Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

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Before the Committee on Housing & Executive Administration
Council of the District of Columbia

Budget Oversight Hearing Regarding the Housing Production Trust Fund and the Department of Housing & Community Development

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The COVID-19 pandemic has worsened existing economic inequalities in the District, imposing disproportionate burdens on Black and Latinx residents, and deepening a longstanding affordable housing crisis. Tens of thousands of families are continuing to struggle to make ends meet. Many are long-time Washingtonians who were struggling with high rents before the pandemic and now face eviction and displacement. With a once-in-a-lifetime $2 billion infusion of federal funds, the current Fiscal Year 2022 budget presents an opportunity to reverse these trends.

With this background, the Legal Aid Society of the District of Columbia[1] submits the following testimony regarding the Housing Production Trust Fund (HPTF) and Department of Housing & Community Development (DHCD) budgets. While we appreciate the Mayor's proposals to make historic and desperately-needed long-term investments in affordable housing, these steps will not avert the current crisis. Long-term solutions must be coupled with immediate action, including keeping the eviction moratoria and other tenant protections in place, improving the STAY DC program, and expanding FY21 funding for the Emergency Rental Assistance Program, topics we also will address in other budget hearings. Unfortunately, the Mayor's budget and other recent actions by the administration have fallen short in this regard.

We also are concerned that the much-needed funding for affordable housing production and preservation in the FY22 budget will not be maximized without additional investments:

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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 protect and serve their needs." Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 89 years, Legal Aid staff and volunteers have been making justice real — in individual and systemic ways — for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

1. To ensure at least half of HPTF funding supports deeply-affordable units, the Committee should match HPTF dollars with operating subsidies.

2. To prepare for a wave of rental housing sales, the Committee should increase funding for Neighborhood-Based Activities in DHCD's budget to support tenant organizers.

3. To prevent further escalation in rents, the Committee should add funding to the budget to implement the Voluntary Agreement Moratorium Amendment Act of 2020.

We urge the Committee to identify funding for each of these priorities.

The COVID-19 Pandemic Is Exacerbating the District's Existing Affordable Housing Crisis, Putting Black and Latinx Tenants at Risk of Displacement

In a city where the average rent for a one-bedroom apartment now tops $2,000 per month, households with low and moderate incomes — the vast majority headed by people of color — are being left behind.[2] Since 2002, the District has lost over half of its low-cost rental units, those renting for $800 or less.[3] Subsidized housing also remains out of reach for most tenants. The centralized waiting list maintained by the D.C. Housing Authority (DCHA) has been closed for eight years and still numbers just under 40,000 families.[4]

The result of this deepening affordability crisis is that low-income families are paying far too much of their limited incomes for housing. Nearly two-thirds of extremely low-income households in the District pay half or more of their income towards rent, a threshold that HUD classifies as "severely housing cost burdened".[5] This issue is one of racial equity; 88 percent of extremely low-income, severely rent-burdened households are headed by a person of color.[6]

The shortage of affordable housing and accompanying heavy rent burdens are having devastating effects on Washingtonians with low incomes, particularly Black households. A national study found that the District had the greatest "intensity of gentrification" of any city across the country

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[2] Rent*Cafe*, *Washington*, *DC Rental Market Trends*, *available at* https://www.rentcafe.com/average-rent-market-trends/us/dc/washington/.

[3] D.C. Fiscal Policy Inst., *Going, Going, Gone: DC's Vanishing Affordable Housing* (March 2015), *available at* https://www.dcfpi.org/wp-content/uploads/2015/03/Going-Going-Gone-Rent-Burden-Final-3-6-15format-v2-3-10-15.pdf.

[4] D.C. Hous. Auth., *2020 Performance Oversight Hearing - Committee on Housing and Neighborhood Revitalization Responses to Pre-Hearing Questions* (March 2020), p. 28, *available at* https://dccouncil.us/wp-content/uploads/2020/03/dcha.pdf. DCHA did not provide updated figures in this year's performance oversight responses.

[5] D.C. Fiscal Policy Inst., *A Broken Foundation: Affordable Housing Crisis Threatens DC's Lowest Income Residents* (Dec. 8, 2016), p. 3, *available at* https://www.dcfpi.org/all/a-broken-foundation-affordable-housing-crisis-threatens-dcs-lowest-income-residents/. Extremely-low income families are those with incomes at or below 30 percent of area median income.

[6] *Id*. at 1.

for the period of 2000 to 2013, with more than 20,000 Black residents displaced.[7] This ongoing displacement is caused in part by eviction, which disproportionately impacts majority-Black areas of the District with high concentrations of poverty.[8]

Against this backdrop, nearly 40 percent of District residents have lost employment income since mid-March 2020, and District employees have filed over 200,000 claims for unemployment.[9] Over 50,000 families report that they are still finding it "very difficult" to pay their regular bills.[10] This includes 11 percent of tenants in the District reporting they were not current in their rent payments as of the end of April 2021, and 14 percent with little or no confidence in their ability to pay May 2021 rent.[11] The burden of this economic and housing crisis is falling disproportionately on low-income Black and Latinx families. Ninety-four percent of the families reporting that they are not current in their rent and 98 percent of the families with little or no confidence in their ability to pay future rent are Black or Latinx.[12]

This Committee Must Ensure That Housing Production Trust Fund Dollars Will Be Matched With Operating Subsidies to Support Deeply-Affordable Units

The HPTF provides critical support for affordable housing in the District, with loans and grants to developers for the dual purposes of preserving and producing rental units that are affordable to tenants at targeted income levels.[13] Fifty percent of HPTF loans and grants are required to be

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[7] National Cmty. Reinvestment Coal., *Shifting Neighborhoods* (March 2019), *available at* https://ncrc.org/gentrification/. An updated study covering 2013 to 2017 found that the District "still has a high intensity of gentrification" with displacement continuing. National Cmty. Reinvestment Coal., *Gentrification and Disinvestment 2020* (June 2020), *available at* https://ncrc.org/gentrification20/.

[8] *See* Brian J. McCabe & Eva Rosen, Georgetown Univ., Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability (Fall 2020), pps. 18-21, *available at* https://georgetown.app.box.com/s/df0d4mruf59wcvqm6cqo9a8pyu8ukeuk. McCabe and Rosen found that nearly sixty percent of all eviction cases in the District are filed against tenants living in Wards 7 (22.6 percent) and 8 (34 percent), both of which have populations that are over 90 percent Black, even though those two Wards account for only 25.7 percent of all renter households.

[9] U.S. Census Bureau, *Week 27 Household Pulse Survey: Mar. 17-29 – Detailed Tables*, Employment Table 1, *available at* https://www.census.gov/data/tables/2021/demo/hhp/hhp27.html; D.C. Dep't of Emp't Servs., "Unemployment Compensation Claims Data," available at https://does.dc.gov/publication/unemployment-compensation-claims-data. The Census Household Pulse Survey has collected survey data from jurisdictions across the United States, including the District, since the week of April 23, 2020.

[10] U.S. Census Bureau, *Week 28 Household Pulse Survey: Apr. 14-26 – Detailed Tables*, Spending Table 1.

[11] *Id*., Housing Tables 1b., 2b.

[12] *Id*.

[13] D.C. Code § 42-2802.

allocated for projects that are affordable to extremely low-income households, families with incomes at or below 30 percent of area median income.[14] Rental units produced using HPTF dollars generally must be maintained at affordable rent levels for 40 years, ensuring long-term affordability.[15] Since Fiscal Year 2017, the District has allocated at least $100 million annually to the HPTF, making the Trust Fund one of the largest sources of local government funding for affordable housing. The Mayor now proposes allocating an additional $156.7 million in the FY21 supplemental budget (to be added to $100 million already allocated for FY21) and a total of $250 million in the FY22 budget for the Trust Fund.[16]

These proposed investments are historic and desperately needed, but they should be considered with two cautionary notes. First, because of ongoing increases in construction and rehabilitation costs, more funding will continue to be needed each year just to keep pace and generate the same level of preserved or produced affordable housing. According to an analysis by the D.C. Fiscal Policy Institute, to generate the same housing in 2020 as in 2015, the HPTF needed a 50 increase in funding from $100 million to $150 million annually. Put another way, while $100 million in 2015 yielded approximately 1,140 units, by 2019 that same level of funding only yielded approximately 710 units.[17] Those trends have only continued during the pandemic, as various construction material costs have spiked and land costs in the District continue to climb.

Second, and more important, to achieve the goal of investing at least half of these funds in deeply-affordable units, historic investments also will be needed in ongoing operating subsidies. For example, an analysis by the D.C. Fiscal Policy Institute estimates that meeting the District's pre-pandemic need by creating 30,000 units of deeply-affordable housing units would require $2.6 billion in funding for construction costs through HPTF, coupled with $732 million per year in ongoing operating assistance through Local Rent Supplement Program (LRSP) project-based funding.[18] If the budget does not get this mix right, the predictable result is that the preservation and production of deeply-affordable units fall short, a reality that has played out for years now. The D.C. Auditor has found that only 19 percent of rental units produced or preserved by the Trust Fund between 2001 and 2016 are affordable to families with extremely-low incomes.[19]

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[14] *Id*. § 2802(b-1)(2).

[15] *Id*. § 2802.02(a).

[16] FY 2022 Proposed Budget and Financial Plan, Vol. 4 Agency Budget Chapters – Part 3, H-33 - H-37 (May 27, 2021), available at https://app.box.com/s/7ucktpq0p16ie032gm3wcp8yfm5mip54.

[17] D.C. Fiscal Policy Institute, *To Ensure all Residents Have a Safe and Affordable Place to Call Home, DC Needs to Double Down on the Housing Production Trust Fund* (March 2019), available at: https://www.dcfpi.org/all/to-ensure-all-residents-have-a-safe-and-affordable-place-to-call-home-dc-needs-to-double-down-on-the-housing-production-trust-fund/

[18] D.C. Fiscal Policy Institute, *Building the Foundation: A Blueprint for Creating Affordable Housing for DC's Lowest-Income Residents* 7-8 (April 2019), *available at* https://www.dcfpi.org/all/building-the-foundation-a-blueprint-for-creating-affordable-housing-for-dcs-lowest-income-residents/.

[19] Office of the District of Columbia Auditor, *Stronger Management of the Housing Production Trust Fund Could Build More Affordable Housing* (Mar. 2018), pps. 9-10, *available at*

DHCD reports that only 18 percent of FY20 funds went to such projects, and the agency projects only 27 percent of FY21 funds will fund deeply-affordable units — despite the statutory requirement that half of all funding go to such units.[20]

At this point, Legal Aid does not have all of the information we need to evaluate whether the Mayor's proposed funding levels for operating subsidies in Fiscal Years 2022 through 2025 will be sufficient to resolve these issues, but we are concerned. Last year, the Mayor, DHCD, and the D.C. Housing Authority (DCHA) announced that project-based LRSP tied to HPTF funding would be allocated through a new process, with funding set aside in the four-year financial plan but not released until new units come online. Affordable housing developers and advocates have raised questions about whether lending institutions will accept these assurances of future funding. Those questions largely remain unanswered. In addition, future allocations in the four-year financial plan are not publicly available or easy to evaluate. Based on the numbers Legal Aid has seen, it does not appear that funding in the FY22 through FY25 budgets will be sufficient to fund all of the units that should be coming online in the next four years, given the statutory mandate to produce or preserve hundreds of deeply-affordable units each year.

Meanwhile, this year's Budget Support Act — released only last week — has new provisions for how operating subsidies will be awarded and regulated, with further details to come in future regulations. Legal Aid has not had enough time to evaluate these proposals fully. While the provisions to allow DHCD to control project-based funding appear sound, we have concerns about changes to the tenant- and sponsor-based programs under LRSP. We expect to share those concerns in the coming budget hearings for the Department of Human Services and DCHA.

Given this changing landscape, it is critical that the Council use the budget process in the coming weeks, as well as ongoing oversight in the coming year, to understand and evaluate these proposals. To put it bluntly, if operating subsidies ultimately do not match Trust Fund dollars, the Mayor's proposed historic investment in affordable housing will be squandered, and those District residents most desperately in need of help will not receive it. To aid in this ongoing process, Legal Aid also supports reintroduction and enactment of Bill 23-123, the Housing Production Trust Fund Transparency Amendment Act. Unless and until the Council and the public have ready access to information about Trust Fund applicants and awards, it will be impossible to perform the level of oversight needed to understand why the goal for deeply-affordable units remains unmet and how to fix it.

This Committee Should Increase Funding For Neighborhood Based Activities to Prepare For a Coming Wave of Rental Property Sales

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http://dcauditor.org/report/stronger-management-of-the-housing-production-trust-fund-could-build-more-affordable-housing/. An independent analysis by the D.C. Fiscal Policy Institute similarly found that the Trust Fund met its annual target for deeply-affordable units only once in Fiscal Years 2014 through 2019. *See Building the Foundation*, *supra*, p. 5.

[20] *See* Department of Housing and Community Development FY20-FY21 YTD Pre-Hearing Responses, Response to Question 104, *available at* https://dccouncil.us/wp-content/uploads/2021/03/Performance-Oversight-FY2020-FY2021-DHCD-Pre-Hearing-Responses-.pdf.

Under emergency legislation enacted by the Council, all deadlines for tenants to exercise their rights under the Tenant Opportunity to Purchase Act (TOPA) have been tolled during the public health emergency.[21] TOPA requires tenants to form tenant associations and act collectively to exercise their rights, steps that have been difficult to accomplish during the pandemic. When the public health emergency ends and tolling comes to a close, we expect to see a wave of TOPA activity from pent-up demand. According to one estimate, at least 100 buildings covering more than 4,000 total units already have received TOPA notices or are in the pipeline to be sold, figures that likely are an underestimate. This market turnover could present an important opportunity for tenants and the District to exercise rights under TOPA and (where necessary) the District Opportunity to Purchase Act to preserve affordable rental housing. But the success of any such effort will depend in part on the ability of DHCD and the community-based organizations it funds to prepare and respond.

Tenant organizers at community-based organizations play a critical role in assisting tenants with navigating the TOPA process, providing technical assistance and connecting tenants with attorneys. Examining District properties that received TOPA notices between 2015 and 2019, 65 percent of those where tenants received technical assistance successfully registered for their TOPA rights, compared to only 21 percent of properties where tenants did not receive this support.[22] In recent years, Legal Aid has partnered with these organizations to provide legal services to tenants in small buildings (ranging from four to fourteen units) in navigating the TOPA process. Legal Aid has found this to be a lengthy, challenging, though ultimately highly-rewarding process for the tenants in these buildings. Each property is unique, yet in every project Legal Aid has worked on, tenants were able to secure the long-term affordability of their units along with needed repairs and upgrades through the TOPA negotiation process.

Community-based organizations like Housing Counseling Services and the Latino Economic Development Center depend on grants from DHCD's Neighborhood Based Activities fund (account 3010) to do this tenant organizing and counseling work. Rather than increasing funding for this program, the Mayor's FY22 budget imposes a modest cut, from $7.370 million to $7.345 million. This year's funds were a cut from FY20, when funding totaled $9.094 million. To ensure that community-based organizations are fully-staffed to assist tenants in exercising their TOPA rights, Legal Aid recommends increasing funding for Neighborhood Based Activities to at least $10 million for FY22, as well as adding new funds in the FY21 supplemental budget to allow organizations to begin hiring now.

Legal Aid also supports the Mayor's proposal to increase funding for the Housing Preservation Fund to $17.652 million in FY22. These dollars are matched 3:1 with private market investment, representing a significant increase in available funding for TOPA transactions and similar projects. The Mayor proposes earmarking $5 million per year of these funds for limited-equity

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[21] D.C. Code § 42-3405.10b.

[22] *See* Scott Bruton & Gretchen Nicholls, Coal. For Nonprofit Hous. & Econ. Dev. and Twin Cities LISC, Opportunity to Purchase Policy Options for the City of Minneapolis (Jan. 2021), p. 27, *available* at https://cnhed.org/wp-content/uploads/2021/01/Opportunity-to-Purchase-Policy-Options-for-the-City-of-Minneapolis.pdf.

cooperatives. Based on our experience working with tenants when their buildings are for sale, we believe there are two other targeted needs for funding that should be considered.

The first is when landlords sell their properties through the bankruptcy or foreclosure process. While TOPA currently does not apply to these sales, affordable housing developers still have a limited opportunity to purchase these buildings, often working in cooperation with the current tenants. The main limitation on their ability to do so is the lack of available funding that can be deployed quickly to complete a purchase on a fast track. HPTF funds cannot be secured quickly enough and competition for Preservation Fund dollars can be a limiting factor. Similarly, Legal Aid has found that smaller buildings of 5 to 50 units often are not attractive to affordable housing developers because they are not as competitive for HPTF or Preservation Fund dollars. The Committee also should consider whether to earmark Preservation Fund dollars for one or both of these purposes.

Finally, the Committee should consider other statutory changes that also could help facilitate the preservation of affordable housing when rental properties are put up for sale. We appreciate the Committee's swift work to mark up and enact Bill 24-168, the District's Opportunity to Purchase Amendment Act of 2021. The Committee also should consider whether to amend TOPA and DOPA to allow a right to purchase in the context of bankruptcy and foreclosure sales, a recommendation in the recently-released report from the Mayor's Saving the District's Rental Housing Strike Force.[23] Legal Aid already has consulted bankruptcy experts on this possibility and would welcome the opportunity to work with the Committee to craft legislation, consistent with federal law, to close the current bankruptcy and foreclosure loophole.

The Committee Should Provide Funding to Ensure Implementation of the Voluntary Agreement Moratorium Amendment Act of 2020

The Council last made comprehensive changes to the District's rent control law in 2006. Since that time, landlords increasingly have used voluntary agreements to win approval for rent increases of hundreds or even thousands of dollars per month, well above market rates. They have achieved these dramatic rent increases by offering current tenants a deal they cannot refuse: agree to the rent increases, but only future tenants will have to pay them. And landlords who do not use this technique use similar ones, for example providing current tenants with large move-out payments if they approve rent increases and then vacate. What this practice does is externalize the costs of rent increases by shifting them to future and other tenants who are not party to the agreement, giving current tenants little to no incentive to challenge such increases. As a result, entire buildings of affordable units become unaffordable. Rent control still theoretically applies, but the law's restrictions are meaningless once substantial rent increases are locked in through voluntary agreements.

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[23] District of Columbia Government, *Saving DC's Rental Housing Market: A report of recommendations from Mayor Bowser's Strike Force to Save DC's Rental Housing Market* (May 21, 2021), p. 16, *available at* https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/SRH%20Strike%20Force%20Report%205-21-2021%20Final_0.pdf.

This practice is not just theoretical, it is well-documented. An analysis by Legal Aid and the Coalition for Nonprofit Housing & Economic Development of voluntary agreements filed since 2006 has found that these agreements alone have resulted in average increases of $964 per month per unit for 5,1335 total units. The 206 approved voluntary agreements resulted in monthly rent increases totaling nearly $5 million per month. Voluntary agreements that shifted costs to future tenants (90 agreements) or required all current tenants to vacate (10 agreements) had average increases of $1,198 per month, compared to $869 for agreements that did not. Some of these agreements approved rent increases as high as $3,000 per month per unit.

Last year, this Committee responded by leading the Council to enact the Voluntary Agreement Moratorium Amendment Act of 2020. This bill still requires funding to be implemented, and these dollars are not currently in the Mayor's proposed FY22 budget. The fiscal impact statement from the Chief Financial Officer estimated the bill would result in a loss of $191,000 in tax revenue over the four-year financial plan, with zero dollars required in FY21 and only $5,000 required in FY22.[24] Legal Aid requests that the Committee allocate the required funding so that the voluntary agreement moratorium can go into effect and put a two-year freeze on the harmful impacts described above. We also urge the Committee to use this two-year period to reconsider the call from Legal Aid and other advocates in the Reclaim Rent Control Coalition, along with many affordable housing owners and developers, to end voluntary agreements altogether.

Conclusion

Thank you for this opportunity to testify. We hope that the Committee will work between now and the budget mark-ups to increase funding in the areas identified above as an initial step toward achieving the goal of building back better toward a more equitable city in which all residents have access to safe, stable, and affordable housing.

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[24] Office of the Chief Financial Officer Jeffrey S. DeWitt, *Fiscal Impact Statement – Voluntary Agreement Moratorium*

Amendment Act of 2020 (Nov. 20, 2020), p. 2, *available at* https://lims.dccouncil.us/downloads/LIMS/45502/Other/B23-0878-FIS_Voluntary_Agreement_Moratorium_Amd_Act_of_2020.pdf.