Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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PUBLIC HEARING

Bill 18-42, the "Tenant Protection Act of 2009"

Bill 18-92, the "Omnibus Rental Housing Amendment Act of 2009"

Committee on Public Services and Consumer Affairs
The Honorable Muriel Bowser, Chair

Council of the District of Columbia

Thursday, June 4, 2009

Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
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10:30 a.m.

Chairperson Bowser and members of the Committee, I wish to thank you for this opportunity to testify on Bill 18-42, the "Tenant Protection Act of 2009," and Bill 18-92, the "Omnibus Rental Housing Amendment Act of 2009." I am Johanna Shreve, the Chief Tenant Advocate for the District of Columbia at the Office of the Tenant Advocate (OTA). One of the statutory duties of the Office is "representing the interests of tenants and tenant associations in legislative, executive, and judicial matters" (D.C. Official Code § 42-3531.07(2)). The OTA works on multiple levels to fulfill this mandate to better protect tenant rights in the District. First and foremost among these rights is the basic right to safe, decent, and sanitary rental housing which we believe is the focus of these Bills.

Current statistics regarding the condition of rental accommodations throughout the District indicate that there are too many rental accommodations that fail to meet the District's housing codes, and; government does not have a stellar track record in adhering to its own regulations regarding civil enforcement policy (found in section 101 of the District's of Columbia's Municipal Regulations Title 14) which only heightens the problems that tenants find themselves in.

We thank the Committee and the sponsor of the bill (Councilmember Graham) for introducing these important tenant protection measures. And we also applaud the efforts of the many talented housing advocates who helped in the development of this proposed legislation.

While we are in total agreement with the goals of these two bills, we are here today to provide a few suggested alternative recommendations for the Committee's consideration.

Section 2 of Bill 18-92 would give tenants the right to file claims at the Landlord & Tenant Branch of D.C. Superior Court against housing providers who fail to maintain a rental property in compliance with the housing code.

We recommend that the Committee consider suspending this provision for a reasonable (but limited) period of time, such as 100 days or until just after the Council's summer recess.

Section 3 of Bill 18-92 would require the regular inspection of all rental properties in the District. However, DCRA has already implemented their "proactive inspection program" which accomplishes the same goal.

We recommend either that the legislation be amended to make the regular inspection mandate general enough so as not to require any changes at this juncture in the pilot "proactive inspection program," or that consideration of this particular proposal be suspended pending the results of the pilot program. We further recommend that DCRA be required to provide the Council with a report on the results of the pilot program, based on specific enumerated criteria, to assist the Council's consideration of appropriate legislation and adjusted resource allocation, as necessary. We would be happy to work with the Committee, DCRA and interested stakeholders to help develop such reporting criteria.

Section 4 of Bill 18-92 would amend the Civil Infractions Act of 1985 (D.C. Official Code §2-1801.01 et seq.) and the housing regulations (14 D.C.M.R. 102) requiring DCRA, and other relevant agencies, to provide tenants with notices, orders, pleadings, and other papers regarding enforcement actions against housing providers.

We recommend that this section be amended to require that all affected tenants be provided with notice of the commencement of a housing code enforcement action. We also recommend that this section be amended to provide affected tenants with the opportunity to opt-out of receipt of all subsequent documents. If the tenant does not choose the opt-out option, the tenant would receive notification of the initial hearing date and copies of all other documents served upon the housing provider during the enforcement process.

Additionally, inasmuch as there is no provision in the bill to ensure that the government actually include tenants as witnesses in the action, we recommend that all relevant notices and the names and unit numbers of any affected tenant be provided to the OTA. This would enable us to apprise the affected tenants of our availability to facilitate communication with the government and to otherwise provide assistance. At a recent meeting, DCRA expressed their willingness to explore this matter with us. We urge the Committee to engage the agencies and stakeholders in drafting the necessary language.

Finally, we recommend that the Committee amend 14 D.C.M.R. 106 as necessary to clarify that Notices of Infraction, as well as Notices of Violation, must be provided to any affected tenant. We would be happy to work with the Committee and DCRA to draft the necessary legislative language.

Section 5 of Bill 18-92 and Bill 18-42 would encourage increased use of the Nuisance Abatement Fund and would require justification of decisions not to use the Fund before closing a building. In the event that the government does close a building due to housing or building code violations, section 2(c) of Bill 18-42 would require the

owner to locate and pay for temporary housing for the displaced tenants or occupants. If the owner fails to do so, the Mayor must pay for the relocation and temporary housing and assess the costs as a tax lien on the property.

We recommend that pro-active inspections coupled with more pro-active abatement should be given a chance before the Council considers any legislative change to the government's closure authority. However, at the very least, the current list of regulatory priorities found in Title 14, Chapter 15, needs to be revisited. We therefore recommend that the Committee constitute a working group consisting of Committee staff, community stakeholders, OTA, and DCRA. The working group should consider the proposals in Section 5, proposals already developed by OTA, and the current language of 14 DCMR Chapter 15 to develop revised language that would better prioritize the Fund's use, in light of both Fund capacities and limitations and District priorities, while also preserving the Director's discretionary authority. As part of the working group process, the DCRA director should formally respond to suggestions from stakeholders and OTA regarding use of the Fund in specific cases.

We recommend that the Council adopt legislation that would require DCRA to provide in its annual report to the Council regarding the Nuisance Abatement Fund an explanation as to why the Fund was not used in lieu of any closure that resulted in tenant displacement.

We recommend passage of the provision pertaining to condemnations (10 DCMR Chapter 30) which require that tenants of a building subject to condemnation be given the opportunity to present evidence as to tenancy,

housing conditions, housing provider culpability for violations, and the reasons why the building should not be condemned.

Finally, we strongly recommend that the Committee adopt the relocation provisions in section 2(c) of 18-42.

In addition to the above recommendations, I have some further commentary regarding the Bills and two critical recommendations regarding related matters not currently included in the two Bills.

Bill 18-92

Section 2: Tenant Housing Code Enforcement at L&T Court

OTA concurs with the Bill that it is critical to provide tenants with a summary process for housing code claims at D.C. Superior Court. As this Committee is well aware, the law currently only provides summary relief for landlords. The only way for a tenant to get injunctive relief for living conditions that violate District regulations is to literally "court" eviction by withholding rent in the "hope" that the housing provider will attempt an eviction action. Only then can the tenant bring the substandard housing conditions to the court's attention. In choosing this course, the tenant, who typically does not have an attorney, can find themselves walking on the edge of a legal cliff where one false step could mean losing their home, even if the merits are on their side.

In this day and age, if housing providers deserve a summary process to protect their financial interests, there should be no reason why tenants don't deserve a summary process to protect their right to humane living conditions. This procedural discrepancy represents a fundamental inequity, and *the District is behind the curve*

when compared to other jurisdictions such as New York, Massachusetts, Connecticut, and Minnesota.

As this Committee knows, the Court has posed some opposition to this proposal -- in part because the Court believes this proposed legislation interferes with its organization and jurisdiction, thus violating the Home Rule Act (D.C. Code §1-206.02(a)(4)). We are pleased, however, that the Court is making what appears to be a serious and promising effort to address the issue, and thereby moot the argument. Specifically, the Court is currently exploring with stakeholders the creation of a pilot program for expediting tenant claims for housing code violations in the Civil Division. The Court informs us that the program would implement all the major elements in section 2 of Bill 18-92: summary process; affordable Court fees comparable to those at L&T Court; provisional payment of rent into the Court registry; and the various types of relief available in the event of a successful claim. Just as importantly, should the tenant lose her claim, she would not be thrown out of her home.

We *commend the Court* for picking up the initiative on this matter and we believe that this initiative should be given a chance to succeed.

Section 3: Inspection of Buildings

We strongly support the goal of Section 3, and believe that all rental properties in the District ought to be subject to regular inspection. A system of regular inspections is the best way to ensure the elimination of sub-standard building conditions that are currently allowed to fester which leads to circumstances of un-inhabitability and tenant displacement due to constructive eviction or building closures.

As you know, however, DCRA is already engaged in the early stages of a "proactive inspections" pilot program for all rental properties with 3 or more units. The Bill would modify the DCRA pilot program in significant ways. DCRA has testified eloquently about the distinctions between the two approaches, and OTA has no reason to duplicate that testimony.

Section 4: Required notice of DCRA/OAH enforcement proceedings.

Tenants have a fundamental interest in the enforcement of housing code violations found in their homes, and government has a fundamental duty to inform tenants of those enforcement efforts. The initial documents of enforcement are Notices of Violation and Notices of Infraction. Informing tenants of government's enforcement efforts must start with provision of these fundamental documents.

Our understanding of DCRA's position is that tenants are generally entitled to receive Notices of Violation pursuant to initial inspection, but they are not legally entitled to Notices of Infraction, which are issued pursuant to a failed re-inspection of a violation. DCRA informs us that they do provide Notices of Infraction to a tenant upon request. That might be reasonable if it weren't for the logical conundrum that the tenant cannot know to request an issued Notice of Infraction unless the tenant has been made aware that one has been issued.

Limiting discussion to Notices of Violation and Notices of Infraction obfuscates a similarly foundational concept that those documents merely indicate that enforcement action has been initiated. Tenants have a fundamental right to follow that enforcement action through to conclusion. Anything else is akin to showing candy to a baby and then

yanking the candy away and putting it in a bag. A promise has been made, but follow-through is cloaked in darkness.

Notices of Infraction, Notices of Violation, and all other enforcement documents served on the housing provider should to be provided to affected tenants as a simple matter of legal right. Common sense demands it, and tenants deserve no less given the prominent role they must play if enforcement of the District's housing code is going to improve.

Sec. 5. Authority to correct realty violations; repair fund

The Nuisance Abatement Fund (D.C. Official Code § 42-3131.01 *et seq.*) is a critically important housing code enforcement tool which we believe needs to be more effectively -- and more frequently -- deployed. The Fund exists for the purpose of allowing the District to abate housing code violations left unabated by the housing provider. The cost to the District is then imposed on the housing provider as a property tax lien.

As a matter of law, the Mayor may use the Fund to correct *any* unabated housing code violation. And in theory, the Mayor would have the resources in the Fund to do exactly that. After all, it could be said, since this is a "revolving" fund the District should be able to replace any and all money taken from the Fund with monies in the same amount collected from the owner. Thus, theoretically, the Fund should always be restored to the original amount, and that amount should always be available to take on the next case.

The current reality, as we understand it, is that the Fund is under-utilized, thus perhaps reinforcing the notion that the Fund may be sufficient to cure practically any

violation. But a more foundational reality is that the Fund is finite, due to an often protracted, uneven, and uncertain collection timetable, human resource limitations, and other factors. Thus it is imperative that the use of the Fund be prioritized in a manner that reflects sound policy judgments, including saving tenant-occupied buildings where the greatest number of District residents can be helped, and where there is the greatest need in terms of the preservation of affordable housing.

OTA's recommendations suggest that the language of the Bill be amended to clarify just what triggers the requirement for DCRA to investigate and either invoke the Nuisance Abatement Fund or justify not invoking the Fund.

We agree however that it is imperative that the tenant community have a prominent voice in making recommendations to the Director for deployments of the Fund. We believe this is best done through the OTA and stakeholders who -- more than would individual tenants -- have a basis for wide-ranging comparisons regarding the need for the Fund.

Section 5 also provides tenants with a voice when their dwelling has been noticed for condemnation by the Board for the Condemnation of Insanitary Buildings. OTA fully agrees that the tenants, the people who live in a building and have up-close, personal knowledge of the building, should have the right to share their experience and knowledge before the Board. Tenant testimony cannot help but assist the Board in making better decisions regarding whether to condemn a building.

Bill 18-42

Bill 18-42 overlaps with section 5 of Bill 18-92. The import of Bill 18-42 is that before closing an occupied rental building, the government would have to consider correcting the housing code violations using the Nuisance Abatement Fund and justify in writing any decision not to do so.

OTA poses some logistical questions that the Committee would need to think through should it decide to move this provision:

1. Would a term like "impracticable" compel the government to perform any abatement that it would not have in the absence of this requirement?
2. It appears that two outside experts would be required to support the government's determination to close the building: a housing code expert who would assess whether the risk to occupants posed by the violations warrants closure; and a financial expert who would assess whether the condition of the Fund warrants abatement instead of closure. Would the experts have to be from outside the relevant agency and/or from outside the government?
3. Is there not an inherent contradiction, and possible conflicts of interest, in authorizing a private expert to override a determination by a public official such as the Chief Building Inspector, who is vested with the authority to make the relevant determination?
4. Would the government have to pay private experts and what would be the fiscal impact?

5. In each and every instance where tenants must be displaced, is it reasonable and feasible to require the government to abate the violation or violations within 30 days, no matter what the extent or the nature of the violations?

Some may question whether the number of building closures merits any remedial action. DCRA reports that there are relatively few building closures in the District -- 14 or so during the past two years. However, we believe that stakeholders have a very legitimate concern -- namely, that implementation of the proactive inspections program could lead to a significant increase in the number of building closures. Furthermore, stakeholders report that tenants who live in very poor housing fail to report violations for fear that the government will close the building, and thus they will have to move. This fear should be seen in light of the relatively scarce supply of affordable housing in the District. OTA shares this concern that suggests that an increase in the instances of closure and tenant displacement will have a significant financial impact on emergency housing resources.

Still, restricting DCRA's closure authority strikes us as a somewhat draconian response to this problem inasmuch as it has not yet materialized, and better prioritization of the Nuisance Abatement Fund could help reduce the number the number of closures.

Finally, I would like to reference two further ways of strengthening tenant enforcement of the housing code, this time in the administrative hearing context.

Regulations should be amended to clarify that tenant associations have standing before the Office of Administrative Hearings and the Rental Housing Commission to

represent any number of its members. The current legal debate within OAH and the Commission is whether the majority of units or the majority of the head-count must be included in a petition before the tenant association may represent its members. This misses the point that the tenant association is there for all, and each, of its members. Regardless of which current interpretation of tenant association representation prevails, the result is one of waste and inefficiency for all parties and agencies. Only Council action can resolve the underlying standing issue.

Additionally, 1 DCMR § 2927.2 should be amended to require that an OAH judge expand the scope of a hearing to include all tenants affected regarding the same issue or violation in a building. When issues are building-wide, the current regulation grants the judge discretion as to whether to grant relief to all affected tenants or to limit relief to those tenants who participate in the petition process. Judges have been loathe to invoke the expansion of scope, resulting in a gross inequity in which some illegalities are corrected and others in the same building are essentially condoned. Council action would easily and simply alleviate the inequity and place the entire building, and its tenants, on equal footing.

OTA will work with this Committee to more fully flesh out the best ways to address these two items. OTA intends these items for future legislative initiatives; however, should the Committee wish to address them as part of the current legislation, OTA is ready to provide assistance.

Thank you, Chairperson Bowser and members of the Committee, for the opportunity to speak to these important tenant rights matters, and for your willingness to take a serious look at the problems associated with housing code enforcement. This

concludes my testimony. I am happy to answer any questions you may have at this time.