VERMONT LEGAL AID, INC.

7 COURT STREET - P.O. Box 606
MONTPELIER, VERMONT 05601
(802) 223-6377 (VOICE AND TTY)
FAX (802) 223-7281
(800) 789-4195

OFFICES:
BURLINGTON
RUTLAND
ST. JOHNSBURY

OFFICES:
MONTPELIER
SPRINGFIELD

February 19, 2016

Hon. Helen Head, Chairwoman
House Committee on General and Military Affairs
Statehouse
Montpelier, VT 05663

Dear Madame Chair and Members of the Committee,

Thank you for inviting testimony on H.797, "An act relating to residential rental agreements." Unfortunately, I am leaving the state shortly for a long-planned family vacation so I am unavailable next week.

As I understand it the purpose of the bill is to ensure a landlord may access a rental unit with minimal notice to resolve a major habitability issue. It also amends Title 12 to provide that a landlord may request rent be escrowed into court for any alleged arrearage prior to filing of the complaint.

Vermont Legal Aid is sensitive to the desire of landlords to make repairs when requested and necessary and so we appreciate the intent of the bill. However, for the reasons set out below, the proposed legislation is problematic, as a consequence we oppose the bill.

Currently, the existing law on access contains three times a landlord may enter a dwelling: First, the landlord may enter with the tenant's consent, *which shall not be unreasonably withheld.* The law anticipates that if a tenant makes a habitability complaint they must have a good reason to withhold consent from the landlord after a request to make repairs. And, in fact, there may be good reasons a tenant would temporarily deny access. For example, consider new parents with infants on a sleep schedule. Or, a person who is very ill who requires time to recover, or they may have to work, go to school, or be someplace else and would rather schedule repairs at a time when they can be present especially if they do not know the repair workers. Second, the landlord may always enter to make repairs between the hours of 9:00 a.m. and 9:00 p.m with 48 hours notice. Finally, the landlord may enter without consent or notice where there is a reasonable belief of imminent danger to any person or property. See 9 V.S.A. § 4460.

The proposed legislation (H.797) would amend the current statute so that any time a habitability violation is alleged by the tenant, a governmental entity, or a qualified inspector the landlord may access the unit after providing *one hour's notice*. In theory, the proposal is to ensure the landlord may access a rental unit, make repairs, and prevent or avoid withholding. As noted above, there may be very good reasons why one hour's notice is insufficient or objectionable to a tenant.

A tenant's right to withhold rent for violation of the warranty of habitatility is also governed by existing statute. 9 V.S.A. § 4458. The tenant remedy of rent withholding provides the landlord with a "reasonable time" to make repairs after "actual notice" of noncompliance by the tenant, a governmental entity, or a qualified independent inspector. If the tenant fails to do so they are not entitled to withhold rent under the statute. Because the law already gives the landlord "a reasonable time" to respond to a habitability violation before a tenant may withhold, the tenant's refusal to allow access should not prejudice the landlord – it would either be at the tenant's request to delay (in which case they've agreed to the delay), or it would be unreasonable. So, it is unclear what this proposal intends to solve.

The reality is that one hour's notice is so little time the tenant may not actually have any notice at all (in cases involving a governmental entity or a qualified inspector where the tenant is not the person making or providing the complaint). So, that is one concern. Another concern is what constitutes "notice." If an email or telephone call constitutes notice and the tenant has not checked their messages they may not have any *actual* notice at the time the landlord enters the premises. The best practice is always to have the parties reach agreement about what is reasonable in terms of access. And, in most cases they do.

Generally speaking, a tenant should be assured some right to privacy and reasonable notice of a landlord's intent to enter their home. Title 9 provides balanced guidance about how and when a landlord may access a rental unit and what notice is required – and under what circumstances a tenant may withhold rent.

Vermont Legal Aid opposes the proposed legislation because existing law already provides a balanced approach to landlord access – including immediate access with no notice requirement at all in cases of danger to persons or property – and because it contains restrictions on when a tenant may withhold rent. Mere allegation of a habitability violation is not a basis on which a tenant may withhold rent. The tenant must also provide a "reasonable time" within which the landlord may respond. So, the need for a landlord to access a rental unit with an hour's notice after notification by the tenant or another agent is unnecessary for purposes of safeguarding the landlord's interest in the rent, unless there is a danger to persons or property – and in that case the law already provides immediate access without notice.

Finally, amending Title 12 to allow the plaintiff to ask the court to require payment of all rent that accrued prior to the time of filing represents a sea-change in the way the court process currently works and would significantly disadvantage tenants with legitimate habitability disputes. This is true for three reasons:

First, it would take a complicated legal issue and turn it into essentially a summary process. Rent escrow hearings are typically set for approximately 15 minutes and are generally for the court to determine if there is, in fact, a rental agreement and whether there is any rent owing. If so, the court will issue an order that rent be paid into court during the pendency of the proceedings (going back to the date of filing) and reserves final judgment about the merits of the case for a final hearing.

Second, it would shift the burden of proof from the landlord to show simply that there is a contract for rent and rent is owing to the tenant to show at a very preliminary stage that there is a defense to the demand for rent. That would require more time and evidence than this preliminary and expedited process currently allows and would greatly prejudice the ability of tenants to pull together the materials they might need to prove a meritorious defense to the eviction action and demand for rent. We would highly encourage the committee to contact the judiciary for a discussion of how the process currently works and what process should be due the litigants and the additional demands this could place on the courts in terms of the time required for such hearings should the law be amended in this manner.

Finally, amendment of Title 12 along the lines set out in H.797 would significantly prejudice tenants who may have incurred expenses and paid out of pocket to correct defects (e.g., paying for heat that was supposed to be included in rent which can be very expensive in winter), but who would be very unlikely to be able to afford both those out of pocket payments and all rents alleged by the landlord prior to filing.

When a court orders rent to be paid to the court and the tenant fails to pay, the landlord is entitled to a default judgment upon request. This proposed change would take a legitimate defense to withholding and make it virtually impossible for a tenant with incurred out-of-pocket expenses to exercise their rights under the statute without a serious risk of default and loss of housing prior to final hearing. Turning complex disputed conditions cases into a summary process requiring the tenant to meet a heavy burden of proof at very preliminary stage is highly prejudicial to tenants and risks diminishing the warranty of habitability to at best a theoretical nicety, and at worst a nullity.

Lawmakers and the courts have a long history of recognizing there are some circumstances wherein the conditions are so bad that tenants should be protected and that one remedy available to them is the withholding of rent. Allowing landlords to assert that all rents allegedly "owed" must be paid into court within 10 days of notice to the parties would represent a substantial departure from that history and tradition and leave many tenants unable to exercise their rights under that subsection of the law as a matter of practice. After default, a subsequent hearing on what rent, if any, was actually owed would be cold comfort to the tenant and her children who just lost their housing even though the withholding is later determined to have been legitimate.

Vermont Legal Aid recognizes the existing statutes governing landlord access and payment of rent into court represent a reasonable balance between the interests of landlords and tenants when conditions problems occur and access for repairs are required. Thank you for your consideration.

Sincerely,

Christopher J. Curtis
Staff Attorney
Vermont Legal Aid, Inc.