Government of the District of Columbia

Office of the Tenant Advocate

Testimony of

Johanna Shreve
Chief Tenant Advocate

Public Roundtable on
Certificates of Assurance in Rent Control

Committee on Housing and Neighborhood Revitalization
The Honorable Anita Bonds, Chairperson
Council of the District of Columbia

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Introduction

Good morning Chairperson Bonds, members of the Committee, and staff. I am Johanna Shreve, Chief Tenant Advocate at the Office of the Tenant Advocate. I am here today to testify regarding Certificates of Assurance for rent control housing. I want to thank the Committee for holding a roundtable to discuss this important matter. Simply put, these Certificates make no sense as a policy matter, and could devastate efforts to expand the District's affordable housing stock through rent control reform.[1]

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[1] ***We are continuing to assess statutory definitions relevant to Certificates of Assurance, but our initial assessment is that mathematically they could neuter the entire tax credit concept, so that the logical absurdity cuts in two entirely opposite directions.*** Curiously, the definition of "fair market rental amount," found in section 103 of the Rental Housing Act of 1985 (D.C. Official Code § 42–3501.03(1)), is "the annualized sum of the rents collected for all rental units in the housing accommodation during the base calculation year, plus an amount equal to the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items, in the Washington, D.C. Standard Metropolitan Statistical Area, during each calendar year; provided, however, that if no rents were collected in the base calculation year because the housing accommodation was then under construction, the annual fair market rental amount shall be a sum equal to the rents which would have been collected during the base calculation year had the housing accommodation been 100% occupied during the entire base calculation year, the sum to be determined by appraisal, as increased by the Consumer Price Index increase under this paragraph."

Further, the definition of "base calculation year" (D.C. Official Code § 42–3501.03(3)) is "the calendar year immediately preceding the first calendar year in which a given housing accommodation is made subject to §§ 42-3502.05(f) through 42-3502.19, or any future District law limiting the amount of rent which can lawfully be demanded or received from a tenant."

Depending on interpretation these definitions suggests that the drafters of the amendment that created Section 221 somehow managed to neuter the effectiveness of Certificates of Assurance, by guaranteeing that the housing provider with a Certificate will never be entitled to any tax credit as long as they charge the full allowable rent under rent control. If the "fair market rent amount" is the no more than the initial rent plus the annual CPI-W increase, then it is no more than the allowable rent under rent control when the Act was enacted (with a standard increase of CPI-W), and it is even less than the allowable rent under rent control today (with a standard increase of CPI + 2%). OTA remains gravely concerned with Section 221 given its clear intent, but this definition creates a puzzling caveat of which the Council should nonetheless be aware.

Background

Section 221 of the Rental Housing Act of 1985,[2] which requires the issuance of Certificates of Assurance, was included in an amendment in the nature of a substitute to what would have been a clean renewal of the rent control law then in effect.[3] That amendment contained numerous other landlord-friendly provisions including various forms of vacancy decontrol and an increase in the guaranteed rate of return under a hardship petition to 12%.[4] This means that at the same time the Council authorized a subsidy to landlords to ensure they will receive market returns if they are ever regulated, it also increased unreasonably the rate of return to which those landlords would be entitled under rent control. Even worse, the amendment was also introduced at the last minute, with little opportunity for debate.

In opposing the amendment, Councilmember Hilda Mason noted the "glaring" action of "seven Councilmembers who consistently opposed the extension of the old rent control law" despite the will of the vast majority of

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[2] D.C. Official Code § 42–3502.21.
[3] *Statement of Councilmember Charlene Drew Jarvis Re: Amendment in the Nature of a Substitute to Bill 6-33* (April 30, 1985).
[4] *Id.*, pp. 3-16.

District residents,[5] clearly emphasizing the rear-guard nature of the amendments and the motivations behind them. She also highlighted several vacancy decontrol provisions and the guaranteed 12% rate of return as particularly troubling.[6] Regarding Section 221, Councilmember Mason questioned whether it was legal in the first place. Her colleague Councilmember Schwartz said at the time in her remarks supporting Section 221 that, "[i]t is intended to create a permanent guarantee in the nature of a covenant running with the land"[7] – meaning that even after the property is sold, the next owner is entitled to the benefits of the Certificate as well, and on into perpetuity. The problem with this, which Councilmember Mason emphasized in response to this notion,[8] is that for a covenant running with the land to be binding requires privity of estate between the parties. This means essentially that both parties to the agreement must have

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[5] *Extended Remarks of Hilda Howland M. Mason, Member At-Large, Council of the District of Columbia, To Be Entered into the Public Record of the Council's Action on Final Reading of Bill 6-33, "Rental Housing Act of 1985"* (April 30, 1985), p. 3.

[6] *Id.*, pp. 1-3.

[7] *Extended Remarks of Councilmember Carol Schwartz Concerning the Provision of Section 221 of Bill 6-33 Engrossed Version* (April 30, 1985).

[8] Councilmember Mason is recorded in the legislative history as saying about Section 221 that it "...attempts to tie the hands of future legislators by requiring the District of Columbia government, through a "Certificate of Assurance," to compensate landlords for any rent loss they suffer as a result of a future re-enactment of rent control. This Certificate of Assurance is defined in the law as a 'covenant running with the land'. I question the legality of this provision. According to Black's Law Dictionary, a 'covenant running with the land' recites the element of privity. Privity means that both parties to the agreement must have a relationship to the same piece of land (as, for example, an owner of land and person to whom the owner sells the land). Under the Certificate of Assurance, the District will have no privity of estate with present or future landlords who fall under this provision. Therefore, the Certificate of Assurance is not a valid covenant running with the land, and it is unenforceable." *Extended Remarks of Hilda Howland M. Mason, Member At-Large, Council of the District of Columbia, To Be Entered into the Public Record of the Council's Action on Final Reading of Bill 6-33, "Rental Housing Act of 1985"* (April 30, 1985), p. 2-3.

a mutual or successive interest in the same piece of property. Nonetheless, with Section 221 the Council purported to authorize covenants running with the land that would bind the Mayor, who has no relationship to the associated private property that would create privity of estate with the owner.

Councilmember Mason's remark regarding the amendment at the time, "I weep for the city," hits home again in the present day, as the dormant threat posed by Section 221 is now emerging. Councilmember Mason had no reason to know on the day the amendment was approved that the vacancy decontrol provisions would fortunately be repealed by voter referendum that November, before they could even take effect[9]; nonetheless, two of the three key reasons why she voted against the bill remain in the law today – including Certificates of Assurance.

It is clear from legislative history that the pretense for the inclusion of Section 221 in the Rental Housing Act of 1985 was to address what was perceived to be a housing investment crisis occurring alongside the housing affordability crisis in the District. In 1985 when the legislation was approved, Councilmember Carol Schwartz argued in support of Section 221 that it "provides a much needed

[9] The approval of the inclusion of vacancy decontrol repeal on the ballot before July 17, 1985, the effective date of the Rental Housing Act of 1985, meant that the effectiveness of the affected provisions of the Act were delayed by law.

incentive to the construction and rehabilitation of rental housing."[10] [11] However, as I will discuss later, the implications of the language of Section 221 make a mockery of this stated purpose.

Tying the Council's Hands

Section 221 is extraordinarily problematic in numerous ways. First of all, it is extremely unusual that the law would purport to bind a future legislature by essentially holding housing providers financially harmless in the event of future regulation. This is especially troublesome at a time when the affordable housing stock is rapidly diminishing, and both the public and housing experts are clamoring for needed reform to the Rental Housing Act of 1985 – including the expansion of rent control in the District. Such expansion will likely be crucial, as the District's stock of rent control housing dwindled from roughly 130,000 units in 1985[12] to less than 80,000 in 2011[13].

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[10] *Extended Remarks of Councilmember Carol Schwartz Concerning the Provision of Section 221 of Bill 6-33 Engrossed Version* (April 30, 1985).

[11] Further evidence of this intent is the requirement of Section 221(b) (D.C. Official Code § 42–3502.21(b)) that before the District issues any Certificate of Assurance, the Mayor and the relevant Council committee must be given the opportunity to review the proposed form of the Certificate of Assurance in part to further "its intended purpose of stimulating the addition of rental units to the District's housing stock."

[12] *Curbed,* "D.C. could extend rent control through 2030" (November 1, 2019), available at: https://dc.curbed.com/2019/9/18/20872531/dc-rent-control-law-buildings-affordable-housing-landlords.

[13] Urban Institute, "A Rent Control Report for the District of Columbia" (June 17, 2011), available at: https://www.urban.org/research/publication/rent-control-report-district-columbia

Indeed, to that end, there is legislation pending in this Committee today that would expand the rent control stock by moving forward the cutoff date for the new construction exemption.[14] If Certificates of Assurance are in fact approved going forward, the District will have to consider diverting public dollars from important public and social programs just to ensure housing providers are getting a full market profit – despite the fact that rent control currently guarantees housing providers an outrageous 12% rate of return.

A Certificate of Assurance with Any Building Permit

Consider as well that the opportunity for the owner to obtain a Certificate of Assurance under Section 221 appears to arise "[u]pon the issuance of any building permit[.]" Depending on interpretation, this (along with the corresponding regulation at 14 DCMR 4218.2(b)) is likely a giant loophole in the statute, and indeed makes an absurdity of the legislative purpose of incentivizing the "construction and rehabilitation of rental housing" as articulated by Councilmember Schwartz. Section 221 appears to allow a housing provider to demand a Certificate of Assurance from the District even where there is no intention to construct or substantially rehabilitate rental housing, but rather

[14] B23-0873, the "Rent Stabilization Program Reform and Expansion Amendment Act of 2020" (Introduced July 27, 2020).

where a building permit is sought only for an insignificant and purely pretextual purpose. Imagine a property owner claiming this kind of credit from District taxpayers in perpetuity for merely intending to erect a retaining wall or fence, or install an awning or signage.

As an example, indulge me for a moment: I am a property owner who decides to construct a housing accommodation. I do not know about Section 221, but I decide – even given the possibility that my building could fall under rent control in the future – that it is a worthwhile and feasible investment to build the housing and to lease it to renters. I get a building permit to construct a housing accommodation without requesting a Certificate of Assurance. Years later, long after the housing has been built and any incentive to do so is moot, I learn that I can actually avoid the impact of any future regulation by requesting that a Certificate of Assurance be issued to me along with any building permit. With no intention to make any substantial improvements to the property, much less any that would benefit tenants, I apply for a building permit to add a new awning to the building. Alongside that application I request a Certificate of Assurance, and my request for a permit is approved. Just like that, I am entitled to a Certificate that guarantees market returns if my building is ever subject to rent control. In this example, I made the initial investment without requiring the incentive, but I

am nonetheless able to claim the benefit later on without doing anything that could seriously be called "construction" or even "rehabilitation" of rental housing.

Thus, in many if not most instances, the District and District taxpayers are being played for suckers. The District should have plenty of retaining walls before long, as housing providers are being given an attractive incentive to put them up.

Property Owners Entitled to Certificates before Building Housing

Eligibility for a Certificate of Assurance under Section 221 does not even require that a housing accommodation currently exist on the property. Rather, the recipient is merely required to use "best efforts" to construct one "as expeditiously as possible." The Certificate will only become void after 5 full years if no housing accommodation is constructed on the property. This means that even if the Council repeals section 221, the District could already be on the hook for future tax credits to property owners who have not even constructed housing and may not for up to 5 years. This is an excessively long "grace period" during which to provide future financial cover to a property owner who does not provide housing, and is all the more reason that the Council should act quickly on this issue.

Claiming the Differential as a Tax Credit

Section 221 permits a housing provider with a Certificate of Assurance to claim the rent differential as a tax credit, which means the housing provider is able to make its own determination as to the appropriate credit and claim it accordingly, with no approval required on the front end. Relatedly, Section 221 removes the Mayor's ability to use means other than a lawsuit to recover these unpaid taxes until Superior Court renders a final judgment on the matter in her favor. These provisions together could enable bad actors to claim excessive credit and deprive District taxpayers of funding for important services for years to come, while the District fights specious tax credit claims in court.

No Questions Asked, No Accountability

Under Section 221, a housing provider does not have to show any type of potential hardship or financial need in order to qualify for a Certificate of Assurance. Housing providers that may fare just fine under rent control are nonetheless entitled to stave off the threat of regulation and ensure that their levels of profit continue to increase at exorbitant rates into the future. Nor is the housing provider required to commit to the re-investment of any profits back into the property, or even account for how much profit it is making thanks to its

Certificate of Assurance – the Certificate operates in perpetuity regardless. Lastly, I would add that the statue does not contemplate withholding a Certificate from a property owner who owes back taxes. Thus, demonstrably, this policy flouts any sense of proportion or balance in terms of the cost to the District as compared to the benefits gained for District taxpayers.

Potential Financial Impact of Certificates of Assurance

We are informed that there are 42 requests for Certificates of Assurance currently pending, two of which were submitted in the 1986 and 1988 respectively and then resubmitted this year. These requests amount to 7,133 units, for an average of 170 units per building. Consider for the sake of discussion there is a $500 differential between the market rent[15] and the allowable rent under rent control for these buildings after a number of years. This would amount to an $85,000 per month differential for the building, and a $1,020,000 annual differential. Multiplying this by 42 buildings, we get $42,840,000 per year. Then add onto that the countless additional Certificates of Assurance that will no doubt be requested if the Council moves closer to expanding rent control. Their issuance would create further such windfalls for even more landlords who are supposedly

[15] See footnote 1.

being regulated. We are informed that of the 42 pending requests for Certificates of Assurance, 40 were received within the last 10 months, so the influx is happening essentially as we speak. This example is based on the premise that market rent increases are not limited, which we believe is the premise of Section 221. However, as I indicated at the outset, those definitions (which include a CPI-W limit on market rate increases), may belie that premise. Again, we are continuing to assess the impact of those definitions.

Furthermore, as market rents continue to increase, the tax credits obligated to the same housing providers will continue to increase year over year. And it is clear to OTA that the upward pressure on rents is intense: since 2010, rent increase complaints – including complaints about sudden rent increases in unregulated units of up to $700 at once – have never failed to make the OTA Annual Report's list of top five most frequent tenant complaints for the prior year. Therefore, assuming a $500 per-unit differential between market rate and rent control as I did in my previous example is not outside the realm of possibility.

Does the Council really want the District to have to consider this kind of uncertain and growing financial liability when it formulates its annual budgets and future financial plans, particularly given the economic downturn caused by the

COVID-19 pandemic? This raises the further question whether Section 221 presents concerns with respect to the District's anti-deficiency obligations. More to the point, District taxpayers will be left holding the bag in what I believe is an exercise in absurdity.

Recommendations

Simply put, Section 221 is terrible policy that continues to cause irreparable harm the longer it is in existence. My emphatic recommendation as the Chief Tenant Advocate and as a District taxpayer is that the Council repeal section 221 of the Rental Housing Act of 1985 as soon as possible. It does nothing to improve, enhance, or provide affordable housing for the tenants of the District of Columbia. I believe all of the problems with Section 221 that I have highlighted support the argument for repeal. Most of all, however, Section 221 presents an illogical threat to the District's ability to make potentially desirable policy changes in the rent control law, even if only by chilling the Council's policy deliberations.

I would further propose that the Council approve emergency and temporary legislation placing a moratorium on requests for any Certificates of Assurance, as well as determinations on pending requests, as soon as possible. This will prevent any obligations being made on the part of the District via

Certificates of Assurance until the Council fully examines and takes action on Section 221. And I will re-iterate: my recommendation is that the action ultimately taken should be a full repeal of that section.

Let me add briefly that there is no doubt more requests for Certificates of Assurance will be filed imminently given the recent advocacy for rent control expansion. Moreover, awareness of their availability will continue to spread more quickly as calls for expansion pick up steam. Housing provider attorneys are advertising that the law provides for these Certificates, and warning housing providers of potential forthcoming rent control reform legislation.[16] Indeed, although it is crucial that we have this public discussion today, it is likely that some housing providers will learn of the existence of Certificates of Assurance from this roundtable and will file their own applications soon. This is why the Council must follow this conversation up with action, and it must do so without delay.

[16] Greenstein DeLorme & Luchs, P.C., "Council of the District of Columbia Considering Amendments to Rent Control Laws; Certificate of Assurance with Respect to Properties Exempt from Rent Control" (News Item, December 9, 2019), available at: https://www.gdllaw.com/council-of-the-district-of-columbia-considering-amendments-to-rent-control-laws-Certificate-of-Assurance-with-respect-to-properties-exempt-from-rent-control/.

Conclusion

In conclusion, Chairperson Bonds, I want to thank you for holding this important roundtable at a crucial time for District renters. This concludes my testimony and I am happy to answer any questions you and other members of the Committee may have at this time.