Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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Bill 18-548, the "Rent Increase Amendment Act of 2009"

Bill 18-598, the "Tenant Organization Petition Standing Amendment Act of 2009"

Committee on Housing and Workforce Development
The Honorable Michael Brown, Chairperson
Council of the District of Columbia

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Thank you, Chairperson Brown, for this opportunity to comment on Bill 18-548, the "Rent Increase Amendment Act of 2009," and Bill 18-598, the "Tenant Organization Petition Standing Amendment Act of 2009." I am Johanna Shreve, Chief Tenant Advocate for the District of Columbia at the Office of the Tenant Advocate. First I will discuss the legislation regarding tenant associational standing, Bill 18-598, which the OTA helped to draft. We thank Councilmember Jim Graham for his leadership in introducing this important legislation, and we thank you, Chairperson Brown, for your leadership in moving it forward today.

Bill 18-598 and Tenant Associational Standing

Bill 18-598 would give a tenant association standing in any proceeding under the Rental Housing Act to represent members who provide written authorization for the representation, regardless of how many members choose to participate in the action, and regardless of whether the association represents a majority of the tenants. It would do so by amending the relevant regulations for rental housing cases before the Rent Administrator (14 D.C.M.R. § 3904) and before the Office of Administrative Hearings (1 D.C.M.R. § 2924).

The current regulations state that:

1. Individual tenants involved in any proceeding shall be individually identified.

2. If a tenant association seeks to be a party, the (Administrative Law Judge) shall determine the identity and number of tenants who are represented by the association.

3. If a majority of tenants are represented by the association, the association shall be a party, and shall be listed in the caption.

The plain meaning of this language is that a tenant association representing a majority of the tenants *must* be deemed to be a party and *must* be listed in the caption. This language does *not* explicitly *prohibit* a tenant association from being a party, or from being listed in the caption, merely because it represents less than a majority of the tenants. Yet that is the prevailing interpretation of these provisions.[1]

In March 2009, the Rental Housing Commission raised the bar even higher when it reversed an OAH grant of tenant associational standing in a case called *Borger Management, Inc. v. Rosa Lee, Winchester-Luzon Tenants Association* (RH-TP-06-28,854, March 6, 2009). The Commission rejected tenant associational standing in this case, partly on the grounds that even if that association represented a *majority of the apartment units* in the building, it did not represent a majority of the *total number of residents* in the building, thus failing to meet the regulatory standard. Indeed, the relevant regulatory language refers to "a majority of the tenants" rather than the number of units or households in the building.

But this ruling raises a bar that is too high even higher. Under this new interpretation of a long-standing regulation, a tenant association is required to first determine the total number of residents in a building -- literally conduct a head-count of every man woman and child living in each unit -- and then obtain association membership from a majority of that number. The practical problems

[1] This interpretation may have resulted in part from confusion with an irrelevant requirement in the District's tenant right of purchase law, which states that only an incorporated tenant association representing a majority of tenants may pursue the opportunity to purchase a building with 5 or more units. D.C. Official Code § 42-3404.11.

are innumerable. In many buildings, tenant associational standing could well depend upon the willingness of the landlord to assist tenants in the head-count. Because of the number of children or uninterested adults, it would be possible for a tenant association to represent 100 percent of the units in the building, but still fail to meet the "majority representation" standard, because one or more *additional* residents in each household do *not* become association members. Of course this is an absurd scenario, but it is not an entirely unlikely one.

Again, the point is that the bar for associational standing has been set much too high for tenants in rental housing cases. The Council should consider this to be unacceptable for any number of reasons, but first and foremost because a tenant association -- like any other kind of association -- has a right to associational standing under the First Amendment of the U.S. Constitution, and under the District's *own law* that generally governs unincorporated non-profit associations.

The U.S. Supreme Court has set forth the criteria that apply to this Constitutional right in a long and well-established line of cases. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996).

In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court set forth the criteria that an organization must meet in order to have a First

Amendment right to "associational standing" to represent the interests of individuals: (1) one or more of the organization's members must have standing in his or her own right; (2) the interests which the organization seeks to protect in the lawsuit must be germane to the purposes of the organization; and (3) the nature of the case must not require the participation of the individually affected members as plaintiffs to resolve the claims or prayers for relief at issue.[2]

The District incorporates this three-prong test in the "Uniform Unincorporated Non-profit Association Act of 2000" (D.C. Official Code § 29-971.01 *et seq.*) which explicitly gives any unincorporated non-profit association that meets the test the right to represent "one or more its members."[3]

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[2] While the pursuit of damages could indicate a need for individual participation in the action, this is not necessarily the case. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.* clarifies that the third prong of this test:

> [I]s best seen as focusing on matters of administrative convenience and efficiency, not on elements of a case or controversy. Circumstantial evidence of that prong's prudential nature is seen in the wide variety of other contexts in which a statute, federal rule, or accepted common law practice permits one person to sue on behalf of another, even where damages are sought.

[3] D.C. Official Code § 29-971.07:
(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

Thus, under the current regulations for rental housing cases, tenants are being denied the Constitutional and statutory rights to which they are entitled. But the "majority representation" requirement has had any number of other adverse consequences. It has undermined the purposes and the enforcement of the Rental Housing Act and other laws enacted by the Council intended to promote tenant rights. It has done so by:

1. Inhibiting the ability of tenants to effectively challenge violations of housing laws affecting all tenants or multiple tenants in a particular building;
2. Discouraging attorneys from representing tenants because individual tenant cases generally are not remunerative;
3. Wasting administrative resources through unnecessarily duplicative and protracted litigation;
4. Requiring Administrative Law Judges to become preoccupied with thorny evidentiary determinations as to whether a tenant association truly represents a "majority of the tenants," rather than with substantive matters such as illegal rent increases and housing code violations;
5. Undermining the efforts of tenants, as contemplated by the rental housing laws, to act as "private attorneys general" to vindicate not only their own rights, but also the public interest;
6. Resulting in the improper probing into the identity of association members who do not wish to participate in the litigation, which could have a chilling effect on tenant organizing activity, and which is something the U.S. Supreme Court acknowledged as a First Amendment concern when it said

that a "vital relationship exists between freedom to associate and privacy in one's associations." *NAACP v. Alabama ex rel. Patterson.*

Arguments we have heard from housing provider attorneys in defense of the "majority representation" rule in our estimation simply do not hold water. Upon examination, some of these arguments really go to wholesale opposition to the involvement of *any* tenant association in *any* rental housing case. For example, the claim that tenant associational standing gives the association "rights" not contemplated by the Rental Housing Act is simply incorrect. First, the Rental Housing Act explicitly defines "person" as including an "individual, corporation, partnership, *association*, joint venture, business entity, or an *organized group of individuals*" (D.C. Official Code§ 42-3501.03(24)). Second, it is always the rights of individual tenants who authorize the association's representation that are at issue. Another example is the claim that tenant associational standing threatens the due process rights of the housing provider. This is incorrect because no one disputes the proposition that claims or damages particular to any individual tenant should be demonstrated by that tenant through direct participation in the action – that is inherent in the standard itself.

But if the claim involves an alleged violation of law by a housing provider that commonly impacts multiple tenants -- such as lack of registration or licensing, common area housing code violations, common area reduction of services or facilities, or a housing provider petition for Rent Administrator approval of a building-wide rent increase -- then requiring each tenant to prove the claim serves no purpose other than to protract the litigation and place

unnecessary burdens on tenants. As noted, the "majority" requirement not only leads to repetitious evidence and wastes adjudicatory resources, it also gives derelict housing providers an incentive to "game the system" by attempting to pick off individual tenants through a series of challenges to membership status. The purpose here can only be to frustrate the tenants' enforcement of housing regulations and deny relief to as many individual claimants as possible, if nothing else through the exhaustion of tenant resources.

Finally, with regard to the caption rule, we note having the tenant association named as a party and listed in the caption can be important an organizing tool, leading to greater enforcement of tenant rights.

Accordingly, in the interest of greatly enhancing enforcement of the District's housing code and other tenant rights, we urge the Committee swiftly approve Bill 18-598 and we urge the Council to swiftly adopt this measure.

Bill 18-548 and Conditional Hardship Increases

I will now discuss Bill 18-548, the "Rent Increase Amendment Act of 2009." Under section 212 of the Rental Housing Act of 1985 (D.C. Official Code §42-3502.12), the housing provider may file what is known as a "hardship petition" to increase the rents by the amount necessary to generate a 12 percent rate of return on its equity in the rental accommodation. If the Rent Administrator fails to issue a final decision on the petition within 90 days, then under section 212(c) the housing provider may "conditionally" implement the requested increase, subject to later modification by the Rent Administrator.

The problem is that in the vast majority of hardship petition cases, the Rent Administrator -- for a variety reasons -- does not issue a final decision within 90 days, and in the vast majority of these cases, the housing provider does implement the conditional rent increase. The amount of the rent increases is often well over 100 percent of the current rent levels, meaning that an affordable rental unit can suddenly become unaffordable. These increases have not been reviewed for compliance with the statutory criteria or even for completion of the application. They are imposed *indefinitely* pending a final order by the Rent Administrator. And in some cases we know that tenants have not even yet received notice of the filing of the hardship petition. While there are many serious problems with the hardship petition process generally -- and with housing provider petitions even more generally -- this "conditional increase" problem ranks among the most serious.

The policy reason for the "conditional increase" is to ensure that government inaction does not result in depriving housing providers of their right to the profitable economic use of their property. Indeed, the Rental Housing Act's purposes include "protect(ing) low-and moderate-income tenants from the erosion of their income from increased housing costs" and "provid(ing) housing providers and developers with a reasonable rate of return on their investments." (D.C. Official Code § 42-3501.02(1) & (5)) We firmly believe that striking the right balance between these competing interests is ultimately in the best interest of tenants.

However, it is abundantly clear that the current "conditional increase" mechanism is NOT striking the appropriate balance. The percentage increases in rent that we have seen due to these "conditional rent increases" are alarming, as are the circumstances of the increases including lack of due process for tenants. Meanwhile there is no assurance that these increases yield rates of return for housing providers that are "reasonable" – and I repeat they are not reviewed prior to implementation and they are imposed for indefinite periods of time. While we have not yet received data regarding modifications, we know that the Rent Administrator on occasion does reduce the conditional increase, sometimes by a fairly substantial amount. This illustrates that some housing providers are making excessive hardship requests and that tenants are unfairly bearing the brunt of government inaction.

Bill 18-548 would eliminate this "conditional" or "provisional" rent increase and thus would require housing providers to await the Rent Administrator's final determination prior to implementing the requested adjustment. We understand and we carefully considered the concern that complete elimination of the conditional rent increase may not strike the right balance. On balance, however, we do believe that the conditional increase has served to undermine rent control in the District. We also note that this is it is NOT a Constitutional matter. The D.C. Court of Appeals has stated unequivocally that "landlords (do) not have a constitutional right to immediately pass on to tenants all increased costs" (notwithstanding a prior ruling that the "pass-through" or conditional increase was statutorily required by the Congress prior to Home Rule). *Apartment and Office*

Building Association of Metropolitan Washington et al. v. Walter Washington, 381 A.2d 588 (1977). Therefore, this is strictly a policy matter and it is up to the Council to determine how best to strike the balance between landlord and tenant interests in this regard. Other areas of the law may be instructive – OTA stakeholders who have expertise in the area of utility regulation tell us that while the "hardship" concept exists in utility regulation, there is no similar provision for any kind of "conditional" or "provisional" utility rate increase.

Thus, we endorse the elimination of the "conditional increase" and at the same time welcome the opportunity to participate in further dialogue with the Committee and all interested stakeholders to explore a range of possible legislative fixes, which we understand is the Committee's intention. Over the past couple years, OTA working groups have considered problems associated with housing provider petitions generally, hardship petitions, and the condition increase in particular. These policy deliberations have resulted in a laundry list of intriguing legislative ideas which could be brought to bear on these discussions. A number of them would reform either the conditional increase provision itself, or other aspects of the hardship petition provision to ameliorate the impact these conditional increases are now having on too many tenants in the District.

Unless the Committee intends to move quickly as well as deliberately, we recommend that Committee also consider moving some version of Bill 18-548 as emergency legislation. Again the balance of interests has demonstrably tipped against tenants and meaningful rent control which is a problem that must be addressed decisively and promptly.

At this point I would like to note what appears to be a technical problem with the bill as introduced. The bill strikes the fourth and fifth sentences of section 206(c), and corresponding sentences in section 212(c) of the Act. But in retaining the following sentence, the Rent Administrator would be required to make a provisional finding -- for no explicit purpose – ten (10) days prior to being required to issue a final order, which is required within ninety (90) days of the filing of the petition. It appears the intention would be to eliminate the requirement of any provisional finding along with the conditional increase (please see attached).

This concludes my testimony. Thank you again, Chairperson Brown, for this opportunity to comment on these important tenant rights measures and I am happy to take any questions you may have at this time.