Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

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PUBLIC HEARING
Bill 18-68, the "Office of Administrative Hearings Amendment Act of 2009"

Committee on Public Safety and the Judiciary
Honorable Phil Mendelson, Chair

Council of the District of Columbia

Thursday, February 12, 2009

Room 123
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004
10:00 a.m.

Thank you, Chairperson Mendelson, for this opportunity to comment on Bill 18-68, the "Office of Administrative Hearings Amendment Act of 2009." Thank you also for re-introducing this legislation which I believe represents a significant step forward for HFA tenants, who have long been deprived of fundamental rights enjoyed by all other District tenants.

The OTA carefully considered this legislation in consultation with a working group consisting of no fewer than 10 individuals including 7 attorneys. The OTA's positions on each of its major elements are as follows:

1. ***OAH adjudication of RHA cases under HFA jurisdiction***

Section 2 of the bill would amend the Office of Administrative Hearings Establishment Act of 2001 (D.C. Law 14-76; D.C. Official Code § 2-1831.03) to include within its jurisdiction adjudicated cases of the District of Columbia Housing Finance Agency (HFA) that are subject to the Rental Housing Act of 1985. ***The OTA strongly supports this provision.***

The Housing Finance Agency's (HFA) establishment act requires the agency to promulgate rules in accordance with Title V and Title VII of the Rental Housing Act of 1985 (RHA)(D.C. Official Code § 42-2703.08(b) & (c)), and appears to contemplate HFA adjudication of tenant claims in these areas. The OTA appreciates the considerable effort HFA made in issuing proposed rule-making on May 16, 2008 to fulfill that statutory mandate. However, as we indicated last year in our comments on the proposed rule-making, we believe OAH -- using rules that have been in place for some time, revisions for which will soon be the subject of OAH's own proposed rule-making -- is the more

appropriate agency to adjudicate these cases. OAH has the requisite adjudicatory experience and resources, and has developed substantial expertise in rental housing cases since the October 2006 transfer of these cases from the Rent Administrator to OAH.

Moreover, given its involvement in financing the acquisition, construction, and rehabilitation of rental accommodations, HFA has a potential conflict of interest in adjudicating rental housing cases that could affect a housing project's bottom line, or that could impact relationships with housing developers regarding other housing projects. These factors reinforce the conclusion that OAH is the more appropriate agency to adjudicate any claims HFA tenants may have under or in accordance with the RHA.

Section 2 of the bill would also require that advisory neighborhood commissions receive notice in cases where zoning regulations are affected, and require the matter to be referred to the zoning commission or board of zoning adjustment in land improvement matters. The OTA has no comment on this provision of the bill.

2. ***Application of provisions of the RHA to HFA buildings***

Section 3 of the bill would amend Section 308 of the District of Columbia Housing Finance Agency Act (D.C. Law 2-135; D.C. Official Code § 42-2703.08) to make it subject to Titles V and VII of the RHA, thus eliminating, with respect to these two titles, HFA's general exemption from the RHA.

The OTA strongly supports this provision so far as it goes, but urges the Committee to expand this provision to include other tenant claims,

especially to allow for the administrative redress of poor housing conditions, unless it can be determined that HFA participation in federal programs would be unduly compromised.

The most significant impact of this provision in its current form is in the area of evictions. Under Bill 18-68, HFA tenants would have the same eviction protections under Title V that other tenants in the District have: the HFA tenant could be evicted only on the basis of one of ten reasons enumerated in section 501 of the RHA; the HFA tenant would have access to OAH for adjudication of alleged Title V violations; the HFA housing provider would have to serve the Rent Administrator with a copy of any notice to vacate other than one based on non-payment of rent; and the Rent Administrator would have the ability to take enforcement action against housing providers who violate eviction protections (D.C. Official Code § 42-3509.01).

Another salutary effect of this provision is the fact that Title V would apply *in toto* to HFA tenants, whereas HFA's statutory mandate regarding Title V rule-making only reaches evictions and retaliatory action. Were HFA to retain jurisdiction and HFA rule-making were to take effect, this would leave out important rights enjoyed by other District tenants: the right of tenants in a building to organize to pursue common interests; the right of victims of domestic violence to terminate leases where continuing the tenancy would pose a further safety risk; and the right of victims of domestic violence to require the landlord to change the locks to help prevent further incidents of domestic violence (D.C. Official Code §§ 42-3505.06; 42-3505.07; and 42-3505.08, respectively).

Again, the OTA strongly supports this provision of the bill so far as it goes. However, Mr. Chairperson, we believe ***it could and should have a far greater impact if it were broadened to include claims included in similar legislation you introduced during the last Council session.*** Under Bill 17-57, the "Office of Administrative Hearings Amendment Act of 2007," HFA tenants would have had the opportunity to pursue actions for ***rent reductions for housing code violations, substantial reductions in services, or an unlawful rent or rent increase.*** These important claims, we believe, would far surpass the number, if not the significance, of eviction actions against HFA tenants. Their omission is a serious and consequential matter not only for HFA tenants, but for the District as a whole in terms of an existing gap in tenant enforcement of the District's housing regulations.

To provide some context, HFA affordable housing projects using federal tax credits have proven to be a good vehicle for ensuring affordability of a certain percentage of units in a building. If the building has been under rent control, however, these projects can entail harsh realities for tenants in the remaining units. The housing provider is entitled to claim an exemption from rent control once HFA's mortgage revenue bond financing or the federal affordability program kicks in (D.C. Official Code § 42-3502.05(a)). Generally, under federal tax credit requirements, only 20 percent or 40 percent of the units remain affordable past the initial years of the project. Only low-income (50 % AMI) or very-low income tenants (40% AMI) qualify for those units. After the initial period, tenants in the remaining 60 or 80 percent of the units, who likely do not meet the low-income

criteria and yet are of relatively modest means, are no longer protected any by affordability mechanism, federal or local. Thus they are subject to market rent through phased-in but dramatic rent increases.

At least as troubling as the potential loss of affordability is what happens to these tenants who have claims such as housing code violations, service reductions, or unlawful rent or rent increases. They lose the right to an administrative remedy for these grievances, adding insult to injury, at the very same time their rents are allowed to go up to market rent. This describes the experience a few years ago of most of the tenants at the Capitol Park Plaza at 201 I St S.W., which we understand served as a catalyst for Bill 17-57. The issue was not evictions; the issue was the loss of affordability and the concomitant loss of an administrative remedy for construction noise, security, leakage, mold, and generally deteriorating housing conditions.

Unlike the pending legislation, Bill 17-57 would have afforded HFA tenants these ***additional claims without making HFA formally subject to any of the rent control provisions in Title II of the RHA***. We understand that rent control itself if applied to any units in an HFA project -- those that remain affordable under the federal requirement and those that don't -- may interfere either with the federal affordability regulation or with the project's financial viability. Thus, we do not seek application of rent control *per se* to any units in any HFA building. However, we believe the matter of administrative remedy, including the possibility of rent abatement, is a different matter entirely. The lack of such an administrative remedy means ***weaker housing code enforcement in the***

District and ***greater tenant displacement*** due to intolerable conditions if not loss of affordability.

As we understand it, HFA's position on this matter is that an administrative remedy for housing code violations ***necessarily*** precludes or undermines the participation of an accommodation in the relevant federal subsidy programs or in the HFA housing project itself. We have the following questions about this position:

1. As we understand it, HFA has indicated that the issue is ***not*** one of federal preemption, but one of disqualification from certain federal programs if, under federal law, the administrative remedy constitutes an impermissible local regulation regarding rent levels.

    a. What specific federal laws are relevant?
    b. Does an administrative remedy, say for poor housing conditions, necessarily constitute an impermissible "rent level" regulation?
    c. If so, is federal waiver of the relevant rule or regulation a possible resolution?

2. Generally, why would any federal agency have any interest in shielding a housing provider from liability for failure to comply with legal obligations, including even the obligation to keep the premises habitable? Isn't it federal practice to yield to local housing laws as much as possible in this regard?

3. Additionally, we understand that HFA believes that the administrative remedy makes revenue projections in a *pro forma* unreliable or impracticable, and may also give rise to breach of contract claims by housing providers against HFA. How can this be, given that nothing prevents HFA tenants from seeking judicial redress in D.C. Superior Court for ***exactly the same housing provider illegalities***? Why would the availability of administrative remedies for tenants undermine any aspect of an HFA project any more than the availability of judicial remedies?

4. Finally, we note that there is D.C. Court of Appeals precedent for the proposition that a tenant may be entitled to a rent rebate -- even for the amount of a federal subsidy -- where the tenant proves housing code violations and the federal agency (HUD in the instant case) has failed to join the action. Multi-Family Management, Inc. v. Hancock, 664 A.2d 1210, 1215-17 (D.C. 1995). Why isn't this general scenario -- DC tenant

enforcement with the possibility of rent abatement in a federal subsidy situation -- workable in the HFA context?

We have engaged HFA in a productive but sporadic dialogue on this matter, thus far without closure. ***Mr. Chairperson, if you agree these claims for HFA tenants are too important to exclude without more concrete justification, we would request the Committee's involvement in the discussion (and appreciate the Committee's offer of same), its own determination regarding this consequential matter, and if proven to be feasible the inclusion of these important claims in the legislation.***

3. ***Mailing standard for notices of hearings and decisions and orders***

Section 4 of the bill would amend RHA section 216(c) and (j) (D.C. Law 6-10; D.C. Official Code § 42-3502.16) to eliminate the requirement that notices of hearings and copies of decisions by the Rent Administrator (RAD), the Rental Housing Commission (RHC), and OAH be sent by certified mail or another method that assures delivery. Instead, section 4 would allow the relevant agencies to send hearing notices and copies of decisions by first-class mail.

Mr. Chairperson, the OTA fully appreciates the cost concerns you raised last year even before the current budget crisis emerged. Certainly we fully appreciate the budgetary concerns of the affected agencies. We agree that priority mailing with certified receipt constitutes an unnecessary cost. While we do not believe that section 216 of the RHA necessarily requires such a costly method of delivery, we also appreciate the fact that ***any*** requirement of proof of delivery may prove too expensive a proposition.

Nevertheless, we believe that the ***section 216 requirement of assurance of delivery involves important policy considerations which should not be abandoned entirely.*** It should be kept in mind that tenants are the District's front-line in terms of enforcement of the housing regulations, and indeed tenants have been acknowledged by the Rental Housing Commission and the D.C. Court of Appeals as acting as "private attorneys general" in this regard. This enforcement role, together with the history and context of mailing issues in rental housing cases, calls for some standard of mailing by the relevant agencies above and beyond what section 4 of the bill now contemplates. We appreciate that OAH does have "heightened mailing procedures" to assure service upon the parties, including a second pair of eyes to carefully double-check addresses, and a timing methodology designed to assure mailing on the date stated in the Certificate of Service. However, ***we are unconvinced that this method alone, while necessary, is sufficient to quiet concerns regarding the proof of mailings on the part of each of the relevant agencies.***

Reports to the OTA from tenants with cases before the relevant agencies are cautionary tales about dispensing with mailing and delivery assurances entirely in one fell swoop. They include clerical errors such as incorrect addresses, discrepancies between the date on a Certificate of Service and the actual mailing date (which suggests that even signed and dated Certificates can sit on a desk for days before getting mailed), concomitant delays in receiving relevant documents or non-receipt of decisions that the adversary has received, and concomitant reductions in the time one has to file exceptions and objections,

motions for reconsideration, or appeals. We are aware of at least one recent OAH order that referenced the agency's certified receipt to dispute a housing provider attorney's claim that he had not received a prior OAH order. Moreover, attorneys familiar with the long history of rental housing cases inform us that, prior to the requirement of mailing with certified receipt, there were frequent complaints regarding the amount of time spent at hearings and conferences on disputes over whether a party received an agency mailing, and the amount of time and ink adjudicators spent on such matters in their decisions and orders.

We conclude that some proof of mailing or delivery that also addresses the cost concern would benefit all involved, including the relevant agencies. ***Therefore, we strongly recommend that the Committee amend section 4 of the bill to require at least an assurance of mailing*** of hearing notices and decision and orders under RHA section 216. We are aware that the U.S. Postal Service (USPS) offers a ***"certificate of mailing"*** that provides evidence that mail has been presented to the USPS for mailing. It does not provide a record of delivery, but at least elevates the available proof of mailing by an agency above and beyond the Certificate of Service. The ***cost is 40 cents per item*** for a minimum of three items. This represents ***very significant cost savings over the cost of the currently used method of priority mail with certified receipt***. We also believe an even cheaper USPS electronic proof of mailing may be available.

Tenant Associational Standing

Finally, we ask the Committee to use Bill 18-68 as the vehicle to close another looming gap in the capacity of tenants to enforce the District's housing regulations. Specifically, ***the OTA strongly urges the Committee to add a new section to the bill amending the Rent Administrator and OAH procedural rules for rental housing cases regarding tenant associational standing and the listing of tenant associations in the caption*** (14 D.C.M.R. § 3904 and 1 D.C.M.R. § 2924). The purpose is to resolve a long-standing interpretational problem regarding the current regulations that has served to:

1. Weaken the ability of tenants to effectively challenge violations of housing laws affecting multiple tenants in a particular building;
2. Protract litigation unnecessarily and increase evidentiary burdens on tenants seeking to vindicate common rights, thereby undermining the tenant role with regard to housing code enforcement; and
3. Deprive tenant associations of certain statutory rights applicable to all unincorporated non-profit associations in the District.

The relevant OAH regulations (1 D.C.M.R. § 2924), which are identical to the relevant Rent Administrator regulations (14 D.C.M.R. § 3904), are as follows:

> 2924.1 Individual tenants involved in any proceeding shall be individually identified.
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> 2924.2 If a tenant association seeks to be a party, the Administrative Law Judge shall determine the identity and number of tenants who are represented by the association.
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> 2924.3 If a majority of tenants are represented by the association, the association shall be a party, and shall be listed in the caption.

The plain meaning of this regulatory language is that a tenant association representing a majority of the tenants must be deemed to be a party and must be listed in the caption. It does not prohibit a tenant association representing a minority of the tenants from being a party or from being list in the caption. Yet that is the prevailing interpretation of these provisions.[1]

Arguments we have heard from housing provider attorneys for precluding minority tenant associations from being parties do not hold water, and upon examination really go to wholesale opposition to the involvement of any tenant association in any rental housing case, regardless of the percentage of tenants represented. For example, there is no basis for the claim that tenant associational standing gives the association "rights" not contemplated by the RHA. It is the rights of the individual tenants who authorize the association's representation that are at issue, regardless of whether the tenants "associate" for purposes of the litigation. Nor does tenant associational standing threaten the due process rights of the housing provider. Claims particular to any individual tenant must be proven by that individual tenant, who the housing provider should have and does have every right to cross-examine.

But if the claim involves an alleged violation of law by a housing provider that commonly impacts multiple tenants -- such as lack of registration, or common area housing code violations, or common area reduction of services -- then requiring each tenant seeking relief to prove the claim serves no purpose

[1] This interpretation may have resulted in part from confusion with an irrelevant requirement in the District's tenant right of purchase law, which states that only an incorporated tenant association representing a majority of tenants may pursue the opportunity to purchase a building with 5 or more units. D.C. Official Code § 42-3404.11.

except to protract the litigation and place unnecessary burdens on tenants. The requirement not only leads to repetitious evidence, it wastes adjudicatory resources, forces each tenant petitioner to appear at hearings and conferences unnecessarily, and gives derelict housing providers an incentive to "game the system" by attempting to pick off individual tenants through challenges to membership status. The purpose here can only be to frustrate the tenants' enforcement of housing regulations and deny relief to as many individual claimants as possible, if nothing else through the exhaustion of tenant resources.

Moreover, the regulations are in clear violation of tenants' rights under the "Uniform Unincorporated Non-profit Association Act of 2000" (D.C. Official Code § 29-971.01 *et seq.*), which explicitly gives any unincorporated non-profit association the right to represent "one or more its members" if "neither the claim asserted nor the relief requested requires the participation of a member."[2] We also believe that the majority requirement results in improper probing into the identity of association members who do not wish to participate in the litigation, which could have a chilling effect on tenant organizing activity.

Finally, with regard to the caption rule, it is important as a legal matter that the rental housing regulations comport with the statutory right of a tenant association to have standing to represent any number of its members. It is also

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[2] D.C. Official Code § 29-971.07:
(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

important as an organizing tool that any tenant association that is a party be named in the caption.

Accordingly, we urge the Committee to incorporate in Bill 18-68 an amendment to the relevant regulations to read as follows:

> ***14 DCMR 3904.2 Any tenant association may file and shall be granted party status to prosecute or defend a petition on behalf of any one or more of its members who have provided the association with written authorization to represent them in the action, or to seek on behalf of all members any injunctive relief available under the Rental Housing Act of 1985. No further inquiry into the membership of the association shall be permitted.***
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> ***14 DCMR 3904.3 Any tenant association that is a party to the action pursuant to 14 DCMR 3904.2 shall be listed in the caption.***
>
> ***1 DCMR 2924.2 Any tenant association may file and shall be granted party status to prosecute or defend a petition on behalf of any one or more of its members who have provided the association with written authorization to represent them in the action, or to seek on behalf of all members any injunctive relief available under the Rental Housing Act of 1985. No further inquiry into the membership of the association shall be permitted.***
>
> ***1DCMR 2924.3 Any tenant association that is a party to the action pursuant to 1 DCMR 2924.2 shall be listed in the caption.***

Conclusion

Thank you again, Chairperson Mendelson, for the opportunity to comment on Bill 18-68, for considering these recommendations, and for introducing legislation of such importance to HFA tenants and tenants across the District. I would welcome any further opportunity to work with the Committee, the relevant agencies, and stakeholders regarding any aspect of the bill.