Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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Bill 20-113, the "Rent Control Hardship Petition Limitation Amendment Act of 2013"

Committee on Economic Development
The Honorable Muriel Bowser, Chairperson
Council of the District of Columbia

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10:00 a.m.

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

Good morning, Chairperson Bowser and members of the Committee on Economic Development and staff. I am Johanna Shreve, Chief Tenant Advocate for the District of Columbia at the Office of the Tenant Advocate. I am here this morning to comment on Bill 20-113, the "Rent Control Hardship Petition Limitation Amendment Act of 2013." I wish to thank you, Chairperson Bowser, for your leadership in moving this important tenant protection legislation forward today. I also wish to thank Councilmembers Jim Graham and Marion Barry for their leadership in introducing it.

What Bill 20-113 would do

Bill 20-113:

1. Amends the hardship petition process in the District's rent control law to limit the amount of any "conditional rent increase" to a maximum of five (5) percent of the current rent charged;
2. Requires the owner to repay tenant overpayments within 21 days following the final order on a hardship petition, to the extent that requested amounts exceed approved amounts, or if the petition is denied; and
3. Allows the tenant to recover treble damages if the owner is found to have filed the hardship petition in bad faith.

The current state of the law

The Hardship Petition

I will now discuss the current state of the law regarding "hardship petitions" and the "conditional hardship rent increase."

Under the current hardship provision at section 212 of the Rental Housing Act of 1985 (D.C. Code § 42-3502.12), an owner is entitled to a twelve (12) percent "return on equity." The owner may file a hardship petition if – during the course of any twelve (12) month period within the previous fifteen (15) months – the rental revenue has been insufficient to achieve the guaranteed twelve (12) percent return. The rate of return is determined by dividing the owner's "net income" from rental revenue by the owner's "equity" in the housing accommodation. The difference between the "guaranteed" return of twelve (12) percent and the calculated return on equity represents the "return on equity" shortfall. That shortfall is apportioned as "hardship rent increases" among the rental units in the building.

Conditional Rent Increases

Unlike other housing provider petitions, however, the government's failure to act on the petition in a timely manner entitles the owner to impose "conditional" rent increases on the tenants. This is despite the fact that by

law the government must accord a hardship petition expedited review, and issue a final decision within 90 days after the petition has been filed (D.C. Code § 42-3502.12(c). If a final decision is not issued within 90 days, then the owner may "conditionally" implement the full amount of the requested petition rent increases, subject to modification only if and when a final decision is belatedly issued.

Why legislation is necessary

I will now discuss the impact that "hardship petitions" and "conditional rent increases" have had on tenants and on the District's affordable rental housing stock.

The policy reasoning for a "conditional increase" is to ensure that government inaction does not result in delays that deprive owners of their right to realize a profit. The Rental Housing Act's purposes include protecting low-and moderate-income tenants from the erosion of their incomes due to increased housing costs; to protect the District's affordable housing stock, and to provide owners with a reasonable rate of return on their investments. (D.C. Code § 42-3501.02(1) (4) & (5)) The legislative intent was to strike the right balance between these competing interests.

The OTA's most recent review of hardship petitions between Fiscal Years 2006 – 2013 however demonstrates that the "conditional increase"

mechanism is *NOT* striking the appropriate balance. In too many hardship petition cases, as shown on the attached chart, the current regulatory 90-day time frame was not met, which resulted in conditional rent increases that harmed tenants. In one case, the petition was filed in 2005 not decided until 2010.[1] A conditional increase was imposed and the tenants of that property moved out due to the unaffordability of the rents. The decision in that case resulted in the owner being denied the petition request but it was far too late for those tenants.

The amount of the conditional rent increases has ranged from 9.6 percent to 225 percent, and is often well over 100 percent of the current rent levels, meaning that an affordable rental unit can and often does suddenly become unaffordable. These increases often have not been reviewed for compliance with the statutory criteria or even for completion of the application. They are imposed *indefinitely* pending an order by the Rent Administrator or OAH. In at least one case, tenants had not yet even received notice of the filing of the hardship petition prior to the conditional rent increases taking effect.[2] While there are many serious problems with the hardship petition process generally -- and with housing provider petitions even more generally -- the "conditional increase" is the most troublesome. It

[1] HP 20,791.
[2] HP 20,888.

results in rent control units moving from affordabe to unaffordable but it also results in tenant displacement (either due to eviction actions, or because tenants feel compelled to move out due to unaffordability rather than fight the unaffordable rent increase).

One of the most troubling aspects of the "conditional increase" is its indefinite duration. The OTA recently reviewed a total of twelve (12) hardship petition cases for which we have final decisions between fiscal years 2006 and 2013. While this review is by no means exhaustive, it is indicative of the need for prompt Council action to address the matter of the conditional hardship rent increase. Two charts are attached to this testimony. The first chart sets forth the statutory and regulatory timeframe for full consideration of a hardship petition -- including the issuance of a final decision. That total timeframe is 90 days. To the extent that this legal timeframe is met, conditional rent increases would simply not be an issue. The second chart shows in months the longest, shortest, and average time it actually took for the final order to be issued for the cases reviewed. The average time was 28 months – that is two (2) years and four (4) months.

As a case in point, the OTA reviewed the circumstances surrounding the longest known hardship petition review period, which spanned four (4)

years and nine (9) months.[3] During that time, notices of conditional rent increases were served on the tenants of seventeen (17) rental units. The amount of the conditional rent increase was as high as $380 per month. Some five (5) years later, OAH rejected the hardship petition on the basis of the audit report, and ordered conditional increases returned to affected tenants.

The OTA has attempted to confirm whether affected tenants remained in residence and ever received the ordered refunds. We discovered that all affected tenants have vacated their units. While we cannot be sure, we believe that it is quite likely that all or most were priced out.

Legislative alternatives

As noted, Bill 20-113 would continue to allow the owner to impose conditional hardship rent increases, but would cap them at five (5) percent of the current rent charged. The Council considered two (2) other options in Council Session 18. Bill 18-548, the "Rent Increase Amendment Act of 2009," would have eliminated the conditional increase altogether. Bill 18-944, the "Rent Increase Emergency Amendment Act of 2010," would have limited, on an emergency basis, the conditional increase to the lesser of

[3] HP 20,791.

fifteen (15) percent of the rent charged, or 25 percent of the requested rent increase, per unit.

A year ago, Councilmember Graham asked whether, as Chief Tenant Advocate, I would support the elimination of the conditional rent increase (as Bill 18-548 would have). My answer then was yes, and I am here today to urge the Committee to amend Bill 20-113 to do exactly that. I remain keenly aware of the need for the rent control law to strike appropriate balances between affordability for the tenant and profitability for the owner. I reiterate, however, that the conditional increase has served to undermine rent control affordability in the District, and the evidence for this is mounting.

As I have mentioned on previous occasions, the elimination of the conditional rent increase is not *per se* 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." *Apartment and Office Building Association (AOBA) of Metropolitan Washington et al. v. Walter Washington*, 381 A.2d 588 (1977). Therefore, this is a policy matter for the Council to decide. Other areas of the law may be instructive. OTA stakeholders who have relevant expertise have informed us that the "hardship" concept exists in the area of utility

regulation, but not the "conditional" rate increase. Thus, while I believe the five (5) percent cap is a step in the right direction, I whole-heartedly support an amendment to the bill as introduced to eliminate the "conditional increase" altogether. I believe that such a reform would represent a reasonable and necessary re-balancing of the Act's competing interests, core purposes, and legislative intent. I would also welcome the opportunity to further discuss this matter and other options with the Committee and any interested stakeholders.

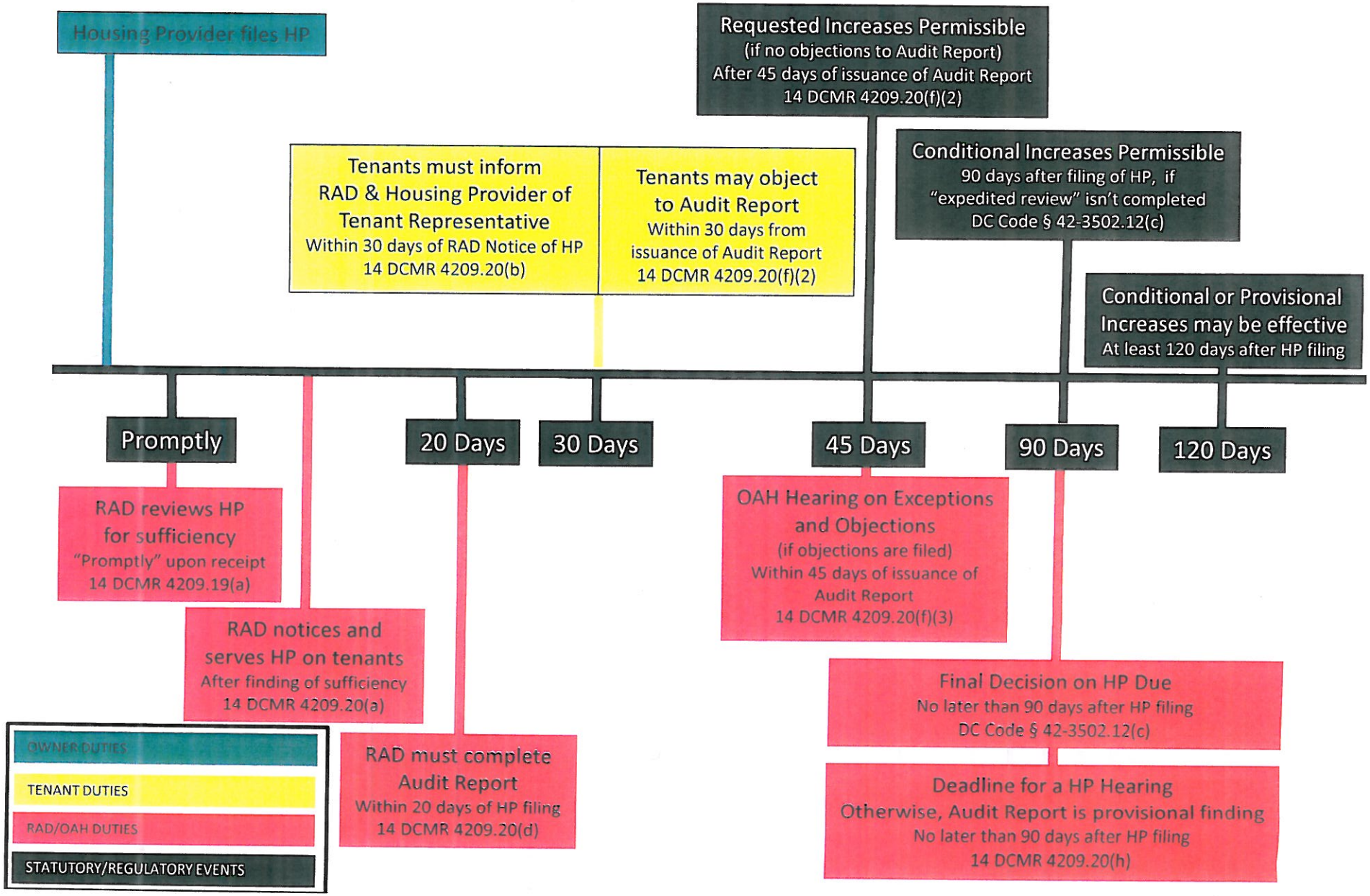
Other policy concerns

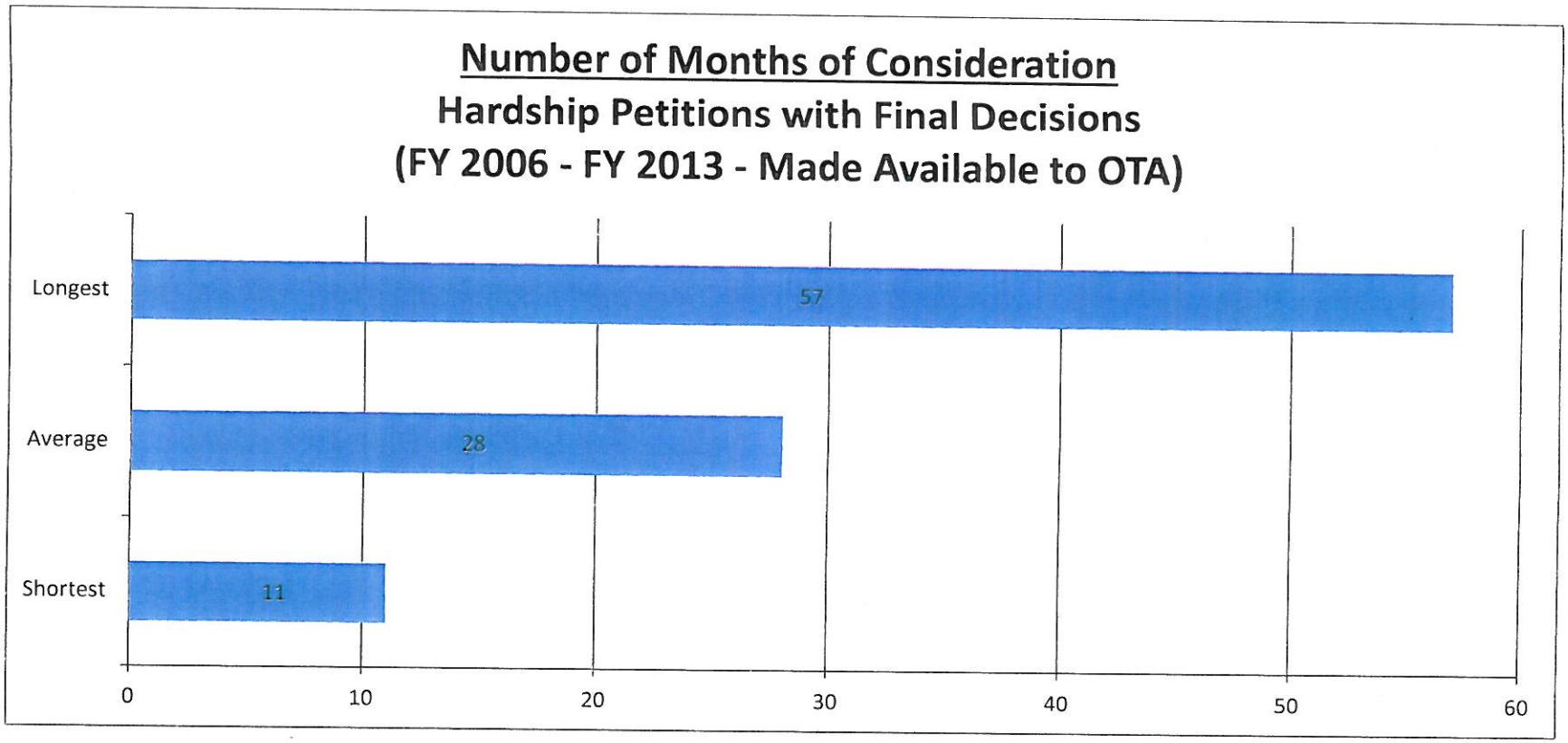
Other than the conditional hardship rent increase, there are numerous other policy concerns regarding the hardship petition. Chief among them is the twelve (12) percent guaranteed rate of return. After the start of Home Rule, the District enacted three (3) separate rent control laws – in 1975, 1977, and 1980 – prior to enacting the current rent control law in 1985. The inclusion of a hardship provision has been consistent throughout each of these successive laws, but the actual rate of return has not. In the 1975 and 1977 laws, the guaranteed rate of return was eight (8) percent; then in 1980 it was increased to ten (10) percent; and then in 1985 it was increased again to twelve (12) percent. No rationale for this steady increase, whether in the Committee reports or otherwise, is evident from our review of the legislative

history. I note that neither the OTA nor any other tenant voice within the government existed prior to 2005. I also would suggest that the twelve (12) percent guaranteed return appears to be excessive when compared to any measure we can think of, and the time has come for the Council to revisit it. There are any number of other policy concerns regarding the hardship petition, and again I would welcome the opportunity to discuss them with the Committee and interested stakeholders.

This concludes my testimony. Thank you again, Chairperson Bowser, for holding this hearing on such a critical affordable housing issue. I am happy to take any questions you may have at this time.

HARDSHIP PETITION (HP) REVIEW BENCHMARKS





This chart reflects twelve (12) Hardship Petitions made available to OTA that have identifiable filing and final decision dates.

- The shortest review period was nine (9) days, but is an outlier. This HP was summarily rejected because the Housing Provider had obtained a general applicability increase within the same year.
- The second shortest review period was eleven (11) months.
- The longest review period spanned four (4) years and nine (9) months. Although this hardship petition was eventually rejected, conditional increases were in effect for nearly five (5) years.
- The average review period was 842 days. (2 years and 4 months).