



May 17, 2013

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Office of the Director
D.C. Department of Consumer and Regulatory Affairs
1100 Fourth Street, S.W., Room E500
Washington, DC 20024

RE: OTA Comments on DCRA's Draft Revisions
to D.C.M.R. Title 14

Dear Ms. Stern:

Thank you for the opportunity to comment on DCRA's draft revisions of the Housing Title (Title 14) of the District of Columbia Municipal Regulations. Please note that due to limited time and the broad scope of the revisions, these comments and recommendations are not exhaustive. Rather we anticipate making further comments during the public comment period for the upcoming proposed rulemaking.

At the outset, let me say that I strongly endorse DCRA's efforts to better consolidate and coordinate Title 14 with the Property Maintenance code at Title 12G. We have made an effort to ascertain whether deletions from the former correspond to current or proposed provisions in the latter. In certain specific instances, these comments reflect concerns I have where this appears not to be the case.

In a number of other instances, however, we have been unable thus far to determine whether the deletion of provisions from Title 14 (a) reflects DCRA's judgment that their elimination is warranted and why; (b) whether the same subject matter is addressed in Title 12G or elsewhere in a similar fashion; or (c) whether the same subject matter is addressed elsewhere in an entirely different fashion.

My more general concern, therefore, is that some unexplained deletions may have unintended adverse consequences in terms of housing code enforcement and related tenant protections. Of course, we will try to identify further specific concerns in our comments on the proposed rulemaking. For now, however, our general recommendation for DCRA would be to err on the side of retaining any provision in Title 14 where there could be a question as to whether its deletion may have adverse consequences.

Another general recommendation for the sake of user-friendliness is to make all references to Title 12G cite-specific. Many references already are cite-specific, but others only mention the Property Maintenance code generally, and some seemingly parallel provisions make no such reference at all.

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Below are questions or concerns we have regarding provisions either placed in the draft revision (revised) or deleted from the existing Title 14 (current):

1. 100.1 Scope (current): Subtitle A currently applies to all residential premises. The draft revision limits its applicability, however, to residential premises that are offered for rent or lease or that are tenant-occupied. Of course, it is the OTA's mission to advocate on behalf of District renters. Nevertheless, this change strikes us as rather dramatic, thus our question is whether it potentially could have an adverse impact on District residents who are owner-occupants. We have in mind for example owner-occupants of cooperative or condominium units who must rely on others to cure housing code violations, particularly in common areas, and who may wish to pursue enforcement action to compel abatement.
2. 100.2 Applicability of Property Maintenance Code (current): The revision eliminates the current provision setting forth the purpose of Subtitle A ("...preserving and promoting public health, safety, welfare... " etc.). This is a concern because so far we know it has existed in the housing code at least since 1955, and potentially it provides important context for regulatory interpretation and enforcement decisions.
3. 101 Civil Enforcement Policy (current): Similarly, the revision eliminates the Civil Enforcement Policy provision, which in part states that housing code violations are a public nuisance; sets forth certain ills that follow from non-abatement; and expressly declares that public policy favors speedy abatement. We fear that the elimination of section 101, together with the elimination of section 100.2, strips the housing code of critical context that has informed not only the advocacy of tenant and other housing attorneys, but also the holdings of seminal District case-law involving the housing code.

This case-law includes the "void lease defense" holding in Brown v. Southall Realty, 237 A.2d 834 (D.C. 1968), and the "implied warranty of habitability" holding in Javins v. First National Realty, 427 F.2d 1071 (D.C. 1970). We believe they are essential guides to regulatory interpretation and are of inestimable value in promoting housing code enforcement. Thus we urge DCRA to retain these provisions in some form. We would welcome a discussion as to how best to balance this consideration with any competing considerations that DCRA may have in mind.

4. 100.3 Maintenance Responsibility (revised): This section replaces the "purpose" provision with a statement regarding the division of responsibility between the owner/agent and the tenant. The thrust of this provision appears to be that the tenant is primarily responsible for maintaining the dwelling unit within his or her occupancy and control, and the owner/agent is responsible for maintaining "structures, equipment and exterior property."

This assertion does not appear to be unreasonable at least broadly speaking. Nevertheless, we believe it introduces into the housing code a novel “division of responsibility” concept that is “spatially” based. We believe this new concept may be somewhat at odds with the existing/retained “maintenance responsibility” concept -- namely, that either the housing provider or the tenant may be held liable for any violation of any provision of the housing code for which he or she is responsible (see current 102.5 and revised 101.6). The concern is that the new spatial “division of responsibility” concept could give rise to creative defenses that have never before existed for an owner/agent who is cited for violations within a dwelling unit.

5. Building closures (revised): For certain revised provisions -- inasmuch as they pertain to building closures -- we believe the overriding imperative is that they reflect the recent Construction Code Coordinating Board discussion with the OTA and other tenant advocates regarding Title 12G revisions. Upon initial review, we believe that generally to be the case. The relevant (revised) provisions are:
 - a. 102 Review and Appeals;
 - b. 104 Unsafe Structures and Equipment;
 - c. 105 Emergency Measures;
 - d. 107 Notices and Orders.

The single exception is that it appears 107.6.3 “Exclusivity of tenant notice provisions” should include references to 104 and 105 as does 107.6.1.2.

6. 103.3 Right of entry (revised): This provision refers to the Constitutional right to demand an administrative search warrant before granting a code official access to the premise. We believe that 103.3.1 and 103.3.2 correctly identify that right as one belonging to the tenant but not the housing provider.

In order to avoid any confusion on this matter, however, we would suggest that the reference to “constitutional restrictions on unreasonable searches and seizures” be deleted from the lead text at 103.3 and instead placed in 103.3.2.

7. 400 General provisions (current): We recommend that consideration be given to retaining these provisions, including:
 - a. 400.3 setting forth the “clean, safe, and sanitary” standard for renting dwelling units;

- b. 400.4 setting forth the owner/agent obligation to “provide and maintain facilities, utilities, and services required by this subtitle”;
- c. 400.5 and 400.6 setting forth the “safe and good working condition” standard for food-related facilities and other facilities and utilities;

We believe these simple declarative statements of broad standards -- even if technically duplicative with provisions in Title 12G -- are more accessible and informative to laypersons, and thus promote tenant enforcement of the housing code.

- 8. 401 Privacy (current): These privacy provisions appear to be elemental and thus we recommend that they be retained unless they are duplicative with Title 12G provisions.
- 9. 405 Ceiling Height in Habitable Rooms (current): We note the deletion of this provision but do not know whether it exists or is being replaced elsewhere in the Code. Our questions include whether the seven (7) foot rule is being eliminated; if so what policy purpose would that serve; and does this create a risk in terms of basement units with inappropriately low ceiling heights being offered for rent?
- 10. 801.1 Responsibilities of Owners and Landlords / resident janitor or housekeeper when required by the Director (current): We note the deletion of this provision and its potential value for building maintenance at least in theory. Our question is has DCRA used this provision even if only historically, and does DCRA agree it has such potential value?
- 11. 1205 Elevator Maintenance (current and revised): The existing provision requires the owner/agent to maintain at least one working elevator if the building has five (5) or more floors. The revised provision requires the owner/agent to maintain at least one working elevator if the building “is occupied in compliance with section 606.6 of the Property Maintenance Code.” Our question is whether this change broadens the “one working elevator” requirement to include buildings with less than five (5) floors.

Regardless, we would recommend a technical fix assuming that DCRA agrees with our reading as follows. The language appears to be circular in the sense that the requirement seemingly only applies if the building is in compliance with Property Maintenance Code section 606.6. Conversely then, this requirement would *not* apply if the building is *not* in compliance with section 606.6 of the Property Maintenance Code.

Again, these comments and questions are not exhaustive and we look forward to offering further input when DCRA publishes Title 14 revisions as proposed rulemaking.

Thank you once again for your efforts to consolidate and coordinate the relevant regulations, for the opportunity to comment on the draft revisions, and for your responsiveness to our concerns. We would be happy to provide any further assistance including proposed language and we look forward to continuing this dialogue.

Sincerely,



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Chief Tenant Advocate
Office of the Tenant Advocate

JS/jc

cc: Paul E. Waters, Esq., Deputy Director for Enforcement and Legislative Affairs, DCRA

