Legal Aid Society
OF THE DISTRICT OF COLUMBIA

MAKING JUSTICE REAL

February 9, 2015

Via regular mail & electronic mail

Matt Orlins
Department of Consumer and Regulatory Affairs
1100 Fourth Street, SW, Room 5100
Washington, D.C. 20024
Matt.Orlins@dc.gov

Re: Tenant Advocate Comments on Second Notice of Proposed Rulemaking – Title 14 DCMR Revisions (Published January 9, 2015)

Dear Mr. Orlins:

We are writing to provide comments to the proposed regulations published on January 9, 2015, to revise the Housing Code (Title 14 DCMR, Chapters 1 to 13). We appreciate the opportunity to continue our dialogue with the Department of Consumer and Regulatory Affairs on these important regulations.[1]

We continue to believe that the proposed transition from the Housing Code to the Property Maintenance Code is likely to generate confusion and should be addressed with care. The vast majority of tenants, as well as many small landlords, are unlikely to be aware of this change unless DCRA makes an effort to inform and educate the public. Equally important, the Property Maintenance Code, like the Housing Code, must be accessible to all District residents. Without a thoughtfully-executed transition plan, landlords and tenants alike may be left in the dark about how and where to turn for information about their rights and responsibilities.

This letter summarizes our concerns and suggestions about the proposed transition, as well as several areas in which we believe the proposed regulations should be revised. Also attached is a section-by-section description of our suggested revisions.

Consolidation of the Housing and Property Maintenance Codes

The most significant change in the revisions to Title 14 is the proposed elimination of large portions of the Housing Code relating to standards for safe and sanitary rental housing. DCRA proposes to eliminate these requirements in favor of similar requirements found in the existing Property Maintenance Code. This will ensure that maintenance requirements for rental housing are uniform and can be found in one place, eliminating potential confusion and conflicts. While this is a laudable goal, we believe the plan requires thought and careful execution.

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[1] In July 2013, we submitted informal comments on draft revisions to the Housing Code. Many of our organizations also submitted joint comments on the revised Property Maintenance Code. We also have met with Jill Stern of DCRA and others to discuss our concerns about these proposals, and we submitted formal comments in response to the first Notice of Proposed Rulemaking in June 2014. We appreciate the time that DCRA has spent considering and responding to our comments, many of which have been incorporated into the current draft. Our comments here focus on the areas in which our prior concerns remain unaddressed.

Any effort to merge the two codes must consider the important place of the Housing Code under current law. The "Housing Code" is referenced in 29 different provisions in the District of Columbia Code[2] and in 28 provisions in the District of Columbia Municipal Regulations[3] (outside of Titles 12 and 14). Nearly 200 cases issued by either the District of Columbia Court of Appeals or the U.S. Circuit Court of Appeals for the District of Columbia reference the "Housing Code."[4] The requirements of the Housing Code are foundational to landlord-tenant law in the District.

The proposed regulations include language to address this issue, by maintaining pieces of the Housing Code with cross-references to the Property Maintenance Code.[5] We appreciate the inclusion of this language, which we believe is critical. We previously suggested that DCRA and the CCCB also may want to include an explanatory note in the Property Maintenance Code itself and to consult with the Counsel to the City Council about whether any further legislation is warranted to address this issue.

The Housing Code also has a special historical and cultural significance in the District. It has become part of the vocabulary that many tenants and landlords use. Tenants are aware of the Housing Code and the fact that it protects them from bad housing conditions. Likewise, landlords understand that the Housing Code imposes requirements on rental housing and can be enforced in various ways. Based on our experience, we do not believe the Property Maintenance Code enjoys the same broad-based understanding, even though it has been in place for a number of years. It is critical that the transition to reliance on the Property Maintenance Code is accompanied by broad public education and outreach efforts for both landlords and tenants.

Related to this point, DCRA also has taken and should continue to take steps to ensure that the Property Maintenance Code will be as accessible to the public as the Housing Code. DCRA already has launched a publicly-accessible website with provisions of the International Property Maintenance Code, as well as D.C.-specific revisions, integrated into one document. This is a vital first step to ensuring public access, and we appreciate DCRA's hard work to make it happen.[6]

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2 *See, e.g.,* D.C. Code § 6-751.09 (authorizing penalties under the Housing Code for failure to comply with smoke detector requirements).

3 *See, e.g.,* 10B DCMR §§ 2205, 2206 (requiring relocation housing to comply with the requirements of the Housing Code).

4 *See, e.g.,Bridges v. Clark*, 59 A.3d 978, 984 (D.C. 2013) (holding that a tenant presented sufficient evidence at trial to support her retaliation defense to an eviction suit based on her complaints of Housing Code violations to the D.C. Housing Authority).

5 Proposed 14 DCMR § 100.2 reads in relevant part: "The provisions of the Property Maintenance Code. . .shall apply to any residential premises or part of any premises [that is offered for rent, lease or occupancy], and are incorporated by this reference."

6 This integration and publication responds to several challenges with reliance on the International Property Maintenance Code. Subtitle 12G – where the Property Maintenance Code is located – is not part of the D.C. Code that is available online for free public access. Even if a member of the public can get access through other means, it is difficult to follow. Subtitle 12G incorporates provisions of the International Property Maintenance Code without re-printing them. To find those provisions, a reader

We believe that DCRA should design and implement a broad public education campaign to accompany the ultimate transition to the Property Maintenance Code. Tenants' advocates from our organizations and others would be happy to collaborate with DCRA on this effort. Specifically, we recommend that DCRA provide:

1. Hard Copy Access: Work with the International Codes Council to publish paper copies of the D.C.-specific version of the Property Maintenance Code. Sufficient copies should be ordered to provide multiple copies to the D.C. Public Libraries for distribution in branches across the District. In addition, DCRA should obtain paper copies or the rights to download/print electronic copies for: several copies to the Office of the Tenant Advocate, the Department of Housing and Community Development, the D.C. Superior Court (including at least two copies for the Landlord and Tenant Branch judges and at least one copy for the Landlord Tenant Resource Center), and the Office of Administrative Hearings (including at least two copies for the administrative law judges and at least one copy for the OAH Resource Center).[7]

2. Targeted Publicity: Use existing stakeholder meetings to reach out to landlords and tenants alike about the transition to the Property Maintenance Code. Tenant leaders could be reached through OTA's monthly stakeholders meetings.[8] Landlord leaders could be reached through the small landlord stakeholder meetings coordinated by DHCD.

3. Broad Publicity: Design and implement a campaign of public service announcements and advertising to publicize the transition to the Property Maintenance Code. This could include segments on Sound Advice (UDC) and/or the Kojo Nnamdi Show (NPR), segments or public service announcements on local radio stations, and advertisements or public service announcements in local newspapers, including those serving LEP communities. DCRA also should publish posters and flyers that could be distributed to stakeholders, including the Office of the Tenant Advocate and other tenants' advocates, for distribution to members of the public.

Changes in the Second Notice of Proposed Rulemaking

The Second Notice of Proposed Rulemaking adds a requirement that tenants 1) provide a separate receptacle for recyclable materials in the tenant's rental unit (§ 501.2(e)); and 2) place all recyclable materials from the tenant's rental unit in that receptacle and then transfer the

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must find the International Property Maintenance Code itself, and then cross-reference the District regulations against the IPMC, bearing in mind that the District has not adopted certain provisions. Even for a lawyer or government expert trained in housing law, it is extremely difficult to read through and understand the provisions of the Property Maintenance Code.

[7] Many of our organizations already have been provided with hard copies of the integrated D.C. Property Maintenance Code. We appreciate these efforts by DCRA to ensure broad public access. Other tenants' advocates should be able to receive copies of the D.C. Property Maintenance Code upon request.

[8] DCRA staff conducted a training session at the Office of the Tenant Advocate's Annual Tenant Summit in September 2014. A similar session could be planned for next year's summit, which will fall after the proposed regulations likely will be in effect.

materials to the landlord's designated place on the premises (§ 501.2(f)). In other words, tenants will now be required to recycle and could be evicted if they fail to comply. *See* 42-3505.01(b) (authorizing eviction for violation on an obligation of tenancy); 14 D.C.M.R. § 4301.4 (defining obligations of tenancy to include any violation of the Housing Code). We believe imposing the penalty of eviction for a tenant's failure to recycle is harsh and unwarranted.

The District of Columbia Solid Waste Management and Multi-Material Recycling Act of 1988 and its implementing regulations already impose detailed requirements on both landlords and tenants related to recycling, with small civil fines for violations. *See* D.C. Code §§ 8-1007, 8-1017; 21 D.C.M.R. §§ 2001, 2003, 2010, 2021, 2036, 2061. There is no need to add the possibility of additional penalties for tenants to this comprehensive legislative scheme. Just as landlords should not lose their housing business license or face additional penalties if they violate the District's recycling requirements, tenants should not face eviction.

Technical Suggestions

We submitted a variety of technical suggestions related to how certain terms are defined and used within the regulations in response to the first Notice of Proposed Rulemaking. DCRA has addressed our top concern, by revising the definitions of owner and operator to make clear that agents of each are covered. Some of our other technical suggestions were accepted while others were not. We have reviewed our suggestions from last time and are including here those that remain unaddressed and that we believe remain noteworthy. These technical suggestions are summarized in our attached section-by-section comments.

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We appreciate this opportunity to continue our dialogue on these important regulations. We would be happy to meet in person again to discuss our concerns in greater detail. You can reach us through Beth Harrison of Legal Aid at (202) 661-5971 or bharrison@legalaiddc.org. Thank you for your consideration.

Sincerely yours,

Beth Mellen Harrison
Julie H. Becker
Legal Aid Society of the District of Columbia

Jennifer Berger
Legal Counsel for the Elderly

TENANT ADVOCATE COMMENTS ON REVISIONS TO TITLE 14 BY SECTION

Comments on Transitory Provisions (Section 108)

In this second notice of proposed rulemaking, DCRA has added a provision to address the transition between the Housing Code and the Property Maintenance Code and the question of retroactivity. Section 108.2 reads:

> The laws and regulations in force on the date of adoption of this amendment to 14 DCMR shall apply with respect to violations or infractions committed prior to said date, whether the prosecutions or adjudications of those violations or infractions are begun before or after said date.

We agree with DCRA's policy choice that conduct occurring before the transition should be covered by prior law, while conduct occurring after the transition should be covered by the new law. However, we fear that turning the analysis on when a violation was "committed" may raise difficult questions, particular where violations have been ongoing for some period of time. We suggest instead focusing on when the conditions or conduct at issue occurred:

> The laws and regulations in force on the date of adoption of this amendment to 14 DCMR shall apply with respect to ~~violations or infractions committed~~conditions or conduct occurring prior to said date, whether the prosecutions or adjudications of those violations or infractions are begun before or after said date.

Comments on New Requirements on Recycling (Section 510.2)

The Second Notice of Proposed Rulemaking adds a requirement that tenants 1) provide a separate receptacle for recyclable materials in the tenant's rental unit (§ 501.2(e)); and 2) place all recyclable materials from the tenant's rental unit in that receptacle and then transfer the materials to the landlord's designated place on the premises (§ 501.2(f)). In other words, tenants will now be required to recycle and could be evicted if they fail to comply. *See* 42-3505.01(b) (authorizing eviction for violation on an obligation of tenancy); 14 D.C.M.R. § 4301.4 (defining obligations of tenancy to include any violation of the Housing Code). We believe imposing the penalty of eviction for a tenant's failure to recycle is harsh and unwarranted.

The District of Columbia Solid Waste Management and Multi-Material Recycling Act of 1988 and its implementing regulations already impose detailed requirements on both landlords and tenants related to recycling, with small civil fines for violations. *See* D.C. Code §§ 8-1007, 8-1017; 21 D.C.M.R. §§ 2001, 2003, 2010, 2021, 2036, 2061. There is no need to add the possibility of additional penalties for tenants to this comprehensive legislative scheme. Just as landlords should not lose their housing business license or face additional penalties if they violate the District's recycling requirements, tenants should not face eviction.

General Comments on Definitions (199)

Owner/Operator

In our prior comments, we noted that there are inconsistencies within Title 14 as to whether requirements are imposed on the "owner or operator" of a property, just the owner, or just the operator. We understand there are places where singling out the owner may make sense. We also appreciate that with revisions to the definition of "owner," it is now clear this terms includes any agent, and therefore presumably any operator. Nonetheless, we continue to believe there are several places where changes should be made, either for uniformity or to reinforce the message that operators share responsibility:

- Section 104.18 places responsibility on the owner and operator while the rest of section 104 references only the owner. This should be made uniform.

- Section 203.5 currently references only the owner but should also include the operator, because it references back to violations of 203.1, which itself imposes obligations on both the owner and the operator.

- Section 304.3 bars any lease provision exempting an owner from certain liabilities. This restriction applies equally to operators and that should be spelled out to reinforce this important policy.

- Section 305.1 requires the owner to obtain a certificate of compliance prior to re-letting a rental unit once an owner has been found responsible for housing code violations. Because operators often may be the party found responsible for housing code violations and also might be the party responsible for obtaining a certificate of compliance and for re-letting the rental unit, this section should refer to owners and operators.

- Section 401.7 imposes a prohibition only on the operator but the rest of section 401 imposes obligations on the owner or operator. This should be made uniform.

Habitation/Housing Accommodation

In our prior comments, we noted two instances where the term "habitation" is used but the term "rental unit" is more appropriate. This stems from a revision to the definition of "habitation" from focusing on a single unit to covering an entire building. DCRA changed one of these references, but not the other.

The relevant part of section 100.1 that still uses the term "habitation" reads:

> The provisions of Chapters 1-78 of this title shall apply to every residential premises or part of any premises (including those owned by the District of Columbia government) that is offered for rent, lease or occupancy, or is occupied or used, as a habitation by a person other than the owner or the owner's invitees

In this passage, we read the term "habitation" as clearly intended to apply to a single unit, not the entire building. We therefore suggest revising this provision to use "rental unit" in place of "habitation."

Household

The definitions now include the term "household" and limit a household to six unrelated persons living together, or up to 15 in the case of a religious community. The term household previously did not appear in Title 14, and it does not appear to be a necessary addition. In addition, we do not believe any numerical limits are necessary or appropriate in this context. We suggest eliminating the term and re-wording the few provisions where it is used.

Comments on Other Sections

100.2 and 401.1: While we support these cross-references to the Property Maintenance Code, we believe listing certain sections but not others may be confusing. We suggest deleting the exemplary list at the end.

401.2: We are concerned that the current language about enforcement remedies does not include private enforcement, which is covered in part in Chapters 1 and 3 of the Housing Code. We therefore suggest including a cross-reference to Chapters 1 and 3 of the Housing Code, as well as a general statement including any other legal remedies available. The revised language would read:

> The provisions of the Property Maintenance Code are intended to supersede any property maintenance provisions now or previously set forth in Title 14 applicable to housing businesses, and, any such property maintenance provisions shall be enforced pursuant to the administrative and enforcement provisions set forth in Chapter 1 of the Property Maintenance Code, Chapters 1 and 3 of this title, and any other enforcement remedies available under District of Columbia law.