DORSEY
DORSEY & WHITNEY LLP

LAWRENCE R. MCDONOUGH
Pro Bono Counsel
(612) 492-6795
FAX (612) 677-3220
mcdonough.lawrence@dorsey.com

March 14, 2014

Hon. Joan Zeldon, Chair
Drafting Committee to Revise the Uniform Residential Landlord and Tenant Act
District of Columbia Superior Court
515 Fifth St., N.W, Room 219
Washington, DC 20001

RE: Tenant Comments on the Draft Revised Uniform Residential Landlord and Tenant Act
By Lawrence R. McDonough, Alice Vickers, John VanLandingham, Florence Wagman Roisman, Phil Lord, Jeffrey M. Hearne, Kevin Quisenberry, Ronnie Reno, Maryellen Griffin, Cathy Haukedahl, Jeremy Rosen, Eileen D. Yacknin, and Shay M. Farley

Dear Judge Zeldon,

We are writing as observers and tenant advocates regarding the work of the Drafting Committee on a Revised Uniform Residential Landlord and Tenant Act. We believe that the Committee would benefit from receiving written comments that contrast with the proposals of the National Apartment Association (NAA). We will focus our comments on items listed in the agenda for the March meetings.

Section 103. Scope

The Committee will consider exceptions to the Act for geriatric institutions and educational dormitories. These residencies should not be excluded. There are many private and subsidized housing programs that include services as part of the residency, but if it is the only housing for the resident, as opposed to a stay in a hospital or treatment facility where the patient still maintains housing elsewhere, they should not be exempt. Exempting such housing from the Act leaves the most vulnerable residents subject to lockouts that are prohibited by the Act.

Residents in dormitories and fraternal organizations are no different than conventional tenants. They pay rent and reside there subject to the rules of the owner. The only difference is that the owner either is an educational institution or has some connection to such an institution. Those owners should not be any freer to lock out their residents than conventional landlords.

Section 601. Failure to Pay Rent; Other Noncompliance with Lease by Tenant

We agree that the tenant should not have the right to cure violations that have created an imminent and serious threat to the health and safety of other tenants on the premises. We disagree that any type of criminal activity on the property, regardless of severity, should preclude the right to cure. "Criminal activity" is not defined or qualified, and would include many minor and even petty things, such as jaywalking or littering. Criminal and non-criminal activity should be judged on its threat to the health and safety of other tenants on the premises. We also oppose including landlord attorneys' fees here, for the reasons discussed below.

Attorneys' Fees and Exemplary Damages

We believe that attorney's fees and exemplary damages should be available only for more egregious and willful conduct where the wronged party might have difficulty obtaining counsel. The purpose of the former is to encourage counsel to take on such cases, and the purpose of the latter is to deter the conduct.

For instance, a tenant willfully locked out by her landlord and who may have no access to funds to hire an attorney should be able to recover her attorneys' fees from the landlord. The availability of exemplary damages might discourage the landlord from locking out the tenant. On the other hand, a tenant's nonpayment of rent may not be egregious or willful and should not give rise to an attorneys' fees claim by the landlord. It also is unlikely that the threat of exemplary damages would induce a tenant who is unable to make a rent payment to tender such payment.

We support continuing the prohibition of attorneys' fees provisions in leases benefiting the landlord in § 203. If the Committee choses to remove that prohibition, it should require that any attorneys' fees provision in a lease benefiting the landlord also benefit the tenant. *See, e.g.,* Minn. Stat. § 504B.172.

NAA Proposals

Section 602. Waiver of Landlord's Right to Terminate

The NAA proposes to move the law backwards by limiting the waiver effect of accepting rent with knowledge of the tenant's noncompliance. Many states have over 100 years of case law recognizing the type of waiver in this section. Contrary to the NAA's claim, there is nothing in the section that requires the landlord to accept rent.

Section 701. Landlord's Access to Dwelling Unit

The NAA proposes an exception to the notice requirement for routine visits. Requiring notice before all nonemergency visits respects tenants' possessory interests in their homes, including privacy and peaceful enjoyment, and is not burdensome.

Section 702. Landlord and Tenant Remedies for Abuse of Access

The NAA attempts to place on the same level (1) the invasion of privacy by the landlord by entering the unit with no prior notice, and (2) the tenant not allowing the landlord into the unit. While the former always involves an unannounced intrusion on the tenant's exclusive possession of the property, affecting the tenant's use and enjoyment of the property, the latter only would be serious depending on the facts. The tenant's reasonable expectation of privacy can be damaged by even a single abuse of access. Unlike the landlord having to reschedule work on the property, it is difficult to quantify that loss of trust and sense of privacy. The committee has appropriately viewed the violations differently for the purposes of setting damages.

Section 802. Termination upon Death of a Tenant

The NAA raises a false issue with this section, which is limited to a spouse *who resides in the dwelling unit*, so the hypothetical raised by NAA is extremely unlikely and does not justify revising this section.

Section 803. Holdover Tenancy

Holdover tenants already are discouraged by the possibility of eviction, loss of the deposit, and bad references. The committee is right in limiting additional penalties to willful conduct in bad faith.

Section 901. Retaliation Prohibited

Some of the NAA's most radical recommendations concern retaliation protections for tenants. The NAA states without data that retaliation laws often are abused. We have seen many cases of retaliation by landlords and only a few tenant attempts at abuse. Some states limit protected tenant activities to those done in good faith, just as this section does, protecting landlords from abuse. We do agree with the NAA that good faith is an appropriate required element in the tenant's protected activity.

Section 904. Presumption of Retaliatory Conduct

The NAA argues that the six month presumption period is arbitrary. To the contrary, six months is not an unreasonably long period of time for presuming retaliatory conduct when there is a basis for alleging retaliation. The purpose of a presumptive period, a concept adopted in many states, is that it is hard for the tenant to prove what is in the landlord's mind. The presumptive period requires the landlord to prove that a sequence of events that suggests retaliation is not. As with retaliation claims in other contexts, timing is a relevant factor in determining whether conduct evidences retaliation, and a six month period of time is not an unreasonable period for imposing this rebuttable presumption.

In fact, we believe that committee should retain the period of one year from the original Act. In § 904 the retaliation presumption period has been reduced from one year to six months. Unless there is strong evidence that the one year period has been burdensome on landlords, it should not be changed. Some states have no time limit. Since the most common term lease is one year, keeping the one year

presumption period is appropriate. Including a standard for rebutting the presumption of retaliation is an improvement, but removing the word "substantial" would allow for a trivial reason for eviction. "Substantial" should be returned to the standard. *See, e.g., Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976).

The NAA also asserts punitive damages are needed in this chapter. There is no evidence of abuse of retaliation protections. If the tenant asserts the claim in bad faith, existing state court penalties for frivolous litigation would apply.

Other Agenda Items

Domestic Violence Sections

The American Bar Association Commission on Domestic and Sexual Violence and the Oregon Law Center are submitting comments on domestic violence issues. We concur with those proposals.

Article 10 – Disposition of Personal Property

Section 1001 gives the tenant only 8 days to contact the landlord after the landlord sends notice of personal property left on the premises. This period is too short, especially given potential delays in forwarding mail. Many states have longer periods, and rightfully so. The committee should extend the period to 30 days.

The NAA states that there is no need for notice to the tenant, claiming without citation that tenants already know their rights and obligations at the time of moving. The NAA claims, again without authority, that property left by the tenant must have been intentionally done. The NAA also claims that an eviction writ gives the tenant ample notice of the execution date. In Minnesota, the writ gives the tenant only 24 hours' notice. Minn. Stat. § 504B.361. These sort of unfounded assumptions are the basis for radical proposals to allow landlords to immediately throw out tenants' property. In many states, landlords have operated for decades under the requirement to safeguard the property for a reasonable period of time having given notice to the tenant of disposition of the property.

Article 11 – Security Deposits, Fees, and Unearned Rent

Section 1101 increases the payment beyond the first month rent to 2 times the rent. This effectively doubles the deposit (regardless of what it is called). This is worse than the earlier draft's increase in the deposit from 1 to 1½ month's rent.

While the increase might appear insignificant to middle and upper income tenants, it is a lot for tenants with lower incomes. Some recent studies have found an increase in the percentage of tenants paying one-half of their income for rent. Most tenants preparing to move have to pay to secure a new apartment while paying rent at the current apartment and awaiting return of the deposit for the current

apartment. Tenants who cannot afford to move become captive to their current landlord and have much to risk by attempting to enforce their rights. Allowing landlords to charge effectively three-months' worth of rent up front will reduce housing opportunities available to lower-income renters and may have the effect of offending federal and state fair housing laws. The deposit limit should not be increased.

In §1104 the landlord has 30 days to decide about disposition of the deposit. It does not take 30 days to determine if the tenant owes rent, or the cost of remedying damage caused by the tenant. Many states give the landlord less time to return the deposit and interest or send a deposit retention notice. The Committee should reduce the period.

The NAA calls for making the deposit sections more burdensome on tenants. We urge the committee to reject the NAA proposals and consider ours.

Thank you for considering these comments.

Sincerely,

/s/
Lawrence R. McDonough
Pro Bono Counsel, Dorsey and Whitney
Minneapolis, MN

/s/
Alice Vickers, Esq.
Director, Florida Alliance for Consumer Protection
Tallahassee, FL

/s/
John VanLandingham, Esq.
Lane County Legal Aid & Advocacy Center
Eugene, OR

/s/
Florence Wagman Roisman, Esq.
William F. Harvey Professor of Law and
Chancellor's Professor
Indiana University Robert H. McKinney School of Law
Indianapolis, IN

/s/
Phil Lord, Esq.
Executive Director, Tenant Union Representative Network
Pennsylvania, PA

/s/
Jeffrey M. Hearne, Esq.
Advocacy Director , Tenants' Rights Project, Legal Services of Greater Miami, Inc.
Miami, Florida

/s/
Kevin Quisenberry, Esq.
Community Justice Project
Pittsburgh, PA

/s/
Ronnie Reno, Esq.
Public Justice Center, Inc.
Baltimore, MD

/s/
Maryellen Griffin, Esq.
Staff Attorney and Director of Housing Task Force, Vermont Legal Aid
St. Johnsbury, VT

/s/
Cathy Haukedahl, Esq.
Executive Director, Mid-Minnesota Legal Aid
Minneapolis MN

/s/
Jeremy Rosen, Esq.
Policy Director, National Law Center on Homelessness & Poverty
Washington, D.C.

/s/
Eileen D. Yacknin, Esq.
Neighborhood Legal Services Association
Pittsburgh, PA

Shay M. Farley, Esq.
Legal Director, Alabama Appleseed Center for Law & Justice, Inc.
Montgomery, AL