Nos. 15-AA-1243 & 15-AA-1244

DISTRICT OF COLUMBIA COURT OF APPEALS

CHRISTINE BURKHARDT, et. al.,

Petitioners,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,

Respondent.

On Appeal from the District of Columbia Rental Housing Commission

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BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY AND URGING REVERSAL

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

This case presents an issue of first impression regarding interpretation of the District's Rental Housing Act: whether tenants are entitled to an administrative hearing when a landlord seeks approval to evict them for purposes of making "alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied." D.C. Code § 42-3505.01(f)(1)(A). The Rental Housing Commission ruled erroneously that no hearing is necessary, despite the obvious due process concerns implicated by the displacement of tenants from their homes. The Commission also incorrectly held that tenants could not raise retaliation as a defense to the landlord's application, a ruling that is contrary to the plain language of the retaliation statute, D.C. Code § 42-3505.02, and the long line of cases regarding retaliation claims.

The issues in this appeal are of significant concern to the low-income tenants whom the Legal Aid Society of the District of Columbia represents.[1] The threat of displacement is especially grave for poor renters, who have fewer resources to support a move and face more difficulty securing decent and affordable housing. This particular case may be unusual in that regard; the specific facts here – where the landlord proposed to relocate the tenants within the same building, and the work was anticipated to take only 120 days – suggest a relatively limited burden on the

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[1] The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II, § 1. Legal Aid is the oldest general civil legal services program in the District of Columbia.

Housing law is among Legal Aid's principal practice areas, and Legal Aid represents hundreds of tenants facing eviction every year. Although the property at issue in this case rents at a higher cost than Legal Aid's clients typically can afford, the central issue here – tenants' rights when the landlord seeks to evict them to make way for renovations – affects the ability of tenants at all income and rent levels to fight displacement from their homes. Legal Aid takes no position on the remaining questions at issue in this appeal.

residents. *See* Decision and Order (Sept. 1, 2015), at 4, 8. But not all applications under the statute will accommodate the tenants so generously. Under the statute, tenants must be moved within the property only if "practicable," and there is no limitation on how long the renovations may take. And other options may be limited or nonexistent, especially for low-income renters.

The experience of *amicus* is that once tenants move away from a property, they are unlikely, for a variety of reasons, to return. A landlord's section 42-3505.01(f) application thus has the potential to displace families permanently and disrupt communities. For these reasons, *amicus* has a particular interest in ensuring that this Court interprets the statute to protect the due process rights not only of the Petitioners in this case, but of tenants in the District as a whole.

STATUTORY FRAMEWORK

A. The 501(f) Statute

Section 501(f) of the Rental Housing Act ("section 501(f)"), codified at D.C. Code § 42-3505.01(f) and reproduced in the Statutory Appendix at SA-2 to SA-6, permits a landlord to evict tenants for the purpose of performing work on the property that cannot safely be done while the tenant remains in place. The statute provides that tenants have the "absolute right" to return to their units once the work is complete, and that they may return at the same rent if the work is necessary to bring the unit into compliance with the housing code. The statute requires the Rent Administrator, a D.C. government official, to approve the renovation and relocation plan before the landlord may move forward with evicting the tenants, and sets forth a number of factors the Rent Administrator must consider before granting approval. D.C. Code § 42-3505.01(f)(1)-(3).

The current version of the statute dates to 2006, when the D.C. Council concluded that the law as previously written contained insufficient protections against its use by landlords as a tool for permanently emptying rental buildings. Prior to the 2006 revision, the statute contained the

same general outline – authorizing a landlord to recover possession in order to complete work that could not safely be accomplished in an occupied unit – but none of the detailed procedures and tenant protections set forth in the current version. *Compare* D.C. Code § 42-3505.01(f) (2004) *with* D.C. Code § 42-3505.01(f) (2016).

The precipitating event for the Council's action was an investigation into "the use of section 501(f) for purposes other than its intended purpose of providing for temporary tenant relocation to allow building repairs to be made safely." D.C. Council Committee on Consumer and Regulatory Affairs, Committee Report on Bill 16-556, "Tenant Evictions Reform Amendment Act of 2006" (Feb. 10, 2006) ("Committee Report"), at 2. The Committee's investigation uncovered evidence that owners were submitting 501(f) applications not in order to bring buildings up to code for current residents, but as "part of a strategy to empty the buildings of tenants to allow for their redevelopment into market-rate apartments." *Id.* The District's then-existing approval process exacerbated the problem: the Rent Administrator's review was cursory, without statutorily-required considerations for approving or rejecting the application. Tenants did not receive notice of the application or have any right to participate in the process. In its investigation, the Committee found that the Rent Administrator was approving applications that were poorly documented and potentially submitted for improper purposes. *See id.*; Yolanda Woodlee, *D.C. Rent Administrator Leaves Position Amid Criticism*, Wash. Post, Dec. 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101768.html. The Committee also noted that reform was necessary to allow tenants to participate in the process, because otherwise "[t]enants who are in a position to know many of the material facts are not afforded the opportunity to dispute facts alleged in the application." Committee Report, at 2.

To address these problems, the Council built a number of protections into the revised statute. A landlord must serve notice of any 501(f) application on all tenants, who have 21 days to respond to the application and comment on how its approval would affect them. *See* D.C. Code § 42-3505.01(f)(1)(A)(ii), (iv). The Rent Administrator must make specific findings about the plan, including whether the proposal is in the tenants' interest and whether the landlord's assertion that the work could not be done with tenants in place is true. *Id.* § 3505.01(f)(1)(A)(v). Tenants receive enhanced protections related to their right to return when the work is complete. *Id.* § 3505.01(f)(2). In addition, the amended law provides for input from the Chief Tenant Advocate, a D.C. government official whose role under section 501(f) is to review the materials, provide information to the tenants, and consult with the Rent Administrator about whether the petition should be approved. *See id.* § 3505.01(f)(1).

The statute as written does not require any oral hearing on the landlord's application. As a result, the Rent Administrator's documentary review is the only point at which the tenants can challenge the landlord's plans. If tenants contend the work is not necessary, or that it can in fact be done while the units are occupied, or that relocation should take place within the building rather than to other properties, their opportunity to raise those claims is by written submission during the Rent Administrator's consideration of the application. Once the Rent Administrator issues a final approval, the landlord may immediately issue 120-day notices to vacate and can evict the tenants if they refuse to leave. *See id.* § 3505.01(f)(1)(A), (D). Although the landlord must gain possession through the court process rather than via self-help, *see Mendes v. Johnson*, 389 A.2d 781, 787 (D.C. 1978), nothing in the statute allows tenants to use eviction proceedings as an opportunity to mount a collateral attack on the Rent Administrator's decision. Under the statute, the only question in such a case would be whether the procedural requirements of section 501(f)(1)(A) have been

satisfied. If they have, and the Rent Administrator has approved the application, the tenants are bound by that decision.[2]

B. Petitions and Hearings under the Rental Housing Act

The 2006 revisions to section 501(f) brought the statute into substantial conformity with other provisions of the Rental Housing Act relating to rent increases and tenant displacement. For example, D.C. Code § 42-3505.01(h) authorizes eviction for the purpose of "immediate, substantial rehabilitation" of the unit and provides for the tenant to return once the rehabilitation is complete. Like a section 501(f) action, an eviction for substantial rehabilitation requires the Rent Administrator to preapprove the landlord's plans. *Id.*; *see id.* § 42-3502.14. Also similar to section 501(f), the substantial rehabilitation law requires the Rent Administrator to "examine the plans, specifications, and projected costs for the rehabilitation," and to grant approval only if the proposal is "in the interest of the tenants." *Id.* § 42-3502.14(a), (b).

The main difference between a section 501(f) petition and one for substantial rehabilitation is that the Rent Administrator may, in connection with the latter, authorize a rent increase of up to 125 percent if necessary to pay for the rehabilitation. *See id.* This scheme comports with the Rent Administrator's authority to permit rent increases for other reasons: to fund capital improvements, to account for a change in services or facilities provided to the tenants, or to increase the landlord's rate of return on the property. *See id*. §§ 42-3502.10 (capital improvement); 42-3502.11 (services and facilities); 42-3502.12 (hardship).

[2] Although tenants can appeal the Rent Administrator's decision to the Rental Housing Commission, as they did in this case, the Rent Administrator's decision is fully effective when it is issued. An appeal does not preclude the housing provider from moving forward with eviction unless the tenants obtain a stay from the Commission. *See* D.C. Mun. Regs. tit. 14, § 3805.5.

When a landlord petitions for a rent increase for any of these reasons, the Rental Housing Act entitles tenants to an oral hearing regarding the landlord's request. *See id.* § 42-3502.16. As originally written, the Act authorized the Rent Administrator to conduct these hearings, evaluate the plans and the corresponding rent increases, and make final decisions on petitions. *See id.* In 2004, however, the Council transferred these functions to the D.C. Office of Administrative Hearings (OAH). *See id.* § 2-1831.03(b-1). The Council contemplated that the transfer, effective in 2006, would leave the Rent Administrator with only "non-adjudicatory functions," and directed the Rent Administrator's office to submit a plan for "how [it] will function after its adjudicatory responsibilities are transferred" to OAH. *Id.*; *see id.* § 42-3502.04(*l*). Since the effective date of the transfer, the Rent Administrator no longer rules on petitions for substantial rehabilitation, hardship, capital improvement, or changes to services and facilities. Instead, the Rent Administrator receives the petitions; performs ministerial functions relating to processing the matters and giving notice to the tenants; and then, if the tenants wish to contest the petition, transfers the matter to OAH for a hearing. *See id.* §§ 42-3502.16, 42-3502.04(*l*).

ARGUMENT

In affirming the Rent Administrator's approval of the section 501(f) application in this case, the Rental Housing Commission committed two separate errors. First, the Commission was wrong in concluding that no OAH hearing is required on a landlord's application under section 501(f). Because a section 501(f) claim implicates tenants' property interest in retaining their homes, due process requires a hearing before the application can be approved. That hearing, whatever form it takes, must occur at OAH and not with the Rent Administrator, because the OAH Establishment Act divests the Rent Administrator of authority to adjudicate individual parties' rights.

Second, the Commission erred in concluding that the tenants could not raise retaliation in defense of the landlord's section 501(f) application. The retaliation provisions of the Rental Housing Act apply broadly. *See* D.C. Code § 42-3505.02. Contrary to the Commission's holding, neither the statute nor its implementing regulations confine retaliation claims to tenant petitions. The tenants instead were entitled to assert retaliation and to have the adjudicator assess the merits of that claim as part of the section 501(f) review process.

I. TENANTS ARE ENTITLED TO A HEARING AT OAH ON A LANDLORD'S PETITION UNDER SECTION 501(f).

The Rental Housing Commission erred in concluding that the Rent Administrator may grant a petition under section 501(f) without transferring the matter to OAH for a hearing. As the Commission acknowledged, OAH now has jurisdiction over any "adjudicated" case previously within the Rent Administrator's authority. *See* Decision and Order (Sept. 1, 2015) at 31. The OAH Establishment Act defines an "adjudicated case" as a "contested case or other administrative adjudicative proceeding before the Mayor that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined by an adjudicative hearing of any type." D.C. Code § 2-1831.01(1) (quoted in Decision and Order at 31).

In this case, given the category of rights at issue, the Due Process Clause of the Fifth Amendment requires a hearing before the landlord's request to evict the tenants under section 501(f) can be granted. Whether that proceeding qualifies as a contested-case hearing or something less formal, it is indisputably an adjudicative hearing of some type. OAH therefore has jurisdiction over the matter, either as a contested case or as an "other administrative adjudicative proceeding" under the OAH statute. D.C. Code § 2-1831.01(1).

Indeed, OAH is the *only* forum suitable for adjudicating the tenants' rights in a section 501(f) petition. In connection with establishing OAH, the Council relieved the Rent Administrator of all "adjudicatory functions" – *i.e.*, all responsibilities related to determining the rights of specific parties under the Rental Housing Act. Thus, regardless of the form or formality of any section 501(f) proceedings, the adjudicative authority belongs to OAH, not the Rent Administrator.

A. Due process requires a hearing on a section 501(f) petition.

To determine if a hearing is required under the Due Process Clause of the Fifth Amendment, the court must make a two-part inquiry: whether the matter involves a property or liberty interest, and, if so, what degree of process is required. *See Mathews v. Eldridge*, 424 U.S. 319, 332-335 (1976).[3] A tenancy is a protected property interest under the Due Process Clause. Granting a section 501(f) petition infringes on that interest, sometimes temporarily but often permanently. Tenants thus are entitled to notice and an opportunity to be heard before the landlord may move forward with a section 501(f) eviction.

1. <u>Tenancy is a protected property interest for due process purposes.</u>

The "right to continued residence" in one's home is a "significant" property interest. *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993) (the "right to maintain control over [one's] home . . . is a private interest of historic and continuing importance"); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("due process requires that there be an ability to present every available defense" to a claim for

[3] The Rental Housing Commission refused to conduct a due process analysis on the basis that the tenants had not identified any "particular supporting provision of the Constitution," or the specific protected property right at issue. Decision and Order at 32. Given that the tenants claimed a "due process" right against displacement from their homes, which, as discussed in the following subsection, is a well-recognized right protected by the Fifth Amendment, the Commission's refusal to conduct any sort of due process analysis was erroneous.

possession). This Court has long recognized that issues relating to eviction have "significant Constitutional overtones," and that due process, including meaningful notice and an opportunity to be heard, is necessary before a tenant can be displaced from a rental unit. *Frank Emmett Real Estate, Inc. v. Monroe*, 562 A.2d 134, 136, 137 (D.C. 1989).

The significance of that property interest does not change where, as in the case of a section 501(f) petition, the deprivation is ostensibly temporary. *See Connecticut v. Doehr,* 501 U.S. 1, 12 (1991); *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972) (citing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and *Bell v. Burson*, 402 U.S. 535 (1971)). In *Fuentes*, for example, the Court held that the deprived party's ability to recover replevied property at the end of replevin proceedings did not alter the need for a pre-seizure hearing. While the temporary nature of a property deprivation may affect how formal a hearing is necessary, "it is not decisive of the basic right to a prior hearing of some kind." *Fuentes*, 407 U.S. at 86; *see also, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 (1978) (holding, in the context of utility cutoffs, that even though "utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation"); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (student subject to a 10-day suspension from school entitled "to a hearing of some kind" under Due Process Clause).

The interests at stake in a section 501(f) case are even more important. *Fuentes* involved the temporary deprivation of various household goods, including "a stereo, a table, a bed, and so forth," 407 U.S. at 88, while a section 501(f) case involves an ostensibly temporary (but, in practice, often permanent) eviction, with serious consequences for employment, education, safety, and family life. The statute includes no time limit on section 501(f) evictions. And unless relocation within the same building is "practicable," tenants can be displaced to another property

in a different neighborhood. *See* D.C. Code § 42-3505.01(f)(1)(B)(v)(II)-(IV). The evicted tenant is compensated with a maximum of $300 per room to relocate, which is unlikely to cover moving expenses, let alone any temporary rent increase. *See id.* §§ 42-3505.01(f)(4); 42-3507.03(a).[4]

The effects of even temporary relocation can be significant. Moving may impede access to public transportation, making it harder for tenants to hold down jobs or obtain education. It may require children to change schools or child-care providers. When multiple tenants relocate at once, it disrupts community networks and support systems. While moving is stressful for any resident, it can be even more challenging for those living in poverty. Low-income tenants face particular difficulty in finding replacement housing, especially given the District's serious shortage of affordable rental units.[5] They may also face other barriers in relocating, including poor credit histories, criminal records, or the need for housing accessible to people with disabilities.[6] And

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[4] In 2006, the Council establishing $300 per room as a starting point for relocation assistance and requiring the Mayor to establish, by rule, an amount that would be updated yearly to keep pace with rising costs. *See* D.C. Code § 42-3507.03(a), (b). It does not appear that any such rule has been established, leaving in place the original $300 per room maximum.

[5] *See, e.g.*, Wes Rivers, *Going, Going, Gone: DC's Vanishing Affordable Housing*, D.C. Fiscal Policy Institute, (March 15, 2015), http://www.dcfpi.org/wp-content/uploads/2015/03/Going-Going-Gone-Rent-Burden-Final-3-6-15format-v2-3-10-15.pdf.

[6] *See, e.g.*, Susan J. Popkin et al., *A Decade of HOPE VI: Research Findings and Policy Challenges*, Urban Institute, 34 (May 18, 2004), http://www.urban.org/research/publication/decade-hope-vi (discussing relocation in the context of public housing redevelopment); The Annie E. Casey Foundation, *Responsible Redevelopment: Relocation Road Map 1.0*, 31-33 (2008), http://www.aecf.org/m/blogdoc/aecf-ResponsibleRedevelopmentRelocationRoadMap-2008.pdf (same).

Legal Aid recognizes that the potential displacement in this case – in which the landlord's plan called for moving tenants in stages to other apartments in the same building – was likely to be far less disruptive than moving tenants off of the property would have been. But that does not affect the general principle that a tenant's interest in her home is a constitutionally cognizable property interest, and that displacement under section 501(f) generally can also include displacement to a different building or neighborhood.

evictions and other forced moves are associated with relocation to poorer neighborhoods and substandard living conditions, loss of possessions and other material deprivations, increased employment instability and job loss, poor school performance and adolescent violence among children, and symptoms of depression among parents. Matthew Desmond, *Evicted: Poverty and Profit in the American City* 296-99 (2016); Matthew Desmond and Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 Soc. Prob. 46, 59 (2016); Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 Am. J. Soc. 88, 89, 118-19 (2012). Furthermore, although the law gives tenants the right to return to their units once the work is complete, in Legal Aid's experience that right is largely meaningless if low-income tenants have been relocated off the property. For some of the same reasons that moving is problematic in the first place, the reality is that once tenants are displaced from their rental property, they are unlikely to return even if offered the chance to do so.

For these reasons, a tenant's interest in remaining in her rental unit – even as against a temporary relocation – is a property interest cognizable under the Due Process Clause. The Constitution "draws no bright lines around three-day, 10-day or 50-day deprivations of property." *Fuentes*, 407 U.S. at 86. Where, as here, the government must consider whether to approve an order displacing tenants from their homes even for a temporary period – and especially where, as here, the period, though technically "temporary" is unlimited in duration – due process is required.

2. Tenants are entitled to an oral hearing regarding a landlord's request to displace them pursuant to section 501(f).

Because property interests are at stake, the Court must determine "what process is due." *Mathews*, 424 U.S. at 333. This inquiry balances three factors: (1) the nature of the private interest at issue; (2) the likelihood of erroneous deprivation resulting from the existing procedures and the probable value of additional procedural safeguards; and (3) the government's fiscal and

administrative interest in avoiding additional proceedings. *Id.* at 335. In the case of section 501(f) petitions, the balance weighs heavily in favor of conducting an oral hearing before permitting the landlord to evict the tenants.

The nature of the private interest. First, as discussed above, the interest involved – a tenant's right to remain in her home – is of critical importance. This Court has recognized that "[t]he upheaval of the tenant from his home, even if he can find alternative housing, creates a cognizable *irreparable* injury." *Akassy v. William Penn Apts., L.P.*, 891 A.2d 291, 309 (D.C. 2006) (emphasis added); *accord Salvattera v. Ramirez*, 105 A.3d 1003, 1005 (D.C. 2014). A person's "private interest in the perpetuation of her housing" is "fundamental and overarching." *Ass'n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 34 (D.D.C. 2006). A tenant's interest in keeping her home weighs strongly in favor of greater procedural safeguards under the *Mathews* test. *See id.*; *United States v. Property Identified As Lot Numbered 718*, 20 F. Supp. 2d 27, 36 (D.D.C. 1998) (party's interest under the first prong of *Mathews* "is especially great because she faced eviction from her home") (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993)).

Risk of erroneous deprivation. The second factor, the degree of risk that the current process will result in erroneous deprivation of rights, calls for an oral hearing rather than the paper-only procedures described in section 501(f). While the "ordinary principle" is "that something less than a [trial-type] hearing is sufficient" in administrative matters, *see Donnelly Assocs., L.P. v. D.C. Historic Pres. Review Bd.*, 520 A.2d 270, 279 (D.C. 1987), it is also true that "[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). Where the balance falls in any given case depends on the

issue being adjudicated, the nature of the existing proceedings, and the adequacy of those proceedings to safeguard the parties' interests. *See Mathews*, 424 U.S. at 348-49.

In examining the risk of erroneous deprivation pursuant to *Mathews*, this Court generally has found that procedures satisfy due process if they provide the parties a meaningful and robust opportunity to present their cases, even when the procedures are not identical to a full contested case hearing under the D.C. Administrative Procedure Act (DCAPA). In *Richard Milburn Public Charter Alternative H.S. v. Cafritz*, 798 A.2d 531, 531, 544 (D.C. 2002), for example, this court approved hearing procedures that included an "informal hearing . . . [with] thirty minutes to present testimony, including an opening statement; the submission of testimony in written form; one hour of questions and answers; and written responses to the list of reasons forming the basis for the . . . decision." Similarly, in the context of historic landmark designation, the court found sufficient a hearing with "extensive procedural protections," including "the right to assistance of counsel at the hearing; the right to present evidence, and to rebut evidence offered by other interested parties, and the right to a written decision." *Donnelly*, 520 A.2d at 283.

But where a statute provides only for the submission of papers without any oral hearing, this Court has remedied the resulting due process violation by requiring a full contested case hearing under the DCAPA. *See District of Columbia v. Douglass*, 452 A.2d 329, 332 (D.C. 1982); *Woods v. D.C. Nurses' Examining Bd.*, 436 A.2d 369, 373 (D.C. 1981). As this court later explained in *Milburn*, 798 A.2d at 548, where a critical property interest is at stake and the choice is between no hearing and a full contested case hearing, due process requires the latter.

In this case, the process set forth in section 501(f) provides far fewer protections than the procedures this Court has deemed sufficient to satisfy due process. Most notably, there is no oral hearing. The final decision is based, instead, solely on written submissions from the landlord, the

tenants, and the Chief Tenant Advocate. Tenants have no opportunity to ask questions, introduce evidence, or respond to the Rent Administrator's reasoning. *Cf. Milburn*, 798 A.2d at 547 (approving a hearing that included oral testimony, a question-and-answer period, and an opportunity to respond to the decision-maker). Oral hearings, even informal ones, are important in providing due process because they "ensure accuracy when facts are in dispute . . . [and] are an effective way to eliminate misunderstandings and focus issues . . . ." *District of Columbia v. Jones*, 442 A.2d 512, 522 (D.C. 1982) (citing *Gray Panthers v. Schweiker,* 652 F.2d 146, 161-162 (D.C. Cir. 1980)). Even where the contested issue is "sharply focused and easily documented" – a factor weighing against greater procedural formalities, *see Mathews*, 424 U.S. at 343 – the opportunity to respond in person is an important element of the process. *See Milburn*, 798 A.2d at 544, 546.

While there may be specific circumstances in which an oral hearing is unnecessary, such as when there are no contested facts, the determination is data-driven, or an issue involves corporate parties easily capable of representing their interests in writing, s*ee, e.g.*, *Southwest Airlines Co. v. Transp. Sec. Admin.*, 554 F.3d 1065, 1075 (D.C. Cir. 2009); *CNG Transmission Corp. v. FERC*, 40 F.3d 1289 (D.C. Cir. 1994), those circumstances are notably absent in section 501(f) proceedings. Most notably, the question of whether the proposal is "in the interest of each affected tenant," D.C. Code § 42-3505.01(f)(1)(A)(v)(III), is not susceptible of accurate determination without an oral hearing. This factor necessarily involves presentation from residents regarding their individual circumstances, the conditions of their homes, the effect those conditions have on them, and the "overall impact of relocation" on each tenant. *Id.* These primarily qualitative factors are not susceptible to proper evaluation on a paper record. And indeed, in the context of substantial rehabilitation – a separate proceeding under the Rental Housing Act involving renovations to the property – the "interest of the tenants" is one of the critical issues the

decisionmaker must explore at an oral hearing. *See Tenants of 738 Longfellow St. v. D.C. Rental Hous. Comm'n*, 575 A.2d 1205, 1213-14 (D.C. 1990). The failure to give tenants a chance to testify orally on this point in the section 501(f) context significantly increases the likelihood that the decision will not adequately address this question. *See Jones*, 442 A.2d at 522.

The absence of an oral hearing under section 501(f) is especially concerning in the context of low-income tenants, some of whom may have particular difficulty communicating their concerns in written form. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (U.S. 1970) ("Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."). The statutory 21-day deadline for written comments also poses challenges, particularly for those tenants who rely on free legal assistance. In Legal Aid's experience, the chances that such tenants will be able to organize effectively, secure counsel, and submit useful written comments on a detailed and complicated application – all within a three-week period – are small.

Nor does the participation of the Office of Tenant Advocate (OTA) cure any defects in the tenants' ability to participate in the process, as the Commission suggested. *See* Decision and Order at 35-36. Under section 501(f), OTA's role, aside from educating tenants about their rights, is limited to "mak[ing] such inquiries as the Chief Tenant Advocate considers appropriate" to determine whether the landlord has complied with the law and whether "the interests of the tenants are being protected." D.C. Code § 42-3505.01(f)(1)(C)(ii). In a section 501(f) proceeding, OTA does not represent individual tenants or tenant associations; indeed, because section 501(f) explicitly makes the Chief Tenant Advocate a consultant to the Rent Administrator, *see* D.C. Code § 42-3505.01(f)(1)(A)(v) & (C), it would be improper for OTA to advocate for individual tenants' interests in a section 501(f) case.

The clearest remedy for this constitutionally deficient process, and the one this Court has chosen in previous cases, is to require a full contested case hearing in accordance with the DCAPA. *See Milburn*, 798 A.2d at 548 (citing *Woods*, 436 A.2d at 373 and *Douglass*, 452 A.2d at 332). But even if such a hearing, with the full set of trial-type features, is not required – a question this case does not squarely present – some type of in-person oral hearing nonetheless is necessary. *See, e.g.*, *Schweiker*, 652 F.2d at 161-162 (finding that an informal, non-trial-type oral hearing may satisfy due process).

Compounding the likelihood of an erroneous result due to the lack of an oral hearing is the Commission's faulty conclusion that the Rent Administrator may consider *ex parte* information in a section 501(f) petition – in violation of the statute, its implementing regulations, and due process principles. *See* Decision and Order at 37. The consideration of *ex parte* information in this context is incompatible with due process because "participants in [an administrative] proceeding must have an opportunity to address themselves to [the] evidence. Otherwise, the fundamentals of due process of law are denied." *Citizens Assoc. of Georgetown v. D.C. Alcoholic Bev. Cont. Bd.*, 288 A.2d 666, 669 (D.C. 1972); *Quick v. Dep't of Motor Vehicles*, 331 A.2d 319, 323 (D.C. 1975) ("It is fundamental that the mind of the decider should not be swayed by evidence which is not communicated to both parties and which they are not given an opportunity to controvert."); *cf. Citizens Comm. to Save Historic Rhodes Tavern v. D.C. Dep't of Hous.*, 432 A.2d 710, 720 (D.C. 1981) (finding that due process was assured because, among other reasons, "[t]his is not a case in which the decisionmaker has been the recipient of *ex parte* communications from an advocate for one side of the issue") (citations omitted).[7]

[7] While the absence of an oral hearing is a constitutional defect in section 501(f), the consideration of *ex parte* evidence is simply a failure by the Commission to properly follow the applicable statute and regulations.

First, the Commission ruled that its regulation prohibiting *ex parte* communications (D.C. Mun. Regs. tit. 14, § 4002.1) was irrelevant to section 501(f) matters, because it applies only to matters that qualify as "contested cases" under the DCAPA. Decision and Order at 37. But § 4002.1 is broader: it prohibits *ex parte* communications regarding "a petition *or other contested issue* pending disposition before the Rent Administrator." D.C. Mun. Regs. tit. 14, § 4002.1 (emphasis added). A "contested issue" is not the same as a "contested case," and, by its plain terms, a 501(f) application – at least where, as here, the tenants have raised a challenge – is clearly "contested" as that term is ordinarily understood. *See Webster's New World Dictionary, Second College Edition* (1978) (defining "contest" as "1. to try to disprove or invalidate (something) as by argument or legal action; dispute").

Second, while recognizing that section 501(f) permits tenants to comment on "'any *statement* in the application,'" the Commission held that they have no right "to comment on any of the other '*evidence and documentation*' considered by the Acting Rent Administrator," even if that evidence was critical to the outcome. Decision and Order at 54 (emphasis added) (citing D.C. Code §§ 42-3505.01(f)(1)(A)(ii), 42-3505.01(f)(1)(C)(i)(II)). It is unreasonable to construe these statutory provisions, whose purpose is to provide tenants with information and an opportunity to respond, as permitting the decision-maker to consider additional information that the tenants have no chance to address. It is doubly unreasonable to do so in light of due process concerns. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288, n.4 (1974) (noting that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation") (citing *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937); *cf. Donnelly*, 520 A.2d at 283 (finding process sufficient because of, among other things, the opportunity "to rebut evidence offered by other interested parties").

The government's interest. The final factor in the *Mathews* analysis, the government's interest in more limited proceedings, also cuts in favor of a hearing in section 501(f) cases. The District already has a fully functioning forum at OAH for adjudicating rental housing issues, and OAH already hears cases in which landlords seek approval to evict tenants or raise the rent in order to improve the property. There is no reason to suppose that transferring section 501(f) cases to OAH would result in any significant additional burden on that office or on landlords. To the extent that timing is a concern, there is no reason to believe that OAH hearings will cause meaningful delays; indeed, the Rent Administrator took more than seven months to issue a decision in this case.[8]

Analyzing the three *Mathews* factors compels the conclusion that due process requires an oral hearing in section 501(f) cases like this one. Section 501(f) implicates critically important interests, while a hearing requirement poses a minimal prospective burden on the government and is likely to increase the fairness of decisions. These facts weigh against an existing process that does not afford tenants an adequate opportunity to articulate and protect their interests.

B. OAH has exclusive jurisdiction to adjudicate section 501(f) cases.

Whatever type of proceeding was required in this case, the Commission erred in finding that the Rent Administrator, and not OAH, had authority to conduct it. Contrary to the Commission's conclusion, a section 501(f) matter is an "adjudicated case" under the OAH Establishment Act. In creating OAH, the Council removed from the Rent Administrator any

[8] Where more timely action is required, as in the case of a property in need of immediate repairs for safety reasons, the District has other measures available to protect tenants' health and safety, including placarding and condemnation. *See* D.C. Mun. Regs. tit. 12A, § 115 (authorizing District officials to order tenants to vacate an unsafe property); *id.* § 116 (permitting emergency orders to vacate in case of imminent danger); D.C. Code § 6-903 (authorizing condemnation of buildings in a condition that endangers the health or lives of occupants).

authority to adjudicate the rights of individual parties. Accordingly, once the tenants expressed an intent to oppose the landlord's section 501(f) petition, the Rent Administrator should have transferred the matter to OAH for further proceedings.

1. <u>The Rent Administrator no longer has authority to adjudicate parties' rights.</u>

When it created OAH, the Council determined that the Rent Administrator's office should relinquish its adjudicatory responsibilities to the newly-established tribunal. *See* D.C. Code § 2-1831.03(b-1)(2). Although it did not dissolve the Rent Administrator position, the Council limited the Rent Administrator to performing "non-adjudicatory functions," including attending policy meetings of the Rental Housing Commission, issuing materials on tenants' rights, and publishing the Consumer Price Index figure used to calculate permissible annual rent increases. *See* D.C. Code § 42-3502.04; *id.* § 2-1831.03(b-1)(2).

Approving section 501(f) applications, by contrast, is an entirely "adjudicatory function" because it "is concerned basically with weighing particular information and arriving at a decision directed at the rights of specific parties." *Chevy Chase Citizens Ass'n v. D.C. Council*, 327 A.2d 310, 313 (D.C. 1974); *see Powell v. D.C. Hous. Auth.*, 818 A.2d 188, 192-93 (D.C. 2003) (same); *see also Gray Panthers v. Schweiker,* 652 F.2d 146, 155 n.18 (D.C. Cir. 1980) (defining "adjudicatory" as "a particularized inquiry which will determine the legal rights and liabilities of a specific individual"). In a section 501(f) case like this one, the decision-maker ultimately must determine whether the landlord is entitled to evict individual tenants from their homes and also approve the relocation procedures, including the options for relocating and the amount of the relocation assistance payment. *See* D.C. Code § 42-3505.01(f)(1)(A), (B)(v). This is an adjudicatory role, and accordingly belongs with OAH rather than the Rent Administrator.

2. Whatever type of hearing is required in this case, OAH has jurisdiction to conduct it.

When the Council limited the Rent Administrator to non-adjudicative functions, it also gave OAH jurisdiction over "adjudicated cases," defined in pertinent part as "a contested case *or other administrative adjudicative proceeding* before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type." D.C. Code § 2-1831.01(1) (emphasis added). "Adjudicated case" thus is broader than matters that qualify as contested cases under the DCAPA; even if no contested-case hearing is required, a matter still belongs at OAH if it satisfies the other qualifications listed in the statute. *See id.*; *cf.* § 2-1831.16(e), (f) (distinguishing between contested cases and other matters for purposes of judicial review). Those qualifications are that the case be: 1) an administrative adjudicative proceeding; 2) that results in a final order; 3) in which the legal rights, duties, or privileges of specific parties are determined; and 4) where that determination must, by the Constitution or other law, take place after an "adjudicative hearing of any type." *Id.* § 2-1831.01(1).[9]

Section 501(f) applications satisfy all the elements of "adjudicated cases." First, as discussed above, they determine the rights of specific parties and thus are "adjudicative" in nature.

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[9] As D.C. Code § 2-1831.01(1) suggests, the term "adjudicated case" is broader than "contested case" under the DCAPA. For a "contested case," the administrative proceeding must be required by regulation, statute, or the Constitution, "adjudicative," and a "'trial-type' hearing." *Powell v. D.C. Hous. Auth.*, 818 A.2d 188, 192-193 (D.C. 2003) (citing *Rones v. District of Columbia Dep't of Hous. & Cmty. Dev.*, 500 A.2d 998, 1000 (D.C. 1985)). The 501(f) statute requires an administrative process before the Rent Administrator, and that process is "adjudicative" in that it determines the individual parties' rights. The only question, which need not be resolved here, is whether due process requires a full trial-type hearing, or something less, in connection with reviewing an application under section 501(f).

Second, the Rent Administrator's decision is "final"; once the Administrator approves the petition, the landlord may recover possession, including by evicting the tenants if they do not leave voluntarily, and begin the renovations. *See* D.C. Code § 42-3505.01(f)(1)(A).[10]

Finally, as explained in Section I.A, above, the Constitution requires a hearing of some type before a 501(f) application is approved. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount."). The Constitution thus requires an "adjudicative hearing" and section 501(f) proceedings are "adjudicated cases" over which OAH has jurisdiction. D.C. Code § 2-1831.01(1).[11]

II. TENANTS MAY ASSERT RETALIATION AS A DEFENSE TO A LANDLORD'S SECTION 501(f) APPLICATION.

Apart from the denial of due process, the Commission committed a second error in refusing to consider the tenants' assertion that Klingle's section 501(f) application was retaliatory. The Rental Housing Act broadly prohibits "any retaliatory action against any tenant who exercises any right conferred upon the tenant by [any] provision of law." D.C. Code § 42-3505.02(a). Retaliatory

[10] Although the landlord must sue for possession if the tenants refuse to relocate, the Rent Administrator's decision is dispositive in such a suit, barring procedural irregularity. *See* D.C. Code § 42-3505.01(f)(1)(A).

[11] For the reasons given above, this Court may conclude that OAH must provide a full contested-case hearing. If not, then OAH will decide, in the first instance, what type of hearing to provide in these circumstances. Although OAH regulations generally require a hearing with trial-type features, *see* D.C. Mun. Regs. tit. 1, § 2821.5, the agency is free to establish separate rules tailored to the type of proceeding so long as those procedures meet constitutional requirements. *See* D.C. Code § 2-1831.05(a)(7) (authorizing the chief Administrative Law Judge to adopt rules of practice and procedure); *Jones*, 442 A.2d at 523 (whether to permit less "fundamental" features such as cross-examination is a decision "best left to the sound discretion of the officials authorized to issue regulations on the subject").

action is defined as any action that "seeks to recover possession of a rental unit" or otherwise interferes with a tenant's rights. *Id.* § 42-3505.02(a).

Protected actions by the tenant include requesting repairs, reporting housing code violations to the D.C. government, and bringing legal action against the landlord. *Id.* § 42-3505.02(b).[12]

The Commission dismissed the tenants' retaliation claim on jurisdictional grounds, holding that claims of retaliation were outside the scope of a section 501(f) case and must be raised in a separate tenant petition. *See* Decision and Order at 45. This was error. As an initial matter, a landlord's efforts to evict tenants under section 501(f) clearly implicate the retaliation statute. The statute expressly encompasses a landlord's action to "recover possession of a rental unit," D.C. Code § 42-3505.02(a), which applies to section 501(f) evictions. And this Court has recognized that the statutory protection is "much more than a simple defense to a housing provider's suit for possession," but instead is a "broad" prohibition on various types of retaliatory conduct. *Twyman v. Johnson*, 655 A.2d 850, 856 (D.C. 1995).

The Commission nonetheless concluded that retaliation claims were not cognizable in a section 501(f) case, and that if the tenants wished to assert retaliation, they would have to file a separate tenant petition. *See* Decision and Order at 45. There is no support for this proposition.

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[12] The Act's anti-retaliation provisions codify a protection first recognized by the D.C. Circuit in *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1969). *Edwards* concerned an eviction suit allegedly brought in retaliation for the tenant's complaints to the D.C. government about housing conditions. *Id.* at 688-689. The Court held that permitting eviction for retaliatory purposes would vitiate the protections of the Housing Code, whose enforcement depends on private complaints. *Id.* at 699-700. The Court reinforced this principle in *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853 (D.C. Cir. 1972), which interpreted *Edwards* as forbidding use of the "state's judicial processes" to punish a tenant for her exercising legal rights. *Id.* at 857, 862.

The Commission's decision cites three statutory provisions and one regulation, none of which purport to make a tenant petition the exclusive avenue for asserting retaliation claims. D.C. Code § 42-3505.02(a) and (b) merely describe what constitutes retaliation and the parties' respective burdens of proof in a retaliation claim, while § 42-3502.16(a) addresses petitions to challenge rent levels without any reference to the retaliation provision. D.C. Mun. Regs. tit. 14, § 4214.4(b) authorizes a tenant to file a tenant petition alleging retaliation, but it does not state or imply that a tenant petition is the only way to assert that claim.

Nor would such a rule be consistent with the retaliation law. The statute, and the eviction-related caselaw underlying it, permit a tenant to raise retaliation without regard to whether the tenant has previously filed a tenant petition raising the issue. *See, e.g.*, D.C. Code § 42-3505.02(b); *Gomez v. Independence Mgmt.*, 967 A.2d 1276, 1289-91 (D.C. 2009) (recognizing retaliation as a defense to eviction without reference to any prior tenant petition); *De Szunyogh v. William C. Smith & Co.*, 604 A.2d 1, 4 (D.C. 1992) (same); *Golphin v. Park Monroe Assocs.*, 353 A.2d 314, 318 (D.C. 1976) (same). This is so because the principle underlying the protection against retaliation is that the District's official processes "may not be used to accomplish an eviction for retaliatory purposes." *Golphin*, 353 A.2d. at 318 (citing *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 861-862 (D.C. Cir. 1972)). Nothing about that rule turns on the tenant's decision to raise the issue, or not, in a tenant petition or any other specific format.

Furthermore, this Court has already suggested, though not decided, that tenants may invoke retaliation in defense of an action under section 501(f). *See Gomez*, 967 A.2d at 1290 n.17. *Gomez* concerned notices to vacate issued pursuant to a 501(f) application. The tenants refused to vacate, claiming, among other things, that the landlord's efforts to obtain possession were retaliatory. *See id.* at 1281, 1289. This Court agreed that retaliation was a viable defense and rejected the

landlord's suggestion that, in approving the section 501(f) application, the Rent Administrator had already considered and rejected the tenants' retaliation claim. The Court noted that the tenants had no advance notice of the section 501(f) application – which was filed under the earlier version of the law – "and thus were not able to raise a claim of retaliation" to the Rent Administrator as a factual matter. *Id.* at 1290 n.17. Importantly, the Court did not hold that the tenants were precluded from asserting retaliation in connection with the Rent Administrator's approval of a section 501(f) application; in fact, the Court appeared to agree that such a defense would have been available in the administrative process as a legal matter had the tenants had the chance to raise it. *See id.*

The principle underlying the retaliation protection – that the state's eviction machinery cannot be used for retaliatory purposes – applies equally to cases contested at the administrative level. To permit the Rent Administrator to approve a section 501(f) application that is brought for retaliatory reasons would squarely undermine the legislative decision to include a broad anti-retaliation protection in the Rental Housing Act. *See Robinson*, 463 A.2d at 863. Moreover, the Commission's proposed solution – that tenants file a separate tenant petition alleging retaliation – would create nothing more than duplicative litigation and delay. Nothing in the Rental Housing Act or its implementing regulations requires two separate proceedings to resolve the single question of whether a landlord may evict tenants under section 501(f). *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (recognizing the "public stake in settling disputes by wholes, whenever possible"). Instead, where, as here, the tenants assert that a retaliatory motive underlies a section 501(f) application, the factfinder must consider that claim before issuing a final decision.

CONCLUSION

For the foregoing reasons, the decision of the Rental Housing Commission should be reversed, and the case remanded to the Rent Administrator to be transferred to OAH for a hearing that satisfies Constitutional due process requirements.

Respectfully submitted.

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STATUTORY APPENDIX

D.C. Code § 2-1831.01 .... SA-2

D.C. Code § 2-1831.03 .... SA-2

D.C. Code § 42-3505.01(f) SA-2

D.C. Code § 42-3505.02 .... SA-7

D.C. Code § 2-1831.01

§ 2-1831.01. Definitions.

For the purposes of this chapter, the term:

(1) "Adjudicated case" means a contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type. The term "adjudicated case" includes, without limitation, any required administrative adjudicative proceeding arising from a charge by an agency that a person committed an offense or infraction that is civil in nature.

* * * *

D.C. Code § 2-1831.03

§ 2-1831.03. Jurisdiction of the Office and agency authority to review cases.

* * * *

(b-1)(1) In addition to those agencies listed in subsections (a) and (b) of this section, as of October 1, 2006, this chapter shall apply to adjudicated cases under the jurisdiction of the Rent Administrator in the Department of Consumer Regulatory Affairs.

(2) In preparation for the transfer of jurisdiction of the Rent Administrator's adjudicatory function to the Office, the Rent Administrator of the Department of Consumer and Regulatory Affairs shall submit a plan to the Mayor and Council by December 31, 2004 describing how the Rent Administrator's office will function after its adjudicatory responsibilities are transferred to the Office, the legislative changes needed to prepare the Rent Administrator for its new role, and the resources needed to maintain its non-adjudicatory functions. The plan shall be developed in consultation with the Office.

* * * *

D.C. Code § 42-3505.01

§ 42-3505.01. Evictions.

* * * *

(f)(1)(A) A housing provider may recover possession of a rental unit for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied, so long as:

(i) The plans for the alterations or renovations have been filed with the Rent Administrator and the Chief Tenant Advocate;

(ii) The tenant has had 21 days after receiving notice of the application to submit to the Rent Administrator and to the Chief Tenant Advocate comments on the impact that an approved application would have on the tenant or any household member, and on any statement made in the application;

(iii) An inspector from the Department of Consumer and Regulatory Affairs has inspected the housing accommodation for the accuracy of material statements in the application and has reported his or her findings to the Rent Administrator and the Chief Tenant Advocate;

(iv) On or before the filing of the application, the housing provider has given the tenant:

(I) Notice of the application;

(II) Notice of all tenant rights;

(III) A list of sources of technical assistance as published in the District of Columbia Register by the Mayor;

(IV) A summary of the plan for the alterations and renovations to be made; and

(V) Notice that the plan in its entirety is on file and available for review at the office of the Rent Administrator, at the office of the Chief Tenant Advocate, and at the rental office of the housing provider; and

(v) The Rent Administrator, in consultation with the Chief Tenant Advocate, has determined in writing:

(I) That the proposed alterations and renovations cannot safely or reasonably be made while the rental unit is occupied;

(II) Whether the alterations and renovations are necessary to bring the rental unit into compliance with the housing code and the tenant shall have the right to reoccupy the rental unit at the same rent; and

(III) That the proposal is in the interest of each affected tenant after considering the physical condition of the rental unit or the housing accommodation and the overall impact of relocation on the tenant.

(B) As part of the application under this subsection, a housing provider shall submit to the Rent Administrator for review and approval, and to the Chief Tenant Advocate, the following plans and documents:

(i) A detailed statement setting forth why the alterations and renovations are necessary and why they cannot safely or reasonably be accomplished while the rental unit is occupied;

(ii) A copy of the notice that the housing provider has circulated informing the tenant of the application under this subsection;

(iii) A draft of the notice to vacate to be issued to the tenant if the application is approved by the Rent Administrator;

(iv) A timetable for all aspects of the plan for alterations and renovations, including:

(I) The relocation of the tenant from the rental unit and back into the rental unit;

(II) The commencement of the work, which shall be within a reasonable period of time, not to exceed 120 days, after the tenant has vacated the rental unit;

(III) The completion of the work; and

(IV) The housing provider's submission to the Rent Administrator and the Chief Tenant Advocate of periodic progress reports, which shall be due at least once every 60 days until the work is complete and the tenant is notified that the rent unit is ready to be reoccupied;

(v) A relocation plan for each tenant that provides:

(I) The amount of the relocation assistance payment for each unit;

(II) A specific plan for relocating each tenant to another unit in the housing accommodation or in a complex or set of buildings of which the housing accommodation is a part, or, if the housing provider states that relocation within the same building or complex is not practicable, the reasons for the statement;

(III) If relocation to a rental unit pursuant to sub-sub-subparagraph (II) of this sub-subparagraph is not practicable, a list of units within the housing provider's portfolio of rental accommodations made available to each dispossessed tenant, or, where the housing provider asserts that relocation within the housing provider's portfolio of rental accommodations is not practicable, the justification for such assertion;

(IV) If relocation to a rental unit pursuant to sub-sub-subparagraph (II) or (III) of this sub-subparagraph is not practicable, a list for each tenant affected by the relocation plan of at least 3 other rental units available to rent in a housing accommodation in the District of Columbia, each of which shall be comparable to the rental unit in which the tenant currently lives; and

(V) A list of tenants with their current addresses and telephone numbers.

(C) The Chief Tenant Advocate, in consultation with the Rent Administrator, shall:

(i) Within 5 days of receipt of the application, issue a notice, which shall include the address and telephone number of the Office of the Chief Tenant Advocate, to each affected tenant stating that the tenant:

(I) Has the right to review or obtain a copy of the application, including all supporting documentation, at the rental office of the housing provider, the Office of the Chief Tenant Advocate, or the office of the Rent Administrator;

(II) Shall have 21 days in which to file with the Rent Administrator and serve on the housing provider comments upon any statement made in the application, and on the impact an approved application would have on the tenant or any household member; and

(III) May consult the Office of the Chief Tenant Advocate with respect to ascertaining the tenant's legal rights, responding to the application or to any ancillary offer made by the housing provider, or otherwise safeguarding the tenant's interests;

(ii) At any time prior to or subsequent to the Rent Administrator's approval of the application, make such inquiries as the Chief Tenant Advocate considers appropriate to determine whether the housing provider has complied with the requirements of this subsection and whether the interests of the tenants are being protected, and shall promptly report any findings to the Rent Administrator; and

(iii) Upon the Rent Administrator's approval of the application:

(I) Maintain a registry of the affected tenants, including their subsequent interim addresses; and

(II) Issue a written notice, which shall include the address and telephone number of the Office of the Chief Tenant Advocate, to each affected tenant that notifies the tenant of the right to maintain his or her tenancy and the need to keep the Chief Tenant Advocate informed of interim addresses;

(D) The housing provider shall serve on the tenant a 120-day notice to vacate prior to the filing of an action to recover possession of the rental unit that shall:

(i) Notify the tenant of the tenant's rights under this subsection, including the absolute right to reoccupy the rental unit, the right to reoccupy the rental unit at the same rate if the Rent Administrator has determined that the alterations or renovations are necessary to bring the rental unit into substantial compliance with the housing regulations, and the right to relocation assistance under the provisions of subchapter VII of this chapter;

(ii) Include a list of sources of technical assistance as published in the District of Columbia Register by the Mayor; and

(iii) Include a copy of the notice issued by the Chief Tenant Advocate pursuant to paragraph (1)(C)(iii)(II) of this subsection.

(E) Within 5 days of the completion of alterations and renovations, the housing provider shall provide notice, by registered mail, return receipt requested, to the tenant, the Rent Administrator, and the Chief Tenant Advocate that the rental unit is ready to be occupied by the tenant.

(F) Any notice required by this section to be issued to the tenant by the housing provider, the Rent Administrator, or the Chief Tenant Advocate shall be published in the languages as would be required by § 2‑1933(a).

(2) Immediately upon completion of the proposed alterations or renovations, the tenant shall have the absolute right to reoccupy the rental unit. A tenant displaced by actions under this subsection shall continue to be a tenant of the rental unit as defined in § 42‑3401.03(17), for purposes of rights and remedies under Chapter 34 of this title, until the tenant has waived his or her rights in writing. Until the tenant's right to reoccupy the rental unit has terminated, the housing provider shall serve on the tenant any notice or other document regarding the rental unit as required by any provision of Chapter 34 of this title, this chapter, or any other law or regulation, except that service shall be made by first-class mail at the address identified as the tenant's interim address pursuant to paragraph (1)(C)(iii) of this subsection.

(3) Where the renovations or alterations are necessary to bring the rental unit into substantial compliance with the housing regulations, the tenant may rerent at the same rent and under the same obligations that were in effect at the time the tenant was dispossessed, if the renovations or alterations were not made necessary by the negligent or malicious conduct of the tenant.

(4) Tenants displaced by actions under this subsection shall be entitled to receive relocation assistance as set forth in subchapter VII of this chapter, if the tenants meet the eligibility criteria of that subchapter.

(5) Prior to the date that the tenant vacates the unit, the Rent Administrator shall rescind the approval of any application under this subsection upon determining that the housing provider has not complied with this subsection.

(6) If, after the tenant has vacated the unit, the housing provider fails to comply with the provisions of this subsection, the aggrieved tenant or a tenant organization authorized by the tenant may seek enforcement of any right or provision under this subsection by an action in law or equity. If the aggrieved tenant or tenant organization prevails, the aggrieved tenant or tenant organization shall be entitled to reasonable attorney's fees. In an equitable action, bond requirements shall be waived to the extent permissible under law or court rule.

* * * *

D.C. Code § 42-3505.02

§ 42-3505.02. Retaliatory Action.

(a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

(1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;

(2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;

(3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;

(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;

(5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or

(6) Brought legal action against the housing provider.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Proposed Brief of the Legal Aid Society of the District of Columbia as *Amicus Curiae* in Support of Neither Party and Urging Reversal to be delivered by first-class mail, postage prepaid, the 21st day of October, 2016, to

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I further hereby certify that a true and correct copy of the foregoing will be delivered electronically through the Court's Appellate E-Filing System on the 21st day of October, 2016, to

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