.[2] Under Massachusetts law, even if there

[1] HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Program, 2013, Pg. 6-39, Subsection C, and D.
[2] Me. Rev. Stat. Ann. tit. 14 § 6028.

is a late payment penalty clause, a landlord cannot impose late rent fees, including interest on late rent, until the rent is 30 days late.[3]

Recommendation

While OTA supports the 5 percent cap on late fees, perhaps, further consideration should be given to whether Bill 21-0647's 10 day grace period is optimal. (My impression was that Ms. Shreve was not convinced about the 10 day grace period).

Late fee due to late subsidy

Other anomalous and unfair situations can and do arise, particularly in the subsidy context. Typically, in the subsidy context, the tenant is responsible for the portion of the total rent that correlates to 30 percent of the tenant's income, while the subsidy provider is responsible for directly paying the landlord the balance of the rent owed. If the subsidy provider fails to make a timely payment, reportedly, it is not uncommon for a late fee to be imposed on the tenant, despite the tenant having timely paid their portion in full. We even hear of landlords bringing eviction actions against tenants who find themselves in this situation.

[3] See Mass. Gen. Laws Ann. ch. 186, § 15B(1)(c). "No lease or other rental agreement shall impose any interest or penalty for failure to pay rent until thirty days after such rent shall have been due."

Recommendation

I recommend that the Committee consider an amendment to explicitly protect a subsidized tenant from being held liable for the subsidy provider's failure to timely pay the rent subsidy to the landlord.

B21-0646, the "Property Rehabilitation for Affordable Housing Act of 2016"

I will now turn my attention to B21-0646, the "Property Rehabilitation for Affordable Housing Act of 2016." This bill would establish a program under which the District would acquire a vacant, blighted, or condemned property at a tax sale, and then transfer the property to a District instrumentality, nonprofit, or resident, for the purpose of transforming it into affordable housing.

I fully support the bill's intentions, and I applaud you, Chairperson Bonds, for crafting legislation aimed at promoting the work of the Housing Preservation Strike Force (on which you and I both sit as voting members). I do believe certain concepts in the bill could be further developed to make it a more significant vehicle for creating affordable housing in the District. A review of the tax sale program guidelines raises many questions as to

how the properties would be acquired and by what government agency since the tax sale guidelines prolonged for a period of at least six months. Additionally, questions are raised as to whether or not the committee's intent regarding the creation of a fund within the DC Housing Finance Agency would be an expansion of the agency's existing multifamily program with defined census tracts or would be used to create a new program all together. If the Agency were to fold this proposed program into its existing program the properties purchased through the tax sale program would have to be located in specific census tracts to qualify. The language in the bill also speaks to single family housing thus if the property acquired through the tax sale program belonged to a low-income family who owned the property would the program design take into consideration a method of refinancing debt to assist the low-income family in retaining the residence?

The more I reviewed the proposed bill the more questions were raised. I applaud the Committee's goal of finding innovative ways to increase affordable housing throughout the District but believe this legislative proposal needs to include additional language particularly regarding the acquisition of tax sale properties as well as consideration for

increasing the DC Housing Finance Agency's multifamily program. (Joel, the underlined section above is directly quoted from what Ms. Shreve wrote).

~~Relevant considerations include (1) eliminating the possibility that the program could conflict with the foreclosure process, or with agency processes for vacant and blighted properties; (2) identifying available federal funding sources and appropriately deploying that funding; and (3) recognizing that, while the bill focuses on vacant properties, tenants who retain a right to return to a rental accommodation could also be impacted.~~

Agency processes

Vacant Properties

There were approximately 2,106 properties that were classified as vacant in FY 2014, and 1,721 in FY 2015. A vacant property is defined as one where the resident abandons the residence and fails to demonstrate the intent to return. DCRA is responsible for determining whether a property should be classified as vacant. DCRA will make the determination after inspecting the premises twice within a 45-day period. If it is determined in the final inspection that no physical changes have occurred, the property may be deemed vacant and the property's class type changed to a Class 3, which places the property in a higher tax bracket. The Office of

Tax and Revenue (OTR) then revises the property' tax rate upward to a rate of $5 per $100 of assessed value.

Blighted Properties

There were approximately 112 properties in FY 2014 that were classified as blighted and 132 in FY 2015. A building is deemed blighted if a DCRA inspector finds the building to be unsafe, insanitary, or is otherwise determined to threaten the health, safety, or general welfare of the community. Once the property is deemed blighted, it is assigned a Class 4 status by OTR, which is also subject to a higher property tax of $10 per $100 of assessed value.

Condemned Properties

In FY 2015, approximately 129 properties went through DCRA's condemnation process, 20 were condemned, and 14 were demolished. The Board for the Condemnation of Insanitary Buildings (BCIB)[4] is charged with supervising the condemnation process, which involves inspecting the building and ensuring that a building that is deemed unsafe or unsanitary is either made safe and sanitary or is razed and removed.

Legislative considerations

[4] Under DC Official Code Section 6-901, et seq. (2001 Edition).

Foreclosure process

On Line 70, the bill would require the Mayor to acquire a property at a public auction pursuant to Chapter 13A of Title 47 of the D.C. Code ("Real Property Tax Sales"). It should be noted that under Section 1306, the property owner has the right to redeem the property typically within six (6) months after the last day of the sale. The competitive bidding process for the transfer of the property from the District to a developer (starting at line 85 of the bill) should take into account the timeframe for the property owner's right of redemption.

DC Bar Foundation

The bill requires, on line 142, that the DC Bar Foundation shall award funding to non-profit organizations that deliver legal services to a developer in the foreclosure of a tax sale property. A concern is that this may require the DC Bar Foundation to divert limited resources away from legal service providers at the expense of legal services now being provided to very low income District residents. Therefore, consideration should be given to using a different foundation or striking the provision requiring legal assistance to developers altogether.

Instead, consideration should be given to enhancing funding for properties owned by low-income individuals or families, who generally are longer term District residents, are struggling to keep up with property taxes and other expenses, and are facing a very real possibility of losing their homes. (Joel, I believe Ms. Sheve still wants to keep this whole section above. However, I am not sure about the rest which were her points initially from last Friday but which I don't think she got to see).

Single v. Multifamily Properties

The legislation should require an allocation plan to direct the relevant government agency to establish the number of single versus multifamily properties that will benefit from the program.

District Acquisition of Property

The bill as introduced would authorize the Mayor to "acquire" properties at a public auction. It should be clarified which Mayoral entity will be assigned the task of purchasing properties, under what terms that entity may participate in the auction, and under what new or existing statutory authority the entity would operate.

HFA Loan Program

My concern regarding the bill's HFA financing provision arises from my familiarity with the HFA's multifamily loan program. While the bill's overarching goals complement those of the HFA program, it is not clear that properties selected from the tax sales inventory would necessarily meet the federal criteria for this funding source. These criteria restrict funding through taxable bonds and the low income housing tax credit to properties within certain designated geographic areas.[5]

Environmental Impact Analysis

Finally, any program design should include an environmental impact study, as is generally required for the deployment of federal dollars in this context.

I would welcome the opportunity to work with the Committee to address these concerns and to maximize the legislation's potential to advance our mutual affordable housing goals.

Conclusion

Thank you, Chairperson Bonds, for this opportunity to testify and for your leadership on these important issues. This concludes my testimony and I am happy to answer any questions you may have at this time.

[5] See the Multifamily Mortgage Revenue Bond Program and 4% Low Income Housing Tax Credit Program.