Summary of the Comments
by the Real Estate, Housing and
Land Use Section and
its Standing Committee on
Rental Housing
on the Proposed Regulations to Implement
the Rental Housing Act of 1985
Capital Improvements Amendment Act of 1989

Effective October 19, 1989, Section 210 of the Rental Housing Act of 1985 (i.e., the Rent Control Law) was amended in several important respects. Section 210 of the Rental Housing Act of 1985 provides for the approval by the Rent Administrator of capital improvements performed by a housing provider with respect to a housing accommodation, and the granting of a commensurate rent ceiling increase in return for the improvements. On October 19, 1989, the Rental Housing Act of 1985 Capital Improvements Amendment Act of 1989, D.C. Law 8-48 (the "Amendments Act") amended Section 210 to provide for the inclusion of interest in the calculation of the increase, to provide that the increase is a temporary "surcharge" and to amend procedural portions of Section 210.

On December 22, 1989 the Rental Housing Commission published a Notice of Emergency and Proposed Rulemaking setting forth its proposed amendments to the Regulations, in order to implement the Amendments Act. The Notice of Emergency and Proposed Rulemaking is attached to the enclosed draft comments.

The enclosed draft contains the comments of the Real Estate, Housing and Land Use Section, through its Standing Committee on Rental Housing, on the Proposed Regulations. The comments are intended to suggest clarification of the procedures proposed, to correct typographical errors, and to suggest ways in which to correct portions of the Proposed Regulations which are inconsistent with the language of the Amendments Act or its legislative history.

Please note that the suggested changes shown in the mark-up of the Notice of Emergency and Proposed Rulemaking attached to these comments will be inserted in typewritten form prior to submission to the Rental Housing Commission.

January __, 1990

BY MESSENGER

Chairperson Ruth Banks
District of Columbia Rental Housing Commission
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and

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Re: Emergency and Proposed Regulations to Implement the Rental Housing Act of 1985 Capital Improvements Amendment Act of 1989

Dear Chairperson Banks and Commissioners:

The Real Estate, Housing and Land Use Section of the District of Columbia Bar, through the Subcommittee on Capital Improvements of the Section's Standing Committee on Rental Housing, hereby submits its comments on the Proposed Rulemaking to implement the Rental Housing Act of 1985 Capital Improvements Amendment Act of 1989, D.C. Law 8-48 (the "Amendments Act"). The Commission's proposed regulations were published in the District of Columbia Register on December 22, 1989 at pages 8537-8545 (the "Proposed Regulations").

The Subcommittee on Capital Improvements is comprised of Ms. Noreen Beiro of American Security Bank, N.A., Eric Rome, Esq. of Eisen & Rome, P.C., Eric Von Salzen, Esq. of Hogan &

The views expressed herein represent only those of the Real Estate Housing and Land Use Section of the District of Columbia Bar nad not those of the D.C. Bar of of its Board of Governors.

Hartson, and Vincent Mark J. Policy, Esq. of Greenstein DeLorme & Luchs, P.C. Ms. Beiro, on behalf of American Security Bank, N.A., has been actively engaged in the lending field with respect to rental housing and capital improvements for several years. Messrs. Rome, Von Salzen and Policy frequently appear before the Rental Accommodations and Conversion Division and the Rental Housing Commission in the representation of clients with respect to capital improvement petitions.

The fundamental purpose of the Proposed Regulations is, of course, to establish a clear and workable procedure for implementing the provisions of the Amendments Act. The Subcommittee believes that, generally, the Proposed Regulations would fulfill that purpose; however, the Subcommittee further believes that a few modifications to the Proposed Regulations are required, in order to avoid confusion and to fill in gaps in the Proposed Regulations.

We explain the reasons for each of our proposed changes below in this letter. In order to further facilitate your review, we have attached to this letter a marked-up version of the Notice of Emergency and Proposed Rulemaking, on which we have inserted the precise language changes which we propose should be made. While our comments below are extensive and perhaps difficult to visualize at times by simply reading this letter, we respectfully suggest that review of the enclosed mark-up will make clear how we believe the Proposed Regulations should be modified.

Mr. Rome has asked that we advise the Commission that, while he joins in this letter generally, he wishes to submit separate comments to the Commission which may differ in some respects from the proposed changes set forth below. Mr. Rome's separate comments will be submitted under separate cover letter.

The Subcommittee's specific proposed changes, and the reasons therefor, are as follows:

1. Section 4210.16(c). This provision describes the capital improvement petitions to which the Amendments Act and the new Regulations will apply. We have three comments on this proposed subsection:

(i) Subsection (c) states that the Amendments Act and the new Regulations will apply only to capital improvement

petitions filed on or after the effective date of "the Act." From the context, it appears that the intention is that the new Regulations would apply only to petitions filed on or after the effective of the Amendments Act. However, subsection (c) uses the term "the Act", which in the context of existing Regulations, specifically Section 3800.5, means the Rental Housing Act of 1985. This ambiguity could be construed to mean that the new Regulations would be applicable to all capital improvement petitions filed under the Rental Housing Act of 1985, since it became effective on July 17, 1985. Clearly, that is not the intention of the Amendments Act. Therefore, we suggest that it is of critical importance that subsection (c) be revised by inserting the word "Amendments" before the word "Act" in the last line thereof, as shown on the mark-up attached hereto.

(ii) Subsection (c) also refers to petitions filed on or after the effective date of the [Amendments] Act. We believe that it might be helpful to laypersons to specify the effective date to which reference is made, and this can be done by changing the third line of subsection (c) to read "petitions filed on or after October 19, 1989, the effective date", etc., as shown in the attached mark-up.

(iii) We suggest that it would be advisable to determine from the Rent Administrator whether there were any capital improvement petitions filed on or after October 19, 1989, but which were filed on the old capital improvement petition form prior to the effective date of the Emergency Regulations (December 22, 1989). If there are such petitions pending, then we suggest that it would be advisable to further modify subsection (c) to state that such petitions will be decided under the law and Regulations in effect prior to the Amendments Act. This would allow such petitions to be processed under the old law, and would avoid the necessity of resubmitting the petition on the new form and starting the proceeding all over again. If there are no such petitions pending, then this proposed change would be unnecessary.

All of the foregoing proposed changes are shown in the attached mark-up at Section 4210.16(c).

In general, apart from the comments above, we believe that Section 4210.16 correctly expresses the intention of the Amendments Act and that it is in accordance with previously

decided case law. 1880 Columbia Road, N.W. Tenants' Assoc. v. RAC, 400 A.2d 333,338 (D.C. 1979).

2. Section 4210.17(a). This subsection provides the formula for building-wide capital improvement increases. We have two comments on this proposed subsection:

(i) Subsection (a) refers in the third line to amortization of "a loan in" an amount therein specified. Section 4210.22(b), however, correctly provides that there may be no loan at the time of the hearing, or in connection with the capital improvements. We therefore suggest that the phrase "a loan in" be eliminated from the third line of subsection (a), in order to eliminate potential confusion with respect to these provisions of the Regulations.

(ii) The phrase "bearing interest at" in the sixth line of subsection (a) should be changed to read "and interest thereon at", and the remainder of the text should remain the same. We suggest this modification as a technical matter because the amount referred to in this subsection technically does not "bear" interest, but rather interest is charged on that amount.

3. Section 4210.17(c). In the sixth line of subsection (c), the reference to Section 4210.17 in the middle of that line appears to be a typographical error. The reference "4210.17" should be deleted.

4. Section 4210.18(a). The same changes should be made in this subsection as are described in Comment 2 above. That is, the phrase "a loan in" should be deleted in line three and the phrase "bearing interest at" in line six should be changed to "and interest thereon at", for the same reasons as stated in Comment 2 above.

5. Section 4210.18(b). At the end of the first line in subsection (b), there is a reference to "clause (4)". This appears to be a typographical error, and the correct reference should be "clause (a)".

6. Section 4210.19(a). In the fifth line of subsection (a), there is a reference to Section 4210.19. This appears to

be a typographical error. The reference "4210.19" should be deleted.

7. Section 4210.19(b). We believe that this subsection contains a substantive error. Beginning in line 11 of this subsection, the Proposed Regulations state that "capital improvement rent ceilings surcharges first granted after the effective date of the Amendments Act shall be excluded from the rent ceiling . . ." We suggest that this provision is inconsistent with the provision in Section 4210.16(c) that the Amendments Act and the Regulations only apply to capital improvement petitions filed on or after the effective date of the Amendments Act.

To our knowledge, there are in fact petitions which were filed prior to the effective date of the Amendments Act, but which were not decided until after that effective date (and some have still not been decided). Under Section 4210.16(c) the Amendments Act and the new Regulations would be entirely inapplicable to those petitions, regardless of when they are decided. Nonetheless, under the proposed Section 4210.19(b), as it is currently phrased, the provision of the Amendments Act excluding the surcharge from the rent ceiling would apply to those petitions because they would be "first granted after the effective date of the Amendments Act." We believe that this latter phraseology is incorrect in light of the total inapplicability of the Amendments Act to such petitions under Section 4210.16(c). Accordingly, in order to eliminate this inconsistency, we suggest that the sentence beginning in the eleventh line of Section 4210.19(b) be changed to read: "Capital improvement rent ceiling surcharges to which these Regulations are applicable under Section 4210.16(c) shall be excluded from the rent ceiling" and then continue as in the present text.

We also note that in the seventeenth line of Section 4210.19(b) the phrase "for such rental unit" is repeated twice. The second occurrence of this phrase should be eliminated, as shown on the attached mark-up.

8. Section 4210.19(d) (page 8541). This subsection deals with the abatement of the surcharge. It contains two parentheticals which we believe should be eliminated. These are lines 8-11 "(by subtracting the dollar amount of the monthly capital improvement rent ceiling surcharge from the then existing monthly rent ceiling)" and lines 14-17 "(by

subtracting the dollar amount of the monthly capital improvement rent surcharge from the then existing rent charged)". From the context of this subsection apart from these parentheticals, we believe that it is clear how the two abatements in question are to be calculated, so that the two parentheticals referenced above are unnecessary. Moreover, we believe that both of these parentheticals are confusing. For example, abating the capital improvement rent ceiling surcharge by subtracting the surcharge "from the then existing monthly rent ceiling" is confusing, because the surcharge is already excluded from the rent ceiling for purposes of Section 4210.19(b). Similarly, the abatement of the rent surcharge by subtracting the rent surcharge from the then existing rent charged may not lead to a correct result, because the existing rent charged would not include the capital improvement rent surcharge if the housing provider has not in fact begun to charge that surcharge.

9. Section 4210.19(e) (page 8541). Subsection (e), in the second and third lines refers, respectively, to Section 4210.17(i) and Section 4210.18(i). These references should instead be to Section 4210.17(a) and Section 4210.18(a), respectively, as shown in the attached mark-up.

10. Section 4210.19(f) (pages 8541-8542). This subsection sets forth the procedure for a "Certificate of Continuation". We believe that there is an important substantive gap in subparagraph (1) (page 8542) of this Proposed Regulation, which results in it not adhering to the legislative intent of the Amendments Act. The intent of the Amendments Act was that a housing provider would recover in rent all costs, service charges and interest in connection with the capital improvement. See Introductory Remarks of Councilmember Nathanson, September 29, 1987 and January 17, 1989, emphasizing complete recovery, including debt service.

However, subparagraph (1) on page 8542 of the Proposed Regulations would not accomplish that purpose. It states that the Certificate of Continuation shall include the "total costs, including interest and service charges, of the capital improvements, which shall be based upon such costs, interest and service charges as were approved by the Rent Administrator." This approval by the Rent Administrator would occur in the decision on the petition.

There are at least two instances in which the actual amount of interest will not be calculable at the time of the

decision and thus cannot be included therein, i.e., when the loan is a "floating rate" loan (for example, two points over the prime rate) and when the housing provider has not secured the loan until after the decision. In both of these cases, the applicable interest rate used in the decision would be the hypothetical interest rate set forth in Section 4210.22(b). If after the decision of the Rent Administrator the actual interest rate payable on the loan was determined to be higher than the hypothetical interest rate, then under subsection (1) on page 8542, the housing provider would not recover all interest payable to the capital improvements, contrary to the legislative intent of the Amendments Act. This is because the only interest includable in the Certificate of Continuation under subsection (1), as presently drafted, would be interest as "approved by the Rent Administrator". Since the increase in interest would occur after the decision under the foregoing example, it would not have been approved by Rent Administrator, and therefore would not be includable in the Certificate of Continuation. (If the interest rate decreases, Section 4210.19(d) already requires that the surcharge be abated when full recovery has occurred, so no further change is necessary in that respect.)

We do not question that any interest included in the Certificate of Continuation should be the subject of review by the Rent Administrator. However, in order to faithfully implement the Amendments Act's intention that all interest is to be recovered, it must be recognized that the hypothetical interest provision is only to make the calculation feasible at the time of decision, because the determination of the actual amount of interest may not be possible at the time of the hearing or at the time of the decision. Nonetheless, when the actual amount of interest becomes determinable, it is recoverable under the Amendments Act. Therefore, a procedure must be established for the Rent Administrator to review the actual interest and for its inclusion in the Certificate of Contribution when that interest can be determined. Otherwise, this subsection would be subject to challenge, as contrary to the Amendments Act.

Accordingly, we suggest the following two changes:

(i) In subparagraph (1) on page 8542, we suggest the inclusion of a parenthetical (shown on the attached markup) which states that the terms of the loan approved by the Rent Administrator shall be set forth in the decision on the

petition and any amendment to that decision. These terms would include the amount of principal, the amount of service charges and the interest rate (i.e., the formula by which interest is calculated under the loan documents).

(ii) As to review and approval by the Rent Administrator, we suggest adding to Section 4210.22 (on pages 8544 and 8545) a new subsection (b), which provides for the filing of a Motion to Amend Capital Improvement Decision, by which a motion could be filed to amend the decision to include interest which turns out to be higher (or increases above) the amount of interest included in the capital improvement petition approved by Rent Administrator. (As noted above, no further change is required with respect to decreases in the interest rate, because Section 4210.19(d) already covers that circumstance.)

The specific language which we suggest to implement the foregoing changes is shown on page 8542 and in Insert A following page 8545 of the enclosed markup.

We submit that these changes are necessary in order to allow the inclusion of all interest actually payable (and not just hypothetical interest), while at the same time assuring that only interest reviewed and approved by the Rent Administrator is included in the Certificate of Calculation.

11. Section 4210.19(g). We have several comments on this section:

(i) On page 8542 of the enclosed mark-up, subsection (g) (in the second and fifth lines) contains two references to Section 4210.19(e). The correct reference is to Section 4210.19(f), as shown on the attached markup. Also, in the fourth line of subsection (g), it appears to us that the word "filing" should instead be "filed".

(ii) Towards the end of subsection (g), as it appears on page 8543 of the enclosed mark-up, at the end of the twelfth line, it appears to us that the phrase "or as set forth in the event no audit is permitted or conducted" is incomplete. We believe that it should read "or as set forth in the Certificate of Continuation in the event no audit is permitted or conducted", and then continue as in the present text.

(iii) In the fifteenth line of page 8543 (subsection (g)) the sentence beginning with "Any funds collected as part of the surcharge" is made somewhat ambiguous by the use of the word "funds". We suggest that this sentence would be more clear if it were changed to read "Any portion of the rent collected which is based on the capital improvement rent ceiling surcharge during the pendency of an audit", and then continue as in the present text.

(iv) The last line of subsection (g), as it appears on page 8543, provides that a refund is to be made in full within 60 days after the issuance of a decision of the auditor. The audit is conducted according to the procedure set forth in section 4209.19 of the Regulations, i.e., the hardship audit procedures. Under that procedure, a party may file exceptions and objections to the decision of the auditor, and is entitled to a hearing and decision by the Rent Administrator on those exceptions and objections before being required to take action. Section 4209.19(f). We therefore believe that the refund referred to at the end of subsection (g) should be made in full within sixty days after the "issuance of the decision of the Rent Administrator." If no exceptions or objections are filed, the decision of the auditor becomes the decision of the Rent Administrator under the existing procedures of Section 4209.19.

12. Section 4210.20. The word "Whether" in the first line of this section appears to be a typographical error. It should instead be "Where".

13. Section 4210.21(a). This subsection sets forth the definition of the term "interest", which is a key definition under the new Regulations. We believe that the inclusion of the phrase in this definition that interest is the compensation "paid by the housing provider to a lender" causes confusion.

Under Section 4210.22(b), it is clear that in the absence of any loan, the housing provider is to include the hypothetical interest calculated as provided in Section 4210.22(b). The statement in the definition of "interest" in Section 4210.21(a) that interest means all compensation "paid by the housing provider to a lender" is in conflict with Section 4210.22(b) in this respect, in that the definition of interest implies that there must be a loan, whereas Section 4210.22(b) is to the contrary. The Amendments Act contains no requirement that there be a loan for the capital improvements,

and we suggest that it should not be policy of the Commission to promulgate Regulations which tend to compel housing providers to obtain loans and further encumber housing accommodations, where it is possible for the housing provider to perform capital improvements using cash flow from the housing accommodation or the housing provider's own resources without a loan.

Accordingly, in order to eliminate the above-described conflict, we suggest that the phrase "paid by the housing provider to a lender" should be eliminated from the definition of interest in Section 4210.21(a).

14. Section 4210.22. We have several comments on this Section:

(i) The introductory clause to this Section (page 8544) states that "The amount of interest which shall be includable in a capital improvement petition by a housing provider shall be" as stated in the succeeding subsections. As discussed above, it is the interest actually payable by the housing provider which is recoverable, and not just the hypothetical interest which is stated in subsection (b) of Section 4210.22. Rather, the hypothetical interest is used in the calculation for purposes of calculating the surcharge at the time of the hearing and decision. In order to make this point more clear, we suggest that the introductory language of Section 4210.22 should be revised to read as follows (as shown in the attached markup):

> The amount of interest which shall be includable by a housing provider in a capital improvement petition for purposes of the calculation under Section 4210.17(a) or Section 4210.18(a), as applicable, shall be:

(ii) In order to include the procedure for a Motion to Amend, as described in Comment 10 above, we have redesignated the existing introductory clause of Section 4210.22 as subsection (a) thereof. The procedure for the Motion to Amend would be set forth in a new subparagraph (b) in that same Section and would be as shown in Insert A in the attached mark-up following page 8545. Similarly, we have redesignated subsections (a) and (b) in the Proposed Regulations as (1) and (2) in order to conform this Section to the addition of the new subsection (b) which we propose.

(iii) On page 8545 of the Proposed Regulations, the existing subsection (a) (which would be subsection (1) as proposed above) states that "the amount of interest includable shall be the amount of interest payable by the housing provider at a fixed rate of interest on a loan of money used to perform the capital improvement. . . ." In recent years, it commonly occurs that a loan is made to a housing provider for acquisition costs and other purposes, as well as for costs of capital improvements. In order to avoid confusion as to whether the entire loan must be used to perform the capital improvement in order for the interest to be includable, we suggest that this subsection be clarified to acknowledge such multi-purpose loans, by changing the text to read as follows:

> The amount of interest payable by the housing provider at a fixed rate of interest on a loan of money used to perform the capital improvement or on that portion of a multi-purpose loan of money used to perform the capital improvement, [and then continue as in present text]

(iv) As to Section 4210.22(b) on page 8545, which would become subsection (2) under our proposal, beginning in the fourth line, the description of the reference to United States Treasury Bills should be modified in the following manner:

> (i) a rate for seven year United States Treasury constant maturities [and then continue as in present text]

Technically, the instruments referred to in Publication H.15(519) are described therein as "United States Treasury constant maturities", and this language should be used in the Regulations for clarity and consistency.

15. Section 4210.23. In the fifteenth line of this proposed section, following the word "thereafter", we believe that the word "and" should be deleted. It appears to have been inserted by typographical error, and it is unnecessary to the substance of the sentence.

The Real Estate, Housing and Land Use Section of the Bar, the Subcommittee on Capital Improvements, and the Standing Committee on Rental Housing appreciate the opportunity to

submit these comments on the Proposed Regulations. If the Commission has any questions regarding the foregoing comments or requires any further information, we would be pleased to provide it. In that event, please contact Mr. Policy at 452-1400.

The regulations of the Bar require that we advise the Commission that the views expressed herein represent only the views of the Real Estate, Housing and Land Use Section and the Standing Committee on Rental Housing and not those of the District of Columbia Bar or its Board of Directors.

Respectfully submitted,

Vincent Mark J. Policy
Chairperson
Subcommittee on Capital Improvements

VMP:wes

By Messenger/w/encl.
cc: Howard E. Lewis, Esq., Rent Administrator
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