GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE TENANT ADVOCATE

August 16, 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 Proposed Rule-making:
Revisions to D.C.M.R. Title 14, Chapter 1

Dear Mr. Gil:

Pursuant to DCRA's Notice of Emergency and Proposed Rulemaking dated June 10, 2011 (D.C. Register, Vol. 58 – No. 23, 004908 – 004914), the purpose of this letter is to provide comments and recommendations (bolded) regarding proposed revisions to the administration and enforcement regulations in the housing code (D.C.M.R. Title 14, Chapter 1).

First, we thank DCRA's General Counsel's office for the helpful and ongoing dialogue about this important rulemaking. Second, regarding new section 116 ("Unsafe Residential Premises"), these comments and recommendations are based upon our understanding from the dialogue thus far that:

A. The purpose of this new section is to broaden the existing placarding and closure provisions to cover special circumstances in which:

   a. Prior to enforcing the closure order, DCRA may afford tenants and those assisting them a limited period of time to make arrangements for alternative housing; and

   b. DCRA may be in a position to temporarily abate violations for the purpose of better ensuring occupant safety, but only for that limited period of time.

B. Notwithstanding the titles of these sections, the critical difference between a closure pursuant to new section 116 ("Unsafe Residential Premises") and a closure pursuant to section 115 ("Imminently Dangerous Residential Premises") is that under the new section the building does not have to be closed immediately. The standard or trigger for a closure under either section remains essentially the same – namely, the existence of a condition or conditions that would pose some "imminent danger," but for, in the case of a non-immediate closure, DCRA's ability to take temporary and limited abatement measures.

C. Also notwithstanding section titles, the purpose of the new section is *not* to broaden the standard for closing occupied accommodations that have become "unsafe" but are not yet "imminently dangerous." Rather, while it is based upon existing language in the building

code,[1] the term "unsafe" is used merely as a way to distinguish closures that may be non-immediate from those that must be immediate.

D. DCRA neither envisions nor intends that this rulemaking will be used to justify closing any occupied accommodation that previously would not have been closed, or that would have been made habitable through use of the Nuisance Abatement Fund. Rather, the goal of the new "non-immediate closure" procedures is, where possible, to ameliorate the disruptions and hardships imposed on tenants due to the abrupt government closure of the accommodation.

On the basis of this understanding, we have the following comments, concerns and recommendations regarding the proposed rulemaking:

1. ***Section 116 should be reframed to reflect its premise***

We agree that creating new procedures for the non-immediate closure of rental accommodations is desirable to address situations in which the only other practical possibility is immediate closure. We do not believe, however, that new section 116 as proposed adequately reflects the premise outlined above based on the interagency dialogue. In fact, except for the section titles, new section 116 is virtually identical to section 115.

This is problematic. First, it gives rise to the inference that the new section indeed does broaden the standard for closing an occupied building, if only because there is no other apparent purpose for adding it to Title 14.

Second, this in turn gives rise to the concern that, notwithstanding present intentions, future DCRA officials could interpret the new non-immediate closure provisions as providing authority for closing occupied accommodations even where there is a practical alternative such as permanent nuisance abatement. Not only would this contradict what we understand to be the rulemaking's present purposes, it would also undermine important District policies, including the explicit policy favoring the "speedy abatement of public nuisances."[2]

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[1] "Unsafe" buildings "shall be taken down and removed or made safe and secure, as the code official may deem necessary." 12A D.C.M.R. § 115A.

[2] 14 D.C.M.R. § 101.5. This public policy preference is evident elsewhere in District law and in Title 14 itself. For example, in determining whether to use District funds to correct outstanding violations, chapter 15 states that DCRA "should consider" … "the best interests of the tenants in being provided safe and sanitary conditions" (14 D.C.M.R. § 1502.1(g)). Furthermore, recently introduced legislation -- Bill 19-134, the "Nuisance Abatement Special Purposes Revenue Fund Amendment Act of 2011" – would prioritize use of the Nuisance Abatement Fund so as to prevent the displacement of tenants from rental properties, and would require DCRA to explain in its annual report why it did not use the Nuisance Abatement Fund instead of closing any accommodation that results in tenant displacement. As you are aware, these provisions are modeled in part on language developed through interagency discussions between DCRA and OTA in prior Council sessions.

Recommendation: Accordingly, we recommend that section 116:

a. **Be refashioned as "Non-Immediate Closures of Residential Premises" rather than "Unsafe Residential Premises";**

b. **Set forth the criteria for a non-immediate closure determination, including the following considerations:**

   i. **Based on the interagency dialogue, we believe the criteria would be essentially the same as those for an immediate closure determination pursuant to section 115 -- "but for" DCRA's ability to take temporary remedial measures and thus afford tenants time to find alternative housing;**

   ii. **For any closure determination but particularly for non-immediate closures, we believe there should be a prerequisite determination that nuisance abatement for the purpose of making the building habitable for the longer-term is impracticable, or otherwise inadvisable, pursuant to the factors for District correction set forth in 14 D.C.M.R. § 1502.1;**

c. **Set forth separate and discrete requirements for notice to all parties including the timeframes for DCRA's temporary abatement measures and eventual closure of the building; and**

d. **Explicitly state whether the owner may use the temporary abatement period as a further opportunity to permanently abate the violation, which if done satisfactorily would result in DCRA rescission of the non-immediate closure order.**

2. ***Definitions of "unsafe" and "imminently dangerous"***

We note that while the term "unsafe structure" is defined at 14 D.C.M.R. § 199, the terms "imminent danger" or "imminently dangerous" are not defined in Title 14. Instead section 115.1 describes the presence of an "imminent danger" with reference to the definition of "unsafe structure."

Under the wordings for existing section 115.1 and proposed sections 115.1 and 116.1, it appears that a residential premise can be declared "imminently dangerous" merely "because" it meets the definition of an "unsafe structure."

Recommendation:

a. **If our first recommendation above is not adopted, and the proposed titles for section 115 and new section 116 are retained, we would recommend that consideration be given to redefining the term "unsafe structure" and adding a definition for the term "imminent danger" or "imminently dangerous" to Title**

14. The definitions should distinguish these terms as they are being used in sections 115 and 116, and as they are being used by DCRA to make relevant determinations.

b. In order to further clarify that the presence of an "imminent danger" is an additional closure criterion, and not merely a consequence of a residential premise being unsafe, we recommend the following edits to section § 115.1:

If a residential premise, or part of a residential premise~~, presents an imminent danger to the inhabitants or the surrounding community because it has been~~ is determined to be ~~that it is~~ an unsafe structure which presents an imminent danger to the inhabitants or the surrounding community, a structure unfit for human occupancy, an unlawful structure, or a structure in which there is unsafe equipment, the Director may order the owner, licensee or operator to close and barricade the structure within a specified time.

3. ***Assessments against the property owner for costs incurred by OTA for emergency relocation expenses***

Proposed sections 115.1 and 116.1 eliminate language in existing section 115.1 setting forth examples of costs assessable against the owner upon the owner's failure to execute a DCRA closure order within 48 hours.[3] The existing language includes items associated with OTA's Emergency Housing Assistance Program (EHAP). Our understanding from the interagency dialogue is that (a) DCRA does include in the abatement order it provides to the owner a general reference to the possibility that EHAP costs will be assessed against the property; and (b) DCRA has decided, however, that it should not or cannot include EHAP costs in its own collection and enforcement efforts.

Recommendation: As noted in footnote 2, relevant legislation is pending before the Council. Specifically, in the event that a tax lien is imposed on the property under the nuisance abatement law, section 304 of Bill 19-134 would require that an assessment for any OTA/EHAP expenditures be added onto the assessment for costs associated with DCRA expenditures. Thus we believe this is an evolving issue that fundamentally includes a common interest both in administrative efficiency and in holding derelict property owners accountable for costs incurred by the District government. Accordingly, we recommend further discussion of this matter between the agencies, the Mayor's office, and the Council.

[3] "… the Director may order the structure barricaded and may assess all reasonable costs of barricading the structure and all expenses incident thereto, *including, but not limited to, administrative costs, occupant relocation costs including temporary housing, security deposits and the first month's rent if required, costs associated with cleaning the premises as defined by this subtitle, utility removal costs, court costs, fines, and penalties*, as an assessment against the property. 14 D.C.M.R. §115.1 (emphasis added).

4. ***Placarding notice requirements***

Whereas existing section 103.1 requires that DCRA provide the operator with notice before placarding a housing business, proposed section 103.1 would allow DCRA to provide the notice to "the operator, owner, licensee, tenant, or occupant." We note that under the definition in section 199, an "occupant" would include a one-year-old child. Based on the interagency dialogue, however, it is our understanding that DCRA does not intend that notice to a tenant or occupant could substitute for notice to an owner or agent. Rather, the intention is to notify as many of these parties as possible.

Recommendation: We recommend replacing the word "or" with the word "and" in the phrase "operator, owner, licensee, tenant, or occupant." Alternatively, we recommend language that would better ensure that both an owner/agent and a tenant/occupant are notified, such as "operator, owner, or licensee, and the tenant or occupant." Additionally, regarding the manner of service, we recommend that consideration be given to incorporating in section 103 the service requirement for notices of violation in section 105.

5. ***Appeal and Hearing***

Proposed rule 107 ("Appeal and Hearing") includes separate "right to appeal" provisions for an "owner, licensee, or operator" regarding determinations under subtitle A (107.1), and for an "owner, licensee, operator, tenant or occupant" regarding orders under section 115 (107.1). This is problematic for a number of reasons, including:

a. It appears from this section that tenants do not have appeal and hearing rights under Title 14 regarding any order other than one pursuant to section 115, notwithstanding the fact that tenants are subject to adverse orders including notices of violation under section 102. However, we note that this apparent omission also occurs in the existing regulations at section 107.1.

b. It is not apparent whether the appeal and hearing process provisions starting at proposed section 107.3 applies to section 107.1, section 107.2, or both.

c. Section 107.3 provides that the timeframe for an appeal may be limited "in the public interest" to only 24 hours "after the date of service of the notice of violation." Implicitly, inasmuch as section 107.2 applies only to "close," "barricade," and "vacate" orders under section 115, and not to notices of violation, it seems the 24 hour provision refers back only to proposed section 107.1 but not to proposed section 107.2. Additionally, we note that this 24-hour provision is not entirely new, and in fact is found in existing section 107.2 regarding "notices of violation." Nevertheless, it is not clear what circumstances other than a pre-closure hearing (provided that the opportunity for a post-closure hearing is then afforded) would justify such an extreme abbreviation of the basic right to appeal an adverse administrative order or determination.

d. This is particularly puzzling in the context of section 107.5, which provides that under "exigent circumstances" the timeframe for appealing an immediate closure may be limited to only 24 hours. Because this same provision provides for a post-closure hearing, it is not apparent why there would be any need to curtail the timeframe for appeal.

Recommendation: Accordingly, we recommend that:

a. **Generally, the tenant or occupant's right to appeal an adverse order or determination under the Sub-Title or Title should be made explicit.**

b. **Absent a compelling and articulable rationale, the abbreviated timeframes for appeals should be eliminated entirely.**

c. **The distinction between the bases for appeal in proposed sections 107.1 and 107.2 should be eliminated or clarified.**

6. ***Orders issued for imminently dangerous or unsafe residential premises***

Proposed section 117 sets forth certain requirements for closure, barricade, and vacate orders pursuant to section 115 or section 116.

***Please see* recommendation #1(c) above regarding notice requirements for non-immediate closures, and recommendation #4 above regarding the manner of service of orders upon the owner or agent.**

Thank you and the General Counsel's office once again for the helpful and ongoing dialogue about this important rule-making, and for considering these comments and recommendations. We would be happy to provide any further assistance and we look forward to continuing the dialogue.

Sincerely,

Johanna Shreve
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Office of the Tenant Advocate

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