Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

Johanna Shreve
Chief Tenant Advocate

Bill 18-104, "Tenant Access to Justice Reform Act of 2009"

and

Bill 18-179, the "Tenant Opportunity to Purchase Preservation Clarification Act of 2009"

Committee on Housing and Workforce Development
The Honorable Marion Barry, Chairperson
Council of the District of Columbia

Thursday, November 30, 2009
11:00 a.m.

Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Good morning, Councilmember Barry and members of the Committee on Housing and Workforce Development. I am Johanna Shreve, the Chief Tenant Advocate of the District of Columbia in the Office of the Tenant Advocate. I am here this morning to present testimony regarding Bill 18-104, "Tenant Access to Justice Reform Act of 2009," and Bill 18-179, the "Tenant Opportunity to Purchase Preservation Clarification Act of 2009."

BILL 18-104, "TENANT ACCESS TO JUSTICE REFORM ACT OF 2009"

What the bill would do

Bill 18-104 would permit a tenant to bring a civil action in the Landlord and Tenant Branch of D.C. Superior Court against a housing provider who fails to maintain a rental unit, or the building's common areas, in compliance with the District's housing regulations including the housing code. It also gives "any person" the right to receive a "certified" copy of any housing inspection report prepared by a District agency. The relevant agency would have to provide the certified copy of the report within 2 days of the request, and it would then be admissible in court without further authentication.

Right to housing inspection reports

First I wish to discuss the matter of inspection reports which is addressed in section 6 of the bill. Please note that under current regulations, DCRA must provide the tenant with a copy of any post-inspection notification that is issued to the owner. (14 D.C.M.R. § 106.1) For any number of reasons -- including DCRA's interpretation regarding the scope of the regulation, which the OTA and DCRA continue to discuss -- tenants are not always provided with copies of inspection notices. Thus, I strongly support section 6 of the bill and recommend the following amendments to clarify and strengthen this provision.

1. Section 6(a) should specifically refer to "inspection notices" as well as "inspection reports," and should also specifically refer to "reinspections" as well as "inspections."
2. The phrase "housing inspections" may be interpreted as referring only to DCRA inspections pursuant to the housing regulations codified at DCMR Title 14. However, if the intent of this bill is to include inspections by other agencies such as the Department of the Environment and the Department of Health, then I would recommend that section 6 should refer to "any inspection of the

premises by any District agency" rather than "any housing inspection by any District agency."

3. To ensure that the certification process works as intended, I recommend that the term "certified" be defined with reference to the appropriate Superior Court rule or process.
4. I recommend the addition of a new section 6(c) to clarify that: "Nothing in this act shall be construed as amending any obligation the Department of Consumer and Regulatory Affairs has pursuant to 14 D.C.M.R. § 106.1." It is important to make clear the legislative intent that DCRA's obligation under this bill is to provide inspection reports upon a tenant's request in no way would supplant DCRA's obligation as a matter of course to provide the tenant with a copy of a post-inspection report under the existing regulation.
5. I also believe that Bill 18-104 is an appropriate vehicle to clarify the existing regulation at 14 D.C.M.R. § 106.1. Further discussion with the Committee and DCRA would be helpful, but one way to do this is by adding the phrase "including any Notice of Violation and any Notice of Infraction" at the end of the existing text.

OTA's position on a "Housing Court" to date

Now onto what may be termed the "Housing Court." At a Committee on Public Services and Consumer Affairs hearing on June 4, 2009, I testified in support of Bill 18-92, the "Omnibus Rental Housing Protection Amendment Act of 2009," and in particular in support of section 2. Similar to the measure being considered today, that provision would create a summary action in the Landlord and Tenant Branch of D.C. Superior Court for tenants who wish to pursue housing code violation claims against their landlords.

At that time, I indicated that this is a matter of fundamental fairness *and* an enforcement imperative. Currently, housing providers may initiate a summary action at the Court's Landlord & Tenant Branch to evict a tenant, but a tenant has no such summary process. A tenant suffering from poor building conditions must literally risk the roof over his or her head in order to gain access to a summary process -- specifically, by raising housing code violations as a defense when sued by the landlord for eviction for non-payment of rent.

Again as stated in my June testimony, this almost feudal inequity *must* be ended. The District *must* catch up with the growing number of jurisdictions -- including New York, Massachusetts, Connecticut, and

Minnesota -- that provide tenants with a summary action for housing code enforcement claims. Moreover, this clearly is in the government's and the tax-payers' best interest. Virtually all the District's tenant protection laws contemplate that a tenant, serving as a "private attorney general," will be the enforcer-in-chief of his or her own rights. This is an implicit acknowledgement that the relevant District agencies acting alone simply cannot keep pace with the high demand for housing condition remediation. Tenants must be provided with effective tools for enforcing their own right to habitable living conditions. Thus, I strongly support the creation of a summary action at D.C. Superior Court to enhance the ability of tenants to enforce the housing code on their own behalf.

My June testimony further noted the Court's position, that the proposed legislation would violate specific provisions of the Home Rule Act (D.C. Code §1-206.02(a)(4)), and generally the Council has no authority to mandate the Court's creation of this action. I believe the arguments that the Council *does* have this authority are quite strong. Nevertheless, I expressed my appreciation for the fact that (1) the Court has embraced the legislation's underlying concept, and (2) has initiated a working group to recommend the features of a model summary process for tenant claims which the Court seems prepared to implement voluntarily. Therefore, I recommended that

the Committee suspend consideration of that measure in order to give the Court's efforts a chance to succeed. This would moot a legal battle over separation of powers and the Home Rule Act conflicts.

Status of the Court's pilot program initiative

Since my testimony in June, the OTA has been kept well apprised of the group's progress by tenant representatives and by the Court itself. Those who are direct parties to this process have characterized the progress that has been made. I would note that (1) the Court has indicated to us that it will be ready to implement a "Housing Court" pilot program in the Civil Division by April 2010, meaning that tenants will be able to start filing claims by then; (2) it is generally acknowledged that some measure of progress has been made, but that significant issues remain to be worked out; and (3) it is generally acknowledged that Bill 18-92, Bill 18-104, and the Council's attention to this matter have helped to focus the Court's and the stakeholders' efforts.

OTA's recommendation

In light of these factors, I renew my recommendation that the Court's voluntary process be given a chance to succeed, but at the same time I believe it is very important that the Council -- and in particular this

Committee and Councilmember Mendelson's Committee which has jurisdiction over section 2 of Bill 18-92 -- remain vigilant on this matter. ***Specifically, I recommend that you, Chairperson Barry, not adjourn this hearing after the completion of today's testimony, but rather that you suspend this hearing until, say, early March 2010. By then we should know whether the start-up of the Court's pilot program is indeed imminent, or whether further Council action may be warranted.***

I also wish to note that after my June testimony, the OTA received a number of thank you's from tenant advocates who believed that our testimony was quite helpful to this cause. But we also received some criticism from a few others who seem convinced that only a legislative mandate will bear fruit. I would suggest that a protracted legal battle over the prerogatives of the Council and the Court will not help a single tenant, and I am cautiously optimistic that the Court's own initiative can succeed in bearing fruit in the near future. I commend Chief Judge Lee Satterfield, Judge Melvin Wright, and the working group for all their efforts which seem promising. And I reiterate my bottom line that one way or another this cause simply must become a reality for tenants in the District.

Bill 18-179, the "Tenant Opportunity to Purchase Preservation Clarification Act of 2009"

What the bill would do

Bill 18-179 would amend the Rental Housing Conversion and Sale Act of 1980 to clarify that hand delivery or sending by first class mail a tenant's letter of interest preserves the tenant's or tenant group's opportunity to purchase rights under the act, and that actual receipt of the letter by the housing provider or the Mayor within the relevant timeframe is not required.

The purpose of the bill

The purpose of this bill is to clarify the Council's intention under the Tenant Opportunity to Purchase Act (TOPA) regarding the amount of time that a tenant has to express his or her interest purchasing the rental unit after being notified that it is up for sale. The relevant provision of the act states that, in order to preserve his or her opportunity to purchase a single-family accommodation, the tenant must "provide the owner and the Mayor with a written statement of interest" within 30 days of receipt of a written offer of sale from the owner (D.C. Official Code § 42-3404.09).

In February 2009, in a case called Tippett v. Daly (No. 06-CV-1327), the D.C. Court of Appeals interpreted this provision as requiring that the tenant must ensure actual receipt of the letter of intent by the owner within the 30-day timeframe. Thus, in that case, the tenant's right to purchase the accommodation was extinguished because the U.S. Postal Service failed to

deliver the letter until the 32nd day. This was despite the fact that the tenant had mailed his letter of interest some two weeks prior to the expiration of the 30 day period.

I will not discuss the particular flaws that I find in the Court's reasoning, but I will commend the reasoning of the dissenting opinion in this case. Suffice it to say that I believe that the Court misinterpreted the plain meaning of the relevant language; overlooked how inconsistent its interpretation is with other provisions of the statute; and misapplied rules of statutory construction, including the statute's own explicit rule of construction. That provision expressly instructs a court "to favor resolution of ambiguity toward the end of strengthening the legal rights of tenants or tenant organizations to the maximum extend permissible under law." (D.C. Official Code § 42-3405.11) Attached to my written testimony is a letter that I sent to the Court in March urging the Court to grant the tenant's petition for a rehearing *en banc*, as well as the Court's Order in August granting that request.

The OTA was happy to consult with Councilmember Graham in the drafting of this legislation, as well as preceding emergency legislation, now expired, and temporary legislation which remains effective until February 2010. Regardless of the outcome of the Court of Appeals case, Bill 18-179

represents an opportunity for the Council to clarify its intentions on this matter once and for all. As we indicated to the Court, its statutory interpretation effectively shortens the time period the tenant has to exercise the right of purchase, which is already quite minimal. It also serves to extinguish the tenant right of purchase for reasons beyond the tenant's control, which could well invite mischief on the part of the District's more unscrupulous landlords to deprive tenants of this important right. The "mail-box rule" -- which deems the acceptance of an offer as being made upon mailing -- should apply for all these reasons, and because that was the Council's clear intention. Bill 18-179 would make the Council's clear intention unmistakable.

Certified mailing requirement

I wish to comment on an amendment made to Bill 18-171, the "Tenant Opportunity to Purchase Preservation Clarification *Temporary* Act of 2009," which as I noted is now in effect (Law 18-23, effective July 7, 2009, expires February 17, 2010). Under the amendment, a tenant still has the option of hand-delivering or mailing a letter of intent, and actual receipt of the letter by the owner within the 30 day time period is not required. However, if the tenant chooses to mail the letter of intent, he or she must do so by certified mail instead of by first class mail. This amendment applies to

the letter of intent to exercise the right of purchase regarding any sized accommodation, whether a single family accommodation, an accommodation with 2 through 4 units, or an accommodation with 5 of more units. (D.C. Official Code §§42-3403.09 & .10 & .11)

I understand that the purpose of this amendment is to provide the owner with some added measure of assurance that the letter will actually be delivered and to the right address. Given our experience that tenants are often scrambling to meet the deadline for mailing the letter of intent, however, I question whether this added assurance of delivery truly outweighs the expense and the inconvenience to the tenant. Moreover, I note that this amendment changes almost 30 years of standard practice and has the potential to deny the right of purchase to tenants who remain unaware of the change and have worked hard to do everything else right.

I raise this matter in anticipation that the Committee may consider incorporating this amendment in the permanent legislation which is the subject of today's hearing. I would be happy to confer with the Committee and interested others regarding how best to strike the appropriate balance between the various interests at stake.

This concludes my testimony. I thank you, Chairperson Barry, as well as Councilmember Bowser and Councilmember Graham, for co-introducing Bill 18-179, and Councilmember Cheh for introducing Bill 18-104. I also thank you for the opportunity to testify on these important measures, and for your continued leadership on behalf of the tenant community. I would be happy to provide the Committee with any further assistance I can and I welcome any questions you may have at this time.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE TENANT ADVOCATE

March 19, 2009

Mr. Garland Pinkston, Jr.
Clerk of the Court
District of Columbia Court of Appeals
Moultrie Courthouse
500 Indiana Ave., N.W.
Room 6000
Washington, D.C. 20001

No. 06-CV-1327: Tippett v. Daly

Dear Mr. Pinkston:

In my capacity as the Chief Tenant Advocate for the District of Columbia, I am writing to urge the Court to grant the appellant's petition for rehearing *en banc* in the above-referenced matter. I am very concerned about the implications of the Court's decision of February 5, 2009, in this case.

The effect of this decision is to shorten the time period that tenants have to respond to an offer of sale of the housing accommodation under the District's "Tenant Opportunity to Purchase Act of 1980" (D.C. Official Code §§ 42-3404.09 & 42-3404.10). It also *extinguishes* the tenant right of purchase in the event of a delay in mail delivery over which the tenant has no control.

Clearly, this is contrary to both the language of the law and the intentions of the DC Council – not only in light of the statutory provisions of particular relevance, but also the rule of statutory construction at D.C. Official Code § 42-3405.11. That provision compels the Court to "resolve ambiguity toward the end of strengthening the legal rights of tenants … to the maximum extent permissible under law." Furthermore, by extinguishing tenants' rights for reasons beyond their control, the Court invites creative mischief on the part of the District's more unscrupulous housing providers to ensure that very outcome.

I respectfully urge the Court to grant the petition for rehearing *en banc* and to reconsider this flawed decision.

Sincerely,

Johanna Shreve,
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District of Columbia
Court of Appeals

No. 06-CV-1327

JAMES TIPPETT,
Appellant,

LTB37786-01

v.

GREGORY DALY,
Appellee.

BEFORE: Washington, Chief Judge; Ruiz, Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, Thompson, and Oberly, Associate Judges.

ORDER

On consideration of appellee's petition for rehearing en banc, the appendix thereto, and appellee's letter from the Chief Tenant Advocate in support of petition; and it appearing that the majority of the judges of this court has voted to grant the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is granted and that the opinion and judgment of February 5, 2009, are hereby vacated. It is

FURTHER ORDERED that the Clerk shall schedule this matter for argument before the court sitting en banc as soon as the calendar permits. It is

FURTHER ORDERED that appellant's brief shall be filed on or before July 24, 2009, appellee's brief shall be filed on or before August 24, 2009, and reply briefs, if any, shall be filed no later than September 24, 2009. Each party shall file ten copies of its briefs. These new briefs shall be specifically designed for consideration by and addressed to the en banc court and shall supersede all briefs previously filed in this appeal. It is

FURTHER ORDERED that any requests for extension of time will be looked upon with disfavor and will be granted only upon showing of good cause.

PER CURIAM