GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE TENANT ADVOCATE

February 12, 2010

Mr. Helder Gil, Esq.
Legislative Affairs Specialist
D.C. Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E., Suite 9500
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RE: OTA Comments on Proposed Rulemaking for Housing Business Licensing

Dear Mr. Gil:

Pursuant to DCRA's January 1, 2010 Notice of Proposed Rulemaking (D.C. Register, Vol. 57 – No. 1, 000134 – 000139), the purpose of this letter is to make the following comments and recommendations (bolded) regarding the District's housing business licensing regulations.

General Licensing Requirements

1. **Retain rule of applicability**

   The proposed rulemaking eliminates existing rule 200.2, which sets forth the rule of applicability that whenever there may be a conflict, the specific provision of Chapter 2 supersedes any general provision of the subtitle. We understand that the general rule of construction favors the application of a specific over a general provision of law in instances where they may conflict. However, we believe the elimination of the explicit rule could encourage mischievous legal arguments as to "regulatory intent," and thus has the potential to undermine Chapter 2 enforcement.

   Thus, **we recommend that the existing rule of applicability at rule 200.2 be retained.**

2. **Retain specific requirement for posting of license on the premises**

   Proposed rule 200.4, pertaining to the display of the housing business license, would eliminate the specific requirement in current rule 200.6 that the license be "framed under clear glass or plastic." We believe this requirement serves the important purpose of allowing interested persons to quickly and readily identify the license, which is a document of primary significance to the business.

   Thus, **we recommend that the phrase "framed under clear glass or plastic" at current rule 200.6 be incorporated into proposed rule 200.4.**

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3. **Require explicit kinds of contact information for property managers**

Proposed rule 200.5 requires each applicant to register the name and contact information of a property manager or resident manager responsible for property maintenance.

We recommend the addition of the phrase "if applicable." Where it is not applicable, the applicant should be required to state that he or she will serve as the property manager.

Proposed rule 200.5 also replaces the phrase "contact information" for the current requirement in rule 202.1 that the property manager's address and physical location must be provided. The elimination of the more specific requirement would allow property managers to provide "virtual" contact information only -- perhaps nothing more than an e-mail address. We believe this would undermine tenants' and the District's ability to track down those responsible for failing to properly maintain the accommodation.

We recommend that required "property manager information" continue to include address and physical location, and that a telephone number also be required.

4. **Make certain technical changes**

Proposed rule 200.6 would require that any change in the property manager position be reported in writing to DCRA "not *less* than five (5) days after the change" (emphasis added). We believe the intent, as well as the appropriate policy, is to require such report *within* a given number days after the change. Furthermore, for the sake of ease and consistency with the rule regarding agents, we believe that the "five (5) days" should be changed to "seven (7) business days."

Thus, **we recommend substitution of the phrase "not more than seven (7) business days after the change" for the phrase "not less than five (5) days after the change."**

We believe that having one section that contains all regulations pertaining to property managers would make them both clearer and more user-friendly.

Thus, **we recommend that the property manager registration requirements be moved to section 204, and that section 204 be re-titled "Registration and Licensing of Property Managers."**

To distinguish those responsible for property maintenance and repairs from those who actually perform the work, **we recommend substitution of the phrase "person responsible for property maintenance and repairs" for the phrase "person to conduct property maintenance" in proposed rule 200.6.**

Proposed rule 200.7 is duplicative of proposed rule 200.4 and thus **we recommend the deletion of proposed rule 200.7.**

License Categories

1. **Eliminate (non-existing) exemption from the RAD registration provision**

   Proposed rule 201.4 would require registration with the Rent Administrator as a condition of licensing, which we believe promotes regulatory coordination and therefore strongly endorse. However, the phrase "unless exempt pursuant to D.C. Official Code § 42-3502.05(a)(3)" suggests incorrectly that there is an exemption in the rent control law from the registration requirement. There is no such exemption. All housing providers must file a "Registration/Claim of Exemption" form with the Rent Administrator which declares the status of each rental unit as either "rent controlled" or exempt from rent control. In fact, D.C. Official Code § 42-3502.05(a)(3) itself makes registration an explicit precondition for any claim to the "small landlord" exemption.

   Thus, **we strongly recommend the deletion of the phrase "unless exempt pursuant to D.C. Official Code § 42-3502.05(a)(3)."**

2. **Reconsider license categories**

   We have questions regarding the license categories set forth in proposed rule 201.1, including distinctions between certain one and two-family rentals involving undefined terms. We also have questions regarding proposed rule 201.3 ("licenses shall not be issued .... (if) rented for less than 90 days") and whether the intent is to prohibit rentals for less than 90 days, or to exempt such short-term rental businesses from the licensing requirement.

   We request inter-agency discussion to clarify and possibly modify these provisions prior to final rule-making.

Inspection of premises

1. **Modify but maintain DCRA's inspection mandate**

   In both the current regulations and the October 2009 proposed rule-making, Rule 201.1 explicitly requires DCRA to inspect licensed housing businesses and premises for which a license application has been filed. That agency mandate is eliminated from the proposed rule-making and no other inspection mandate replaces it. Instead, proposed rule 202.1 requires a licensee to allow DCRA and other agencies to inspect the premises, and proposed rule 202.3 would require the Director to determine whether a licensee is in compliance with all applicable provisions of the building and housing laws (as well as the business license laws).

   We support the inclusion of the "access" requirement on licensees in proposed rule 202.1. We also support the inclusion of the general compliance determination in rule 202.3. But without an inspection mandate, this would beg the question as to how that determination is to be made. For example, at some point in the future, could the determination be made passively on the basis of licensee attestation or "self-certification" instead of actual inspections?

   We are aware that in practice DCRA does not inspect all licensee and applicant properties, nor does it have the resources to do so. But we are concerned that the

elimination of any inspection mandate has the appearance of weakening an existing agency obligation. We believe this would raise more concerns than it resolves, and would be at odds with DCRA's current efforts to enhance its inspection programs, and to make housing inspections in the District more rigorous and more pro-active. Simply put, the elimination of the inspection mandate *in toto* would send the wrong signal to the rental housing community.

We believe the regulations could specify under what circumstances DCRA "shall inspect" housing accommodations. Furthermore, we believe this new rule-making also may represent an opportunity to address the inspection of non-licensed housing businesses and federal and District-owned or subsidized properties, which we understand have been problematic.

Accordingly, **we recommend that the phrase DCRA "shall inspect" -- which has been a part of the housing regulations for time immemorial -- be retained and that non-discretionary inspection circumstances be identified. We also request inter-agency discussion of these matters, particularly the possibility of addressing DCRA inspections at non-licensed and at federal and District-owned or subsidized properties.**

2. **Eliminate selective housing code compliance requirement**

Proposed rule 202.2 requires a licensee to comply with certain parts of the housing regulations, and then includes a catch-all provision referencing "other District and federal statutes and regulations that govern housing businesses." To our knowledge, this would be the first time such a selective enumeration of compliance requirements has been incorporated in the Housing Business License chapter.

The enumeration of certain portions of the housing code for purposes of a licensee compliance requirement raises several concerns. First, it may be perceived as creating a category of housing code provisions of "primary concern," thus relegating others to the status of "lesser concerns". For example, tenants are likely to question the enumeration of a licensee's obligation to maintain grass or weeds under a certain height, and the failure to enumerate a licensee's obligation to maintain utility services. Second, it conceivably could have the general effect of encouraging less code compliance in certain important areas than others. Third, it potentially could be misused by licensees as a legal argument against full enforcement of the non-enumerated portions of the housing code, for example in support of a claim of "substantial compliance" or "de minimus violations."

Thus, **we recommend that the enumeration of compliance requirements on licensees either be eliminated or be made comprehensive through the use of general categories.**

3. **Mandate the proactive inspection program**

In referencing the "regular system of inspections for licensees" which DCRA has already initiated, proposed rule 202.4 states that "the Director *may* develop" such a system (emphasis added). We believe the proactive inspection system should be made a regulatory mandate at this time for the following reasons.

As you know, there is legislation pending before the Council that would require DCRA to regularly inspect all housing accommodations in the District (section 3 of Bill 18-92, the "Omnibus Rental Housing Amendment Act of 2009"). In consultation with DCRA as well as the tenant community, the OTA took the position that any such legislation should be considered in light of actual experience and lessons learned from the pro-active inspection program DCRA has already initiated.

We believe a regulatory mandate at this time would provide assurance to the Council and the tenant community that the proactive inspection program is here to stay, and that DCRA is committed to implementing and refining the program for the long-term. Moreover, we believe a regulatory mandate would be more consistent with proposed rule 220.1(d), which incorporates the statutory $35 per unit fee to cover the agency's proactive inspection costs.

Thus, we recommend the substitution in proposed rule 202.4 of the phrase "the Director may develop" a proactive inspection system with the phrase "the Director shall develop" such a system.

4. **Retain and enhance references to roles of other government agencies**

The proposed rule-making would eliminate various references in the current rules to the enforcement roles of District agencies and officials other than DCRA and the Director, regarding compliance with regulations not under DCRA's purview. Some relate to the license applicant and others relate to the licensee. These other agencies and officials include the Fire Chief (201.1 & 201.4), the Chief of Police (201.1 & 201.5), the agency responsible for enforcement of public health regulations (201.3), and the agency responsible for enforcement against lead and lead-paint hazards (201.6).

Under the proposed rule-making, all these provisions are supplanted by the requirement in proposed rule 202.1 that a licensee must allow access to "any other District government agency responsible for enforcement of the housing and building regulations." As noted above, we support the inclusion of this "access" requirement on licensees.

But the elimination of all references to other government agencies could aggravate the already serious problem of regulatory coordination, or the lack thereof, regarding the health and safety of District tenants. DCRA and OTA have discussed this problem in the context of a matter now pending under section 501(f) of the Rental Housing Act of 1985 -- specifically, the lack of regulatory coordination between that statutory process and the permitting process for construction work involving occupied rental units, and also between certain housing and environmental enforcement mechanisms. As to the latter, we note that both DCRA and DDOE have told the OTA that measures are now being taken to enhance regulatory coordination between these two agencies. Any enumeration of specific functions of other agencies relevant to licensee obligations -- to the extent that they already exist -- we believe would be a boon to the health and safety of District tenants.

Accordingly, **we strongly recommend that DCRA make the roles of other District agencies and officials *more* explicit, not *less* explicit. At the very least, we recommend that the existing regulatory references to FEMS, MPD, DOH, and DDOE, or officials therein, be retained.**

Registered Agent for Non-Resident Licensees

1. **Ensure that any incorporated agent for non-resident owner can be personally served**

   Proposed rule 203.3 requires that any registered agent for a non-resident owner must be an individual who is a District resident or an organization incorporated in the District. It may be a requirement in the District that an incorporated organization must have a place of business and street address where personal service is possible, as well as service by mail.

   Regardless, **we recommend that proposed rule 203.3 be amended to set forth specific contact information requirements for agents of non-resident owners, including street address and telephone number.**

Licensing of Property Managers

1. **Enumerate statutory requirements pertaining to property managers**

   Proposed rule 204.1 defines the term "property manager" by reference to D.C. Official Code § 42-2853.141. Generally speaking tenants are best positioned to report violations of law by those serving as property managers. Thus, the enumeration of eligibility, accountability, and licensing requirements in the regulations -- where tenants are most likely to look for them -- would promote District enforcement of all relevant laws.

   Accordingly, **we recommend that section 204 enumerate the eligibility, accountability, and licensing requirements set forth at D.C. Official Code § 47-2853.141-143.**

Renewal of Housing Basic Business Licenses

1. **Retain security deposit report requirement**

   The proposed rule-making would eliminate current rule 203.2, which requires a licensee -- concurrent with filing a license renewal application -- to also file a detailed report regarding security deposits. We understand that the rationale for eliminating this provision is that it is not currently enforced by DCRA, and doing so may require burdensome changes in the way DCRA collects and maintains relevant documents. We believe a possible way to address this -- similar to what proposed rule 201.4 does regarding rent control registration -- is to require the submission of the security deposit reports to the Rent Administrator. Given that the non-return of security deposits is such a chronic problem and the District needs more not fewer enforcement tools, we wish to discuss this matter with DCRA and the Rent Administrator.

   Accordingly, **we request inter-agency discussion to explore ways to keep this provision on the books and to make it an effective and efficient enforcement mechanism for the security deposit laws.**

2. **Clarify what inspection program pertains to each license category**

   Proposed rule 205.2 states that the "premises of each license renewal applicant shall be subject to the inspection provisions of this chapter."

   Given the parameters of the pro-active inspection program, **we recommend that this rule be clarified -- specifically regarding the inspection program that applies to rental properties with 3 or more units, as distinct from those with fewer than 3 units.**

Denial, Suspension, and Revocation of Licenses

No comments.

License and User Fees

1. **Clarify and specify how and when the reinspection fee must be paid**

   Proposed rule 220.1(b) appears to clarify the existing rule by stating that the $90 reinspection fee "shall be collected for *any* reinspection of a licensee's premises for routine housing code inspections" (emphasis added). It is unclear, however, whether the routine collection of this fee is a current DCRA practice, or merely a prospective one.

   We request clarification of this point, and **we recommend that proposed rule 220.1(b) be amended to provide specific information as to the manner and timeframe for payment of the reinspection fee.**

Thank you for your efforts to improve the housing business licensing regulations, which have such great impact on the District's tenant community, and thank you also for your consideration of these comments and recommendations. We would welcome any discussion of this matter and the opportunity to provide any further assistance.

Sincerely,

Johanna Shreve

Johanna Shreve
Chief Tenant Advocate
Office of the Tenant Advocate

JS/jc