



GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE TENANT ADVOCATE



May 9, 2011

Mr. Helder Gil, Esq.
Legislative Affairs Specialist
D.C. Department of Consumer and Regulatory Affairs
1100 Fourth Street, S.W., Room 5164
Washington, DC 20024

RE: OTA Comments on DCRA Emergency and Proposed Rule-making:
Revisions to D.C.M.R. Titles 14 & 16

Dear Mr. Gil:

Pursuant to DCRA's April 8, 2011, Notice of Emergency and Proposed Rulemaking (D.C. Register, Vol. 58 – No. 14, 003075 – 003085), the purpose of this letter is to raise the following concerns and make the following recommendations (bolded) regarding changes to D.C.M.R. Titles 14 and 16.

1. **The lack of minimum standards governing the code official's discretion over the issuance of housing code citations**

Several provisions including sections 102.5, 105.1 and 105.3 suggest that the code official now has the sole discretion as to whether to issue a notice of violation, a notice of infraction, or combined notice of violation and notice of infraction. This raises the inference that a code official who discovers a violation also has the discretion *NOT* to issue any citation at all.

In the absence of any standard governing the code official's discretion, our concern is that housing code citations may come to be perceived as, or might actually become, something of an arbitrary process. There appears to be no basis in the regulations that would justify the possible, if not likely, scenario that in one instance a code official may issue a citation for housing code violations, but in another instance, the same or another code official may not, even where the affected tenants or rental accommodations are similarly situated. This can only create more uncertainty for tenants who may already be experiencing difficulties with the inspection process and housing code enforcement.

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Furthermore, we fear that vesting a code official with the discretion not to issue a citation may be tantamount to making the entire inspection process itself discretionary. Indeed, as we read it at the time, this was the thrust of language in DCRA's proposed rule-making last year regarding housing business licensing (DCRA's Notice of Proposed Rulemaking, January 1, 2010, D.C. Register, Vol. 57 – No. 1, 000134 – 000139). That proposed rule-making (at proposed section 201.1 of Title 14) would have eliminated the existing (pre-emergency) inspection mandate (DCRA "shall inspect"), replacing it with the requirement only that a licensee must permit DCRA and other agencies to inspect the premises. We recommended then that DCRA not eliminate the inspection mandate, and we did so upon grounds similar to those we are raising now.

Regarding the instant provisions, rather than to vest code officials with the discretion not to enforce the housing code, perhaps the intention is to provide them with more enforcement tools at an earlier stage of the enforcement process. It would be useful to know what circumstances may have prompted the determination that this is a desirable way to promote housing code enforcement, if indeed that is the case.

Regardless, we believe that this discretion should not extend to the decision not to issue a citation at all. Rather it should be limited to a code official's determination that extenuating circumstances warrant the issuance of a citation in the first instance that carries more severe consequences than a notice of violation.

Moreover, if the owner has failed to abate the violation, we believe it should be clarified that upon re-inspection the code official must, at least as a general rule, issue a notice of infraction and impose a fine. In other words, it should be clear that the code official does not have the discretion to issue a second notice of violation or no citation at all.

Recommendation: we recommend that sections 102.5, 105.1 and 105.3 and any other relevant provision be clarified so as to establish the following bottom line -- upon discovering the existence of housing code violations, at minimum DCRA will cite them through a notice of violation; and upon discovering the owner's failure to abate the violations, at minimum DCRA will impose fines through a notice of infraction.

2. **The possibility of a civil infraction proceeding in the absence of a notice of infraction to the owner**

Section 105.3 states that "[f]ailure to issue ... a notice of infraction ... shall not be a bar or a prerequisite to criminal prosecution, civil action, corrective action, or civil infraction proceeding based upon a violation of the Housing Regulations." While "alternative sanctions" are certainly appropriate as the existing (pre-emergency) regulations contemplate, we are concerned that a civil infraction proceeding in the absence of DCRA notice of infraction may raise due process concerns from the housing provider perspective. From the perspective of the tenant community, we are concerned that this could cause a spike in judicial challenges to civil infraction proceedings, which in turn

could have an adverse impact on housing provider compliance with the housing code, and/or on public confidence in housing code enforcement in the District.

We also note that section 105.4(c) (please note that two paragraphs are denoted as 105.4(a)) requires that a notice of violation “[a]llow a reasonable time for the performance of any act required by the notice.” Inasmuch as the code official now has the discretion under the rule-making’s new section 105.3 to issue a notice of infraction and impose a fine contemporaneously with or instead of a notice of violation, the requirement in section 105.4(c) appears to be mooted or rendered meaningless.

Recommendation: we recommend the restoration of existing (pre-emergency) provisions regarding notice requirements for a civil infraction proceeding and alternative sanctions; we realize, however, that this analysis does not take into account any considerations that may have prompted these changes, which we would welcome the opportunity to discuss.

3. **The repeal of the registered agent requirement for non-resident owners of rental units**

The rule-making repeals Chapter 67 of Title 14 which sets forth “registered agent” requirements not only for vacant properties, but also for any rental unit in the District owned by a nonresident. Our understanding of the rationale for this repeal is that the statutory authority (D.C. Official Code § 42-903(b)) establishes the relevant requirement (that a non-resident owner of any rental unit shall appoint and continuously maintain a registered agent for the service of process), and thus the regulation is unduly repetitive.

We strongly disagree with that reasoning – rather we believe that in fact the statute and the existing (pre-emergency) provision are not entirely redundant, and regardless maintaining the (pre-emergency) requirement in the regulations serves all parties well for the following reasons:

- a. It is absolutely critical that nonresident owners of rental units have an agent in the District for the service of process, and that all parties are made as well aware of this requirement as possible. The elimination of the relevant regulation would aggravate the already all too common difficulty that tenants and the District have regarding derelict and unresponsive absentee landlords.
- b. The Housing title of the D.C.M.R. is the most logical “go-to” place for any interested party – including tenants, housing providers, agents, government officials – to look for the various licensing and filing requirements that apply to rental housing providers in the District. The same cannot be said for D.C. Official Code § 42-903(b), the caption for which reads “*Resident agent required for care and maintenance of vacant property owned by nonresidents*” (emphasis added). In other words, the statute is simply not “user-friendly” if the user is interested in rules governing **occupied** property rather than vacant property.

- c. Regarding filing requirements, the statute refers to the Mayor rather than the Director and thus does not include the relevant Mayoral delegation of authority. By contrast, the existing (pre-emergency) regulation at 14 D.C.M.R. sec. 6700.1 does include the relevant Mayoral delegation of authority and specifies that the registered agent statement should be filed with the Director. That distinction alone should be reason enough to retain the existing (pre-emergency) regulation.
- d. The new “D.C. business organization code” law, which is pending the expiration of a Congressional review period, will add its own set of “registered agent” provisions to the mix. There is no telling as yet how these provisions may be interpreted by some regarding their applicability to rental housing businesses. However, the existence of at least a second statute that arguably may apply to rental housing businesses will only complicate the question as to where to look for the relevant law. A conspicuous “registered agent” provision in the Housing title would go a long way towards ameliorating this problem.
- e. DCRA’s own proposed rule-making dated January 1, 2010 (Notice of Proposed Rulemaking, D.C. Register, Vol. 57 – No. 1, 000134 – 000139) would have maintained the registered agent requirement for nonresident owners of rental accommodations. Moreover, that proposed rule-making would have placed the requirement much more prominently in chapter 2 rather than in chapter 67 of D.C.M.R. Title 14. This would have been and still would be a step in the right direction.

Recommendation: the existing (pre-emergency) registered agent provision in section 6700.1, et seq., should be maintained in Title 14, but moved to chapter 2. Moreover, specific contact information should be required for a non-resident owner’s agent, including street address, electronic mail address, and telephone number.

4. **The across-the-board seven (7)-day compliance requirement for Chapter 8 violations**

Should the code official choose to issue a Notice of Violation for a violation of Chapter 8 (Cleanliness, Sanitation, and Safety), sections 800.19(b) and 800.19(c) require that the owner must comply with the requirements of the notice no later than seven (7) days after the date of receipt of the notice, or the District may abate the violation.

Our concern is that seven (7) days may be too permissive if the violation is regarding an essential service or utility and/or is of an emergency nature. Our experience is that violations of this kind that are not abated within 24 hours may well justify summary abatement by the District, as the District’s nuisance abatement law provides (D.C. Official Code § 42-3131.01(c)). Thus this provision may provide the owner with a compliance time-frame that in some circumstances could be in conflict with other relevant law.

Recommendation: we recommend that sections 800(b) and 800(c) be revised so as to conform to any schedule of abatement periods for various violations of the District's housing code, and any summary abatement periods contemplated in the nuisance abatement law.

5. ***The lack of enumeration of the allowable methods for service of notice***

Section 105.6 regarding service of notice methods refers to section 3 of the nuisance abatement law (D.C. Official Code 42-3131.01 *et seq.*), but it fails to enumerate the allowable methods. We believe doing so would make the regulations more “user-friendly,” and make the requirements more readily knowable, by obviating the need for the “user” to consult multiple sources of law.

Recommendation: we recommend that section 105.6 be revised so as to enumerate the service of notice methods referred to in section 3 of the nuisance abatement law (D.C. Official Code 42-3131.01, et seq.).

Thank you for your efforts to improve the housing and civil infractions regulations which have such great impact on the District's tenant community, and thank you for your consideration of these comments and recommendations. We would happy to discuss them further with you and to provide any further assistance.

Sincerely,



Johanna Shreve
Chief Tenant Advocate
Office of the Tenant Advocate

JS/jc