Case No. 15-AA-1243
(Consolidated with 15-AA-1244)

DISTRICT OF COLUMBIA COURT OF APPEALS

CHRISTINE BURKHARDT, *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,
Respondent.

On Appeal from the District of Columbia Rental Housing Commission

BRIEF OF THE DISTRICT OF COLUMBIA OFFICE OF THE TENANT ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION IN PART

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INTRODUCTION AND INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 29(a) of the Rules of this Court, the District of Columbia Office of the Tenant Advocate (OTA) respectfully submits this *amicus curiae* brief in support of petitioner's position "in part."[1]

The OTA is an independent agency within the executive branch of the District of Columbia Government. D.C. Code § 42-3531.05. The agency's statutory mission is to provide technical advice and other legal services, including individual legal representation in limited circumstances, to tenants regarding disputes with landlords; to educate and inform the tenant community about tenant rights and rental housing matters; to advocate for the rights and interests of District renters in the legislative, regulatory, and judicial contexts; and to provide financial assistance to displaced tenants for certain emergency housing and tenant relocation expenses. D.C. Code § 42-3531.07.

Separate and apart from the agency's mission as set forth in its establishment act, the OTA is required to perform certain duties under section 501(f) of the Rental Housing Act. Under section 501(f), where alterations and repairs cannot safely be made while the

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[1] As an agency of the District of Columbia, the OTA is entitled to file a timely amicus brief without seeking permission of the Court or consent of the parties. *See* Rule 29(a). Due to the piecemeal filing of petitioners' briefs in this case, there was some initial confusion regarding the due date of the OTA's *amicus* brief. Out of an abundance of caution, the OTA filed a motion for extension of time to file its brief on October 21, 2016. On October 28, 2016, this Court granted the OTA's motion for an extension of time to file this brief until November 10, 2016.

With respect to consent, while not required to do so, the OTA sought the consent of each the parties to file this brief as *amicus curiae*. The parties responded as follows. Carol S. Blumenthal, counsel for petitioners Christine Burkhardt and Blake and Wendy Nelson, petitioners Don Wassem and Lee Cohen, and Todd S. Kim, Solicitor General for the District of Columbia, each granted consent. Counsel for Intervenor Klingle Corporation, Debra Leege, denied consent.

units are occupied, a housing provider must seek and secure the Rent Administrator's approval prior to issuing to the tenants 120-day notices to temporarily vacate their units. D.C. Code § 42-3505.01(f). As detailed below, the OTA's role with respect to section 501(f) proceedings serves the legislative purpose of protecting, generally and collectively speaking, the tenants' rights and interests under that particular statutory provision, but does not include representation of individual tenants. The OTA's participation in section 501(f) proceedings was not intended to provide tenants with individual due process with respect to those proceedings, nor does it.

The OTA's interest in this matter arises from some of the grounds upon which the D.C. Rental Housing Commission dismissed petitioners' claims in an appeal from the Acting Rent Administrator's final order dated February 26, 2010 (Joint Appendix, 15-AA, 1243 ("NV JA") 284-3000)) and March 3, 2010 (NV JA 301-314). The Commission appears to have conflated the agency's statutory role under "section 501(f)" with the role of an attorney acting in a representative capacity for an individual tenant or group of tenants. As noted above, the OTA plays the latter (representative) role in limited circumstances pursuant to the agency's establishment act. D.C. Code § 42-3531.07(5)(A). As a practical and ethical matter, however, the OTA may not, and cannot, play that role while simultaneously playing its statutory "501(f)" role. Nor did the OTA play any such role with respect to the 501(f) proceedings here or with respect to petitioners here. Thus, we believe the Commission's Decision and Order is in error with respect to the apparent conflation of the OTA's roles, and consequently its dismissal of

the petitioners' claims, insofar as the Commission suggested that the OTA served them here in a representative capacity.

OVERVIEW OF THE "501(f)" PROCESS AND THE OTA'S ROLE

Where it may be necessary for the housing provider to make alterations and repairs to the accommodation that cannot safely be made while the units are occupied, section 501(f) of the Rental Housing Act (D.C. Code § 42-3505.01(f)) sets forth a procedure for the temporary "eviction" or relocation of the tenants until the work is completed. In 2006, the D.C. Council substantially amended the law after a Council committee investigation concluded that, in at least three specific instances, section 501(f) applications had been filed for illicit purposes; "Notices to Vacate" had been issued to tenants unlawfully; and the governmental approval process had failed to protect the public interest. *See* Council of the District of Columbia, Report of the Committee on Consumer and Regulatory Affairs, "Conclusions of investigation into the potential misuse of section 501(f) of the Rental Housing Act of 1985 at specific rental properties" (December 26, 2006) at 17 – 21. Thus, the "Tenant Evictions Reform Amendment Act of 2006" (DC Law 16-140, effective June 22, 2006) amended the statute to provide for significantly more detailed ministerial steps, primarily aimed at preventing abuses of this "temporary" eviction mechanism, whether during the application, approval, or post-approval phase of the process.

Accordingly, before the housing provider may issue 120-day notices to the tenants to temporarily vacate their units, numerous requirements must be satisfied. The housing provider must complete an application for the Rent Administrator's approval, and must

submit to the Rent Administrator and the OTA a number of items along with the application, including: (a) an explanation as to why the alterations and renovations are necessary and cannot safely or reasonably be made while the units are occupied; (b) a copy of the notice of tenant rights; (c) a draft of the Notice to Vacate to be issued if the Rent Administrator approves the application; (d) a timetable for tenant relocation and the commencement and completion of the work housing provider has circulated informing the tenant of the application under this subsection; and (e) a relocation plan for each of the tenants. D.C. Code § 42-3505.01(f)(1)(B).

Before the Rent Administrator may approve or deny the application, the tenant must be given at least 21 days after receiving notice of the application to submit comments. The housing provider must provide the tenants with notice of the application, applicable tenant rights, and other relevant information. The D.C. Department of Consumer and Regulatory Affairs must inspect the premises and verify the accuracy of statements in the application relating to the need for the alterations and renovations. Finally, having consulted with the Chief Tenant Advocate, the Rent Administrator must determine in writing:

> … [t]hat the proposed alterations and renovations cannot safely or reasonably be made while the rental unit is occupied; [w]hether the alterations and renovations are necessary to bring the rental unit into compliance with the housing code … (in which case) … the tenant shall have the right to reoccupy the rental unit at the same rent; and [t]hat the proposal is in the interest of each affected tenant after considering the physical condition of the rental unit or the housing accommodation and the overall impact of relocation on the tenant.

D.C. Code § 42-3505.01(f)(1)(A)(v). Implicitly, the Rent Administrator must also determine that the housing provider has complied with each 501(f) requirement that is requisite to approval.

Section 501(f) also sets forth numerous requirements that apply in the event that the Rent Administrator approves the application. Upon issuing the temporary Notices to Vacate to the tenants, the housing provider must also provide them with certain other notices and with relocation assistance pursuant to Title VII of the Act (D.C. Code § 42-3507.01 *et seq.*). The housing provider must submit periodic progress reports to the tenants, the Rent Administrator, and the OTA until the work is completed. The tenant must be afforded the absolute right to return to his or her apartment upon the completion of the work, and to do so at the same rental rate if the work was necessary to bring the rental unit into substantial compliance with the housing regulations. The housing provider must notify the tenants, the Rent Administrator, and the Chief Tenant Advocate within five (5) days of the completion of the renovations and alterations that the rental units are ready to be re-occupied by the tenant. D.C. Code §§ 42-3505.01(f)(1)(D) – (F) & (f)(2) – (4).

In addition to its consultative role, the OTA's various statutory "501(f)" functions are largely intended to help safeguard those tenant rights and interests that are established or contemplated in section 501(f) itself. Within five (5) days of the agency's receipt of the housing provider's 501(f) application, the OTA must send each tenant a notice, informing the tenant that he or she (1) may review or obtain a copy of the application and supporting documentation, and where this material is maintained; (2) has

21 days in which to submit comments on the application on the impact an approved application would have on the tenant or any household member; and (3) may consult the OTA regarding the tenant's legal rights, responding to the application or to any ancillary offer made by the housing provider, or otherwise safeguarding the tenant's interests.

In the approval stage, the Rent Administrator must make his or her determinations "in consultation with the Chief Tenant Advocate." Moreover, "[a]t any time prior to or subsequent to the Rent Administrator's approval of the application," the Chief Tenant Advocate may make any inquiries regarding housing provider compliance with section 501(f) requirements, and as to whether the interests of the tenants are being protected, and then report the findings to the Rent Administrator. In order to protect the tenant's right to return to his or her unit upon completion of the work, the OTA is charged with maintaining a registry of interim addresses for each affected tenant. D.C. Code § 42-3505.01(f) (1)(C).

ARGUMENT

The OTA's statutory role with respect to a section 501(f) proceeding does not include, and is fundamentally incompatible with, serving individual tenants or a group of tenants in a representative capacity.

The Rental Housing Commission erred by dismissing petitioners' assertion that they had a Constitutional due process right to a hearing on the 501(f) Application partly on the basis of (1) the OTA's statutory "501(f)" role, and (2) "substantial evidence" in the record that the OTA fulfilled this role by participating "in each step of the 501(f) Application process, communicating with tenants, the Acting Rent Administrator, and the Housing Provider in order to ensure that the rights of affected tenants were

protected." *See* Decision and Order, Part V (A) through (G) (Sept. 1, 2015) at 29-36. The Commission appears to have incorrectly conflated the OTA's "501(f)" role with the agency's function under its establishment act to advocate for individual tenants or groups of tenants in a representative capacity. D.C. Code § 42-3531.07(5)(A). In no way did the OTA act in a representative capacity for any tenant in this matter.

Generally, as set forth above, the OTA's role in a 501(f) proceeding may best be characterized as (1) providing the parties, particularly tenants, with educational outreach as to the statutory requirements and protections; (2) performing certain ministerial functions, for example preserving certain tenant relocation information in the event that the application is approved; and (3) serving as regulatory watchdog including, as the record reflects occurred here, making relevant inquiries and alerting the relevant enforcement agency as to possible instances of non-compliance.

These "501(f)" functions do not, and as a practical and ethical matter could not, include that of representing or advocating for any individual tenant or group of tenants. Tenants are entitled to determine what their own interests are. They are also entitled to an attorney of their own choosing to represent those interests. In a section 501(f) proceeding, it is highly foreseeable that tenant interests may well diverge, as indeed they did here inasmuch as some tenants supported the application and others opposed it. The agency did not and as could not have entered into a retainer agreement with any tenant. Had a tenant requested representation by the OTA in this matter, the agency would have a

duty to decline the request under Rule 1.7 of the Rules of Professional Conduct ("Conflict of Interest: General Rule").[2]

To the extent that the rights asserted include the right to challenge the factual basis for DCRA's conclusions regarding the condition of the building, it should be noted that while the agency may raise questions, it was given neither the statutory authority nor the resources, such as the ability to hire expert witnesses, to challenge the factual basis for any such conclusion. Thus, even as a practical matter, the agency's "consultative" role regarding the approval or disapproval of a 501(f) application cannot satisfy a party's right to challenge the factual basis for that outcome.

CONCLUSION

In short, the OTA's statutory role cannot and does not substitute for any Constitutional due process rights any individual tenant may have with respect to a "section 501(f)" proceeding. For the foregoing reasons, the Court should find that the Rental Housing Commission's Decision and Order is in error with respect to the apparent conflation of the OTA's roles, and consequently its dismissal of the

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[2] Rules of Professional Conduct: Rule 1.7--Conflict of Interest: General Rule

(a) A lawyer shall not advance two or more adverse positions in the same matter.

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation;

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

petitioners' claims, partly on the incorrect suggestion that the OTA served them here in a representative capacity.

Respectfully submitted,

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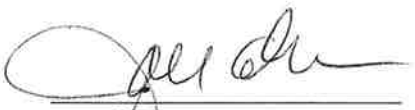

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, hard copies of the foregoing Brief of the District of Columbia Office of the Tenant Advocate as *Amicus Curiae* in Support of Appellant was served via first-class mail, postage prepaid, to:

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Case No. 15-AA-1243
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ADDENDUM TO THE BRIEF OF THE DISTRICT OF COLUMBIA OFFICE OF THE TENANT ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION IN PART

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DISTRICT OF COLUMBIA
COURT OF APPEALS

CHRISTINE BURKHARDT, et. al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Nos. 15-AA-1243 &**
	)	**15-AA-1244**
DISTRICT OF COLUMBIA	)	
RENTAL HOUSING COMMISSION	)	
	)	
Respondent.	)	
	)	

ADDENDUM TO THE BRIEF OF THE DISTRICT OF COLUMBIA OFFICE OF THE TENANT ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION IN PART

Pursuant to Rule 28(f) of this Court, included in this Addendum, numbered in order, are statutes and Committee Reports cited in the Brief of the District of Columbia Office of the Tenant Advocate as *amicus curiae* in support of petitioner's position in part in the above stated case numbers:

Statutes

D.C. Code § 42-3505.01(f)

D.C. Code § 42-3531.05

D.C. Code § 42-3531.07

Committee Report

Council of the District of Columbia, Report of the Committee on Consumer and Regulatory Affairs, "Conclusions of investigation into the potential misuse of section 501(f) of the Rental Housing Act of 1985 at specific rental properties" (December 26, 2006). Excerpt Pg. 1 and 17 – 21.

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Date: November 10, 2016

(f)(1)(A) A housing provider may recover possession of a rental unit for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied, so long as:

(i) The plans for the alterations or renovations have been filed with the Rent Administrator and the Chief Tenant Advocate;

(ii) The tenant has had 21 days after receiving notice of the application to submit to the Rent Administrator and to the Chief Tenant Advocate comments on the impact that an approved application would have on the tenant or any household member, and on any statement made in the application;

(iii) An inspector from the Department of Consumer and Regulatory Affairs has inspected the housing accommodation for the accuracy of material statements in the application and has reported his or her findings to the Rent Administrator and the Chief Tenant Advocate;

(iv) On or before the filing of the application, the housing provider has given the tenant:

(I) Notice of the application;

(II) Notice of all tenant rights;

(III) A list of sources of technical assistance as published in the District of Columbia Register by the Mayor;

(IV) A summary of the plan for the alterations and renovations to be made; and

(V) Notice that the plan in its entirety is on file and available for review at the office of the Rent Administrator, at the office of the Chief Tenant Advocate, and at the rental office of the housing provider; and

(v) The Rent Administrator, in consultation with the Chief Tenant Advocate, has determined in writing:

(I) That the proposed alterations and renovations cannot safely or reasonably be made while the rental unit is occupied;

(II) Whether the alterations and renovations are necessary to bring the rental unit into compliance with the housing code and the tenant shall have the right to reoccupy the rental unit at the same rent; and

(III) That the proposal is in the interest of each affected tenant after considering the physical condition of the rental unit or the housing accommodation and the overall impact of relocation on the tenant.

(B) As part of the application under this subsection, a housing provider shall submit to the Rent Administrator for review and approval, and to the Chief Tenant Advocate, the following plans and documents:

(i) A detailed statement setting forth why the alterations and renovations are necessary and why they cannot safely or reasonably be accomplished while the rental unit is occupied;

(ii) A copy of the notice that the housing provider has circulated informing the tenant of the application under this subsection;

(iii) A draft of the notice to vacate to be issued to the tenant if the application is approved by the Rent Administrator;

(iv) A timetable for all aspects of the plan for alterations and renovations, including:

(I) The relocation of the tenant from the rental unit and back into the rental unit;

(II) The commencement of the work, which shall be within a reasonable period of time, not to exceed 120 days, after the tenant has vacated the rental unit;

(III) The completion of the work; and

(IV) The housing provider's submission to the Rent Administrator and the Chief Tenant Advocate of periodic progress reports, which shall be due at least once every 60 days until the work is complete and the tenant is notified that the rent unit is ready to be reoccupied;

(v) A relocation plan for each tenant that provides:

(I) The amount of the relocation assistance payment for each unit;

(II) A specific plan for relocating each tenant to another unit in the housing accommodation or in a complex or set of buildings of which the housing accommodation is a part, or, if the housing provider states that relocation within the same building or complex is not practicable, the reasons for the statement;

(III) If relocation to a rental unit pursuant to sub-sub-subparagraph (II) of this sub-subparagraph is not practicable, a list of units within the housing provider's portfolio of rental accommodations made available to each dispossessed tenant, or, where the housing provider asserts that relocation within the housing provider's portfolio of rental accommodations is not practicable, the justification for such assertion;

(IV) If relocation to a rental unit pursuant to sub-sub-subparagraph (II) or (III) of this sub-subparagraph is not practicable, a list for each tenant affected by the relocation plan of at least 3 other rental units available to rent in a housing accommodation in the District of Columbia, each of which shall be comparable to the rental unit in which the tenant currently

lives; and

(V) A list of tenants with their current addresses and telephone numbers.

(C) The Chief Tenant Advocate, in consultation with the Rent Administrator, shall:

(i) Within 5 days of receipt of the application, issue a notice, which shall include the address and telephone number of the Office of the Chief Tenant Advocate, to each affected tenant stating that the tenant:

(I) Has the right to review or obtain a copy of the application, including all supporting documentation, at the rental office of the housing provider, the Office of the Chief Tenant Advocate, or the office of the Rent Administrator;

(II) Shall have 21 days in which to file with the Rent Administrator and serve on the housing provider comments upon any statement made in the application, and on the impact an approved application would have on the tenant or any household member; and

(III) May consult the Office of the Chief Tenant Advocate with respect to ascertaining the tenant's legal rights, responding to the application or to any ancillary offer made by the housing provider, or otherwise safeguarding the tenant's interests;

(ii) At any time prior to or subsequent to the Rent Administrator's approval of the application, make such inquiries as the Chief Tenant Advocate considers appropriate to determine whether the housing provider has complied with the requirements of this subsection and whether the interests of the tenants are being protected, and shall promptly report any findings to the Rent Administrator; and

(iii) Upon the Rent Administrator's approval of the application:

(I) Maintain a registry of the affected tenants, including their subsequent interim addresses; and

(II) Issue a written notice, which shall include the address and telephone number of the Office of the Chief Tenant Advocate, to each affected tenant that notifies the tenant of the right to maintain his or her tenancy and the need to keep the Chief Tenant Advocate informed of interim addresses;

(D) The housing provider shall serve on the tenant a 120-day notice to vacate prior to the filing of an action to recover possession of the rental unit that shall:

(i) Notify the tenant of the tenant's rights under this subsection, including the absolute right to reoccupy the rental unit, the right to reoccupy the rental unit at the same rate if the Rent Administrator has determined that the alterations or renovations are necessary to bring the rental unit into substantial compliance with the housing regulations, and the right to relocation assistance under the provisions of subchapter VII of this chapter;

(ii) Include a list of sources of technical assistance as published in the District of Columbia Register by the Mayor; and

(iii) Include a copy of the notice issued by the Chief Tenant Advocate pursuant to paragraph (1)(C)(iii)(II) of this subsection.

(E) Within 5 days of the completion of alterations and renovations, the housing provider shall provide notice, by registered mail, return receipt requested, to the tenant, the Rent Administrator, and the Chief Tenant Advocate that the rental unit is ready to be occupied by the tenant.

(F) Any notice required by this section to be issued to the tenant by the housing provider, the Rent Administrator, or the Chief Tenant Advocate shall be published in the languages as would be required by § 2-1933(a).

(2) Immediately upon completion of the proposed alterations or renovations, the tenant shall have the absolute right to reoccupy the rental unit. A tenant displaced by actions under this subsection shall

continue to be a tenant of the rental unit as defined in § 42-3401.03(17), for purposes of rights and remedies under Chapter 34 of this title, until the tenant has waived his or her rights in writing. Until the tenant's right to reoccupy the rental unit has terminated, the housing provider shall serve on the tenant any notice or other document regarding the rental unit as required by any provision of Chapter 34 of this title, this chapter, or any other law or regulation, except that service shall be made by first-class mail at the address identified as the tenant's interim address pursuant to paragraph (1)(C)(iii) of this subsection.

(3) Where the renovations or alterations are necessary to bring the rental unit into substantial compliance with the housing regulations, the tenant may rerent at the same rent and under the same obligations that were in effect at the time the tenant was dispossessed, if the renovations or alterations were not made necessary by the negligent or malicious conduct of the tenant.

(4) Tenants displaced by actions under this subsection shall be entitled to receive relocation assistance as set forth in subchapter VII of this chapter, if the tenants meet the eligibility criteria of that subchapter.

(5) Prior to the date that the tenant vacates the unit, the Rent Administrator shall rescind the approval of any application under this subsection upon determining that the housing provider has not complied with this subsection.

(6) If, after the tenant has vacated the unit, the housing provider fails to comply with the provisions of this subsection, the aggrieved tenant or a tenant organization authorized by the tenant may seek enforcement of any right or provision under this subsection by an action in law or equity. If the aggrieved tenant or tenant organization prevails, the aggrieved tenant or tenant organization shall be entitled to reasonable attorney's fees. In an equitable action, bond requirements shall be waived to the extent permissible under law or court rule.

(g)(1) A housing provider may recover possession of a rental unit for the purpose of immediately demolishing the housing accommodation in which the rental unit is located and replacing it with new construction, if a copy of the demolition permit has been filed with the Rent Administrator, and, if the requirements of subchapter VII of this chapter have been met. The housing provider shall serve on the tenant a 180-day notice to vacate in advance of action to recover possession of the rental unit. The notice to vacate shall comply with and notify the tenant of the tenant's right to relocation assistance under the provisions of subchapter VII of this chapter.

West's District of Columbia Code Annotated 2001 Edition
Division VII. Property.
Title 42. Real Property. (Refs & Annos)
Subtitle VII. Rental Housing.
Chapter 35A. Rental Housing: Tenant Advocacy.

DC ST § 42-3531.05

§ 42-3531.05. Establishment of Office of the Tenant Advocate.

Effective: October 1, 2007

Currentness

The Office of the Tenant Advocate is established as an independent agency within the District government.

Credits

(Oct. 20, 2005, D.C. Law 16-33, § 2065, 52 DCR 7503; Oct. 1, 2007, D.C. Law 16-181, § 2(d), 53 DCR 6703.)

End of Document

West's District of Columbia Code Annotated 2001 Edition
Division VII. Property.
Title 42. Real Property. (Refs & Annos)
Subtitle VII. Rental Housing.
Chapter 35A. Rental Housing: Tenant Advocacy.

DC ST § 42-3531.07

§ 42-3531.07. Duties of the Office of the Tenant Advocate.

Effective: December 17, 2014

Currentness

The Office shall:

(1) Provide education and outreach to tenants and the community about laws, rules, and other policy matters involving rental housing, including tenant rights under the petition process and formation of tenant organizations;

(2) Represent the interests of tenants and tenant organizations in legislative, executive, and judicial issues, including advocating changes in laws and rules and reviewing landlord petitions on behalf of tenants;

(3) Advise tenants and tenant organizations on filing complaints and petitions, including petitions in response to disputes with landlords;

(4) Advise and assist tenants and tenant organizations at conciliation meetings;

(5)(A) Represent tenants, at its discretion and as it determines to be in the public interest, in Federal or District judicial or administrative proceedings;

(B) Provide an annual report to the Council on or before February 1 of each year setting forth each tenant request for representation, a description of the circumstances surrounding each request, whether or not the Office provided representation, and the outcome of cases where representation was provided;

(6) Organize tenant and tenant organizations participation in building-wide inspections;

(6A) Provide emergency housing and relocation assistance to qualified tenants, as determined by the Office, including payments for:

(A) The short-term relocation of tenants to hotels, motels, or other appropriate accommodations;

(B) The moving and storage of personal property;

(C) Rental application fees, security deposits, and utility deposits; and

(D) The first month's rent;

(7) Operate a Tenant Phone Hotline and Tenant Center; and

(8) Publish a Tenant Bill of Rights, which shall be updated periodically, and noticed in the District of Columbia Register.

Credits

(Oct. 20, 2005, D.C. Law 16-33, § 2067, 52 DCR 7503; Mar. 8, 2007, D.C. Law 16-236, § 3, 54 DCR 391; Oct. 1, 2007, D.C. Law 16-181, § 2(f), 53 DCR 6703; Sept. 14, 2011, D.C. Law 19-21, § 2072, 58 DCR 6226; Dec. 17, 2014, D.C. Law 20-147, § 2, 61 DCR 8310.)

DC CODE § 42-3531.07
Current through September 19, 2016

End of Document

Council of the District of Columbia

COMMITTEE ON CONSUMER AND REGULATORY AFFAIRS

COMMITTEE REPORT

1350 Pennsylvania Avenue, NW, 20004

TO: All Councilmembers

FROM: Councilmember Jim Graham, Chairperson
Committee on Consumer and Regulatory Affairs

DATE: December 26, 2006

SUBJECT: Conclusions of investigation into the potential misuse of section 501(f) of the Rental Housing Act of 1985 at specific rental properties

The Committee on Consumer and Regulatory Affairs, which on December 9, 2005 authorized an investigation into the potential misuse of section 501(f) of the Rental Housing Act of 1985 at specific rental properties, approves the conclusions of this report and hereby reports them pursuant to Council Rule 603.

PURPOSE AND BACKGROUND

On December 9, 2005, pursuant Council Rule 601, the Committee approved the "Investigation of Tenant Evictions Resolution of 2005." This resolution authorized the Committee, with full subpoena power vested in the Chairperson, to investigate the possible misuse of section 501(f) of the Rental Housing Act of 1985 at the following specific rental properties: 1840 & 1846 Vernon Street, NW, 1433 T Street, NW, and 201-213 16th Street, NE. More specifically, the purpose of the investigation was to determine whether there has been compliance with District of Columbia law on the proposed relocation of tenants from these buildings under section 501(f), and with tenant rights under the Tenant Opportunity to Purchase Act of 1980.

Under section 501(f) of the Rental Housing Act of 1985,[1] a housing provider may seek approval from the Rent Administrator for the issuance to tenants of 120-day notices to

[1] Section 501(f) of the Rental Housing Act is codified at D.C. Official Code § 42-3505.01(f)(1). Prior to April 26, 2006, the effective date of Act 16-369, the Tenant Evictions Reform Amendment Act of 2006, the provision stated that:
"(1) A housing provider may recover possession of a rental unit for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied, so long as the plans for the alterations or renovations have been previously filed and approved by the Rent Administrator and the plans demonstrate that the proposed alterations or renovations cannot safely or reasonably be accomplished while the unit is occupied.
"(2) Immediately upon completion of the proposed alterations or renovation s, the tenants shall have the absolute right to rerent the rent unit.
"(3) Where the renovations or alterations are necessary to bring the rental unit into substantial compliance with the housing regulations, the tenant may rerent at the same rent and under the same

3. The duties of the Chief Tenant Advocate, including providing notice to affected tenants of tenant rights, the opportunity to comment on the application, and the Chief Tenant Advocate's availability to assist tenants, making inquiries into the housing provider's compliance with the section's requirements, and, if the Rent Administrator approves the application, maintaining a registry of tenants and relocation addresses;

4. The requirements if the application is approved for the Notice to Vacate, including full notice of tenant rights and a list of sources of technical assistance;

5. The requirement that all notices be published in languages described in the language Access Act of 2004;

6. The requirement that during the period of dispossession the tenant retains all rights under the Rental Housing Conversion and Sale Act of 1980 (D.C. Code § 42-3401.01 *et seq.*) to purchase the rental unit when it is put up for sale. To avoid any question as to whether the tenancy lapses during the period of dispossession, the phrase "absolute right to rerent" is amended to read "absolute right to reoccupy" the rental unit. The tenant's right to receive any notice under the Rental Housing Act of 1985 at the relocation address is made explicit;

7. The requirement that during that the Rent Administrator rescind the approval of any application prior to tenant relocation where the landlord has failed to comply with section 501(f) requirements;

8. The requirement that an aggrieved tenant be provided judicial remedies for section 501(f) violations that occur or are discovered after the tenant has relocated;

9. Clarification that relocation assistance under the Act applies to section 501(f) evictions as well as other specified eviction provisions; and

10. The doubling of the amount of relocation assistance due a relocated tenant and requires the Mayor establish new amounts after considering relocation costs other than merely the cost of transporting personal property.

CONCLUSIONS WITH ADDITIONAL FACTUAL FINDINGS

1. Purposes of the 501(f) applications were illicit: The overwhelming weight of the evidence indicates that the ownership's purposes in filing section 501(f) applications to issue notices to vacate to tenants at the specific properties did not conform to the provision's intended purposes. The Council intended to (1) provide for the ***temporary*** relocation of tenants while alterations and renovations

are made to the rental unit which cannot safely be made while the rental unit is occupied; (2) guarantee that the tenant has the ***absolute right*** to rerent the rental unit upon completion of the alterations and renovations; (3) guarantee that the tenant has the right to rerent the rental unit at the same rate if the alterations and renovations are necessary to bring the rental unit into substantial compliance with the housing regulations; and (4) provide the tenant with such notice of these rights so as to enable the tenant to meaningfully exercise them.

a. The ownership of these properties filed the section 501(f) applications less than 3 months after partnering with a real estate developer advertising its specialization in "commercial and luxury residential" properties. The applications purported that tenant relocation was necessary to make structural repairs and to abate asbestos and lead-based paint.

b. The context for these claims, according to tenants, includes the fact that tenant requests for basic repairs went unattended for years prior to this partnership with a developer. At least one tenant was assured upon moving into the building that there was no lead-based paint problem, only a month later to be given a section 501(f) notice to vacate on the premise that lead and asbestos abatement is necessary and can not safely be made while the unit is occupied.

c. Given the expense involved in rehabilitating the properties and the clear and significant financial benefits that would accrue to the ownership by converting the buildings to condominiums or even market-rate rentals post-rehabilitation instead of bringing back the current tenants at their previous rents, it is clear they had a financial incentive to empty the buildings. Given the unanimity of the testimony from tenants that they were not told that signing the notices to vacate would sign away their rights to return, the Committee concludes that it is likely that the property owners acted on this incentive and attempted to use the section 501(f) procedure, combined with the so-called "Notice to Vacate" that was really a waiver of rights, to secure the permanent relocation of these tenants from the buildings.

d. Ford's admission under oath that he was paid $2,500 for each unit that became vacant -- meaning each unit from which the current tenant was permanently relocated -- supports the Committee's view. There is disputed evidence regarding the state of disrepair at 1846 Vernon Street, NW -- particularly in terms of security -- in October and November 2006, and regarding whether Ford actively solicited tenants of all the subject buildings to vacate their units, nor can the Committee conclude that the ownership or any agent thereof is directly responsible for the October 16, 2006 vandalism or the November 5, 2006 fire that occurred at 1846 Vernon Street, NW. But there can be no doubt that the vacancy occurrences including those the fire helped create financially benefited

Ford. Nor can there be any doubt that Ford's arrangement with Bolton created a conflict of interest between Ford's role as Property Manager whose duty it is to maintain the buildings in good repair, and his arrangement with Bolton who created a financial incentive for Ford not to maintain the buildings in good repair so as to encourage vacancies for each one of which Bolton paid Ford a $2500 fee.

2. The "Notices to Vacate" were unlawful:
   a. The ownership provided to the tenants copies of the Rent Administrator's approval of the 501(f) applications. Attached to the approval letter was a document that was captioned "Notice to Vacate" but in fact was a waiver of rights. The use of the caption "Notice to Vacate," coupled with the agency's approval of the issuance of formal notices to vacate the required terms of which were not included in the "Notice," can most reasonably be interpreted as an attempt to obfuscate the tenant's right, or to confuse the tenant as to the right to rerent the apartments upon the completion of renovations and alterations.
   b. The "Notice to Vacate" offered each tenant $500 in "relocation assistance" upon permanently vacating the rental unit and an additional $500 when the building was completely cleared of tenants. It characterized this assistance as "in consideration of this Notice to Vacate" rather than as a statutory right. It failed to inform the tenant of the right to relocation assistance, the "absolute right" to rerent the rental unit, and the right to rerent the rental unit at the same rate if the alterations and renovations are necessary to bring the rental unit into substantial compliance with housing regulations. The "Notice to Vacate" violated every relevant provision of District regulations relating to eviction notices. (14 D.C.M.R. §4300 *et seq.*, especially 14 D.C.M.R. § 4302).

3. Possible illegal retaliatory action and breach of housing provider's fiduciary obligations to tenants: Aside from the explicit violation of the notice requirements for a section 501(f) eviction, the ownership's aggressive and relentless efforts to empty the buildings, and any failure to keep them in good repair, may constitute retaliatory action in violation of section 502(a) of the Rental Housing Act of 1985, inasmuch as any such act was directed at any tenant who attempted to exercise the right to remain a tenant.[5] Any such action may also constitute a breach of the general and fiduciary obligations of a housing provider to provide tenants safe and habitable housing, and to refrain from undue

[5] Section 502(a) is codified at D.C. Official Code 42-3505.02(a). It states that: "No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion."

interference with a tenant's quiet enjoyment of the leased premises. The ownership's housing business license may be revoked upon an adverse report by the Chief of Police.[6]

4. DCRA's approval process failed to protect to the public interest. Rent Administrator Zapata approved the 501(f) applications within 48 hours after they had been filed on August 1, 2005, and did so on the basis of a study conducted for property in Leesburg, VA. Although later under pressure from the Committee, she reversed her decision, there can be no question that the applications were initially granted in a routine fashion lacking any deliberation.

5. Possible undue influence over agency decision-making by Mayor's office. Documentary evidence raises the concern that officials in the Mayor's office may have exercised, or attempted to exercise, undue influence resulting in the indefinite postponement of the Rent Administrator's Show Cause order:

   a. In December 2005, Chairperson Graham requested that the Rent Administrator determine whether there are sufficient grounds to order a Show Cause hearing regarding possible violations of section 501(f) of the Rental Housing Act by the owners of the specific properties or their agents. In March 2006, Acting Rent Administrator Keith Anderson determined that there are sufficient grounds to believe that a possible violation of the law occurred, and scheduled a Show Cause hearing for April 25, 2006.

   b. Sometime in April, Anderson postponed the Show Cause hearing indefinitely. While Anderson and DCRA officials strongly deny that the wishes of the Mayor's office had anything to do with that postponement, the concern of undue influence is raised by e-mail communications provided to the Committee in response to a subpoena for relevant documents issued to an employee of the management company. In an email dated April 2, 2006, Luchs as attorney for the owners complained to Deputy Mayor Stanley Jackson that the Show Cause order was "directly contrary to what you told us in our meeting. Anderson answers ultimately to you and we ask that you cause this hearing to be cancelled." Jackson replies, "I was assured that this matter was being addressed by Patrick Canavan of DCRA. Please accept my apology if you nor your client have not been contacted by the agency. I will make sure that you are contacted by the agency before close of business today."

   c. While these communications do not constitute conclusive evidence of undue influence, they do raise that concern and warrant further inquiry.

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[6] 14 D.C.M.R. § 200.4 states that: "No license to operate a housing business license shall be issued or retained if the Chief of Police determines that the applicant for the license or the licensee is not a person of good character. An adverse report by the Chief may be appeal to the Board of Appeals and Review."

6. Purpose and style of Perseus Realty: the ownership's efforts to empty the buildings of tenants, particularly at 1840 & 1846 Vernon Street, NW, have been aggressive and relentless throughout the period of the investigation. The payments and the use of Ford as an agent for emptying these buildings from June to December 2006 strikingly resembles the similar use of Salmon in the fall of 2005. Bolton hired both Salmon and Ford, the Committee believes, as agents to empty the buildings as quickly and as completely as possible for the purpose of making them available for luxury residential development, contrary to Bolton's testimony under oath.

COMMITTEE ACTION

On December 21, 2006, at 3:45 p.m., the Committee on Consumer and Regulatory Affairs held an additional meeting in Room 412 of 1350 Pennsylvania Avenue, NW, to consider the conclusions of the investigation. With Chairperson Graham and Councilmembers Brown and Catania present, Chairperson Graham convened a quorum. The Committee unanimously approved the conclusions of the investigation as reported herein, with leave for staff to edit and amend the report as necessary to include information received at the December 20, 2006 roundtable.

ATTACHMENTS

1. 8/1/05 Luchs to Zapata request for approval of 501(f) applications.
2. 8/3/06 Zapata to Luchs approval letters.
3. 9/7/05 & 9/9/05 Zapata to Luchs approval letters.
4. 10/24/05 & 11/10/05 Zapata to Luchs rescission letters (study for property in Leesburg, VA).
5. 11/18/06 Zapata to Luchs technical review of 501(f) applications & request for information, with Housing Provider Survey.
6. Salmon's "notices to all tenants."
7. Salmon's "Notice to Vacate" (waiver of rights).
8. Salmon's Tenant Meeting Script.
9. Salmon's Tenant Notification Log.
10. 10/5/05 Salmon's engagement letters with Bolton.
11. 3/27/06 Rent Administrator's Order to Show Cause.
12. 12/1/06 Rent Administrator's denial of 501(f) applications, and comparison of DCRA and Perseus asbestos/lead-based paint surveys.
13. 3/23/06 Bruno email to Ford: "Barac not involved in the vacating of the buildings."
14. 4/3/06 Jackson/Luchs/Bolton/Ford email: "Order to Show Cause".
15. 4/4/06 Bruno/Ford email: "Show Cause".
16. 4/5/06 Bruno/Ford/Parker email: "it seems as though you are trying to vacate Vernon".
17. 4/5/06 Parker/Bruno/Ford email: "do only the work required by the citations".