Legal Aid Society
OF THE DISTRICT OF COLUMBIA

Testimony of Beth Mellen Harrison
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Legal Aid Society of the District of Columbia

Committee on Public Safety and the Judiciary
Council of the District of Columbia

B18-595, "Neighborhood and Victims Rights Amendment Act of 2009"
April 19, 2010

The Legal Aid Society[1] represents hundreds of tenants in landlord-tenant cases every year. A primary focus of our work is eviction proceedings in the Landlord and Tenant Branch of D.C. Superior Court. My testimony today focuses on two parts of the pending bill – enacting a new public nuisance law and amending the existing drug-related nuisance act – which could have harsh and unfair consequences for tenants.

The existing Drug-Related Nuisance Abatement Act can have harsh and unfair consequences for innocent tenants, particularly those without counsel.

The existing Drug- or Prostitution Related Abatement Act authorizes the D.C. Attorney General, the United States Attorney for the District of Columbia, or a community-based organization to file suit seeking preliminary and permanent injunctive relief to enjoin or abate a drug- or prostitution-related nuisance. D.C. Code § 42-3103. The court may issue a preliminary injunction on 10 days' notice, including an order for a tenant or homeowner to vacate the property. *Id.* § 42-3104. The law does not require the plaintiff to show irreparable harm to obtain a preliminary injunction and removes the defendant's right to a jury trial. *Id.*, 42-3102(c).

In our experience, the Attorney General's Office and the Office of the U.S. Attorney generally have shown restraint under the existing law, at least as to filing suit, invoking the law against tenants on occasion in circumstances involving particularly serious allegations. The existing law also strikes a balance by empowering community members to address serious conditions but limiting this authority. A complaint by a community-based organization must include an affidavit from at least one neighboring resident with personal knowledge, and all cases require prior notice to the owner of the property and specific allegations about the adverse impact of the nuisance on the community. *Id.* § 42-3103.

The Legal Aid Society nonetheless has serious concerns about the current law and its implementation. First, a strong argument can be made that the provision removing a tenant or homeowner's right to a trial by jury is unconstitutional. In any suit seeking an order for a tenant or homeowner to vacate his or her home, thereby threatening the loss of his or her right to possession of real property, the tenant or homeowner has the right to demand a jury trial. *See*

[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." Over the last 78 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of housing, family law, public benefits, and consumer law.

Pernell v. Southall Realty, 416 U.S. 363, 366, 369 (1974).[2] The law's provisions allowing for the court to order a tenant or homeowner to vacate on 10 days' notice, without requiring a showing of irreparable harm, are also flawed. For low-income tenants, the vast majority without counsel and too many with challenges such as mental and physical health problems, an expedited process not requiring a showing of serious harm too often will lead to unjust results.

The Legal Aid Society also has serious concerns about the implementation of the existing drug nuisance law. Prior to filing suit, the Attorney General and the U.S. Attorney's offices send notices to the property owner, warning about the alleged activity and possible consequences if the problem is not abated, including forfeiture or seizure of the home.[3] Although tenants are not often sued directly by the Attorney General or the U.S. Attorney, it is our experience that owners receive these letters threatening forfeiture or seizure in a wide variety of circumstances involving tenants in possession. The owner typically responds by filing an eviction suit and then demanding that the tenant move out, regardless of the individual facts.

We have seen cases in which innocent tenants without knowledge of the alleged activity of a guest or family member or live-in aide, or unable to exercise full control because of factors such as age or mental or physical condition, become caught up in these cases.[4] The tenant may be willing to bar the guilty party from the property or take other steps to abate the problem, but the owner will refuse to enter into such an agreement out of fear that it will not satisfy the Attorney General or the U.S. Attorney. Some tenants' attorneys have had success in working with the offices of the Attorney General or the U.S. Attorney to obtain approval for agreements that stop short of evicting the innocent tenant. Without counsel, however, innocent tenants caught up in bad circumstances will be evicted or forced to move out. This is of particular concern because so few tenants facing eviction in the District are able to obtain counsel.[5]

We urge the Offices of the Attorney General and the U.S. Attorney to apply discretion, following an investigation of the underlying facts, in determining when to issue a letter to the property owner threatening forfeiture and seizure. Many of these cases can be resolved informally, without placing the tenant at risk of eviction. We also hope their offices will continue to work with tenants' attorneys to fashion fair and reasonable resolutions of cases arising under the existing drug nuisance law. We urge the Council to use this opportunity to amend the existing drug nuisance law to restore the right to trial by jury and to require a showing of irreparable harm before the court may issue a preliminary injunction.

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[2] Whether or not the right to trial by jury obtains depends on the relief sought by the plaintiff. An action seeking monetary damages or an order for the party in possession of the home to vacate is at law, and the defendant has the right to a jury trial. *See Pernell*, 416 U.S. at 366, 369; *National Life Insurance Co. v. Silverman*, 147 U.S. App. D.C. 56, 62, 454 F.2d 899, 905 (1971); *Martin w. Howard County*, 349 Md. 469, 489 (Md. 1998).

[3] Two redacted letters are attached to this testimony for the record.

[4] In addition to reviewing our own cases, the Legal Aid Society consulted with housing attorneys at Legal Counsel for the Elderly, the Washington Legal Clinic for the Homeless, and the Neighborhood Legal Services Program about examples.

[5] Only 3 percent of tenants who have to appear before the Landlord Tenant Court in the District of Columbia are represented by counsel. D.C. Access to Justice Commission, *Justice for All?* (2008), at 9.

The proposed Public Nuisance Abatement law could have harsh, unfair, and likely unintended consequences for tenants.

As drafted, the proposed public nuisance abatement law is quite broad, potentially sweeping in a wide variety of behavior that typically falls within the scope of the landlord-tenant relationship. The law defines "public nuisance" to include "anything that threatens the health, safety, quiet enjoyment of life or property, or security of any considerable number of reasonable persons." B18-595 at 4. It is hard to imagine any dispute between a landlord and tenant or between two fellow tenants that does not fall within this definition. The language – if read broadly, as the law itself directs, *id.* at 7 – could include everything from commonplace landlord-tenant disputes to completely innocuous behavior. Because the definition of "community-based organization" is equally broad, any group of tenants, or even tenants banded together with their landlord, would have standing to file suit. *Id.* at 3. A tenant and a landlord who are annoyed by another tenant whose children make "excessive loud noise," *id.* at 4, could file suit under the new law asking for the loud tenant to be evicted, without a 30-day right to cure or the other protections provided under D.C. landlord-tenant law. While we are confident that the Council does not intend for the proposed law to be used as a tool in landlord-tenant disputes, the bill lacks any limiting provisions to avoid this result.

The broad grant of authority to community-based organizations is not coupled with procedural limitations, as it is under the drug nuisance law. The proposed bill does not require a community-based organization to include an affidavit from at least one neighboring resident with personal knowledge, to provide prior notice to the owner of the property, or to include specific allegations about the adverse impact of the alleged nuisance on the community. Once a suit is filed, it appears that the court could order a broad range of relief, from requiring the parties to cease and desist to forcing a tenant the home. As a result of the sheer breadth of these provisions, the bill risks creating a parallel court structure that could be used as an end-run around the District's Rental Housing Act, a statute that was carefully crafted as "a comprehensive legislative scheme to protect the rights of tenants." *Administrator of Veterans Affairs v. Valentine*, 490 A.2d 1165, 1168 (D.C. 1985).

A number of vulnerable populations might be hit particularly hard by this bill. To cite one example, tenants' advocates in other parts of the country have found that nuisance abatements laws too often are invoked against survivors of domestic violence, based on their abusers' threatening behavior and their own calls to the police.[6] In 2006, in the Protection from Discriminatory Eviction for Victims of Domestic Violence Amendment Act of 2006, the Council amended the Rental Housing to ensure that survivors of domestic violence cannot be evicted based on their abusers' conduct. Similar protections are missing from the proposed public nuisance law, once again putting domestic violence survivors at risk.

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[6] *Cf. Metro N. Owners, LLC v. Thorpe*, 2008 N.Y. Misc. LEXIS 7180 (Civ. Ct. N.Y. Dec. 25, 2008) (granting summary judgment and dismissing a landlord's claim that a tenant created a nuisance where the allegations were based on incidents of domestic violence). In preparing this testimony, the Legal Aid Society consulted with the National Law Center on Homeless and Poverty and advocates in New York, Massachusetts, and other jurisdictions.

The Council should limit the bill's provisions as they relate to tenants.

The Council should amend and clarify the proposed bill to avoid harsh and unfair results for tenants. The definition of public nuisance should be narrowly tailored. The definition of community-based organizations also should be limited to pre-existing organizations or those that are incorporated, to ensure that tenants do not abuse the law to target other tenants. The relief available to the court, at least in cases involving tenants in possession, also should be limited. Either the court should be barred from ordering a tenant to vacate his or her home, or that authority should be limited to a narrow set of cases involving egregious allegations, which could be specifically defined. Before entering any order for a tenant to vacate, the court should be instructed to find not only that irreparable harm will result without such an order, but also that no other, more limited relief is available to abate the alleged nuisance.

The Council should restore the right to a jury trial and add procedural protections.

The Council also should amend the proposed bill to include some of the limitations and protections found in the existing drug nuisance. As noted above, suits by community-based organizations should be limited to cases in which a neighboring resident joins in the complaint by providing an affidavit with personal knowledge of the allegations. The complaint also should include specific allegations regarding the adverse impact of the alleged nuisance on the community. Prior notice to the property owner should be required, which allows the owner an opportunity to correct the problem without further legal action. The bill also should be amended to flesh out the relief available and to provide factors that the court must consider in weighing the appropriate form of relief. *See* D.C. Code § 42-3110. Relevant factors might include, for example, (1), the extent, duration, and severity of the nuisance and its impact on the community; (2) prior efforts to abate the nuisance; and (3) whether the nuisance is continuous or recurring.

Finally, the Council should correct flaws that exist in the existing drug nuisance law's procedures which carry over to this proposal. Both laws should be amended to restore a tenant or homeowner's right to a trial by jury in actions that involve their right to possession. The Council also should limit the court's authority to issue injunctive relief to cases in which the requesting party shows irreparable harm, the same standard that applies in all civil suits.

The Council should not rush to judgment on this bill.

Given the significant issues raised by the statute as drafted, we respectfully request that the Council move carefully and deliberately on this bill. A bill such as this one involves competing values, and the wording of the legislation matters a great deal. We are concerned that this bill as drafted will harm some of the District's most vulnerable residents, including survivors of domestic violence and persons with disabilities. We hope to work with the Council to enact legislation that will balance the important competing considerations at stake.

Thank you for the opportunity to testify.

U.S. Department of Justice

Jeffrey A. Taylor
United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530

October 22, 2008

VIA CERTIFIED MAIL

[redacted]

Re: Notice of Unlawful Activity at [redacted]

Dear [redacted]

This letter advises that on October 3, 2008, police officers executed a warrant to search the house at [redacted], for illegal drugs. As a result, police found and seized marijuana, heroin, narcotics paraphernalia, and documents. In the course of serving the search warrant, police arrested one person, too. A copy of the search warrant and the inventory of items seized are enclosed with this letter.

A property's owner has a duty to ensure that it is not used unlawfully. When a property is used to commit drug-related crimes, federal statutes and the law of the District of Columbia authorize a judge to order that a house be seized, closed-up, or forfeited. Specifically:

> (1) A house, apartment, or property used to commit or to facilitate the commission of a violation of the federal anti-drug laws may be seized and forfeited. Federal anti-drug laws are in the Controlled Substances Act, Title 21 of the United States Code, sections 801, *et seq.* Forfeiture is authorized under 21 U.S.C. § 881, and pre-trial seizure is permitted under 18 U.S.C. § 985.
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> (2) A house, apartment, or property is a nuisance and disorderly house when resorted to by persons using illegal drugs in violation of District of Columbia law for the purpose of using any of these illegal drugs or for the purpose of keeping or selling any of the illegal drugs in violation of District of Columbia law. A nuisance and disorderly house may be enjoined and abated under Title 22 of the District of Columbia Code, Sections 2713-2720. It also is a crime to keep a disorderly house.
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> (3) If a house, apartment, or property is a drug or prostitution-related nuisance, the

nuisance may be abated, enjoined, or prevented. Title 42 of the District of Columbia Code, Section 3101, defines a drug or prostitution-related nuisance, and D.C. Code §§ 42-3102, *et seq.*, authorize legal action to deal with such a nuisance.

We are sending you this notice letter because of information that you own the property and house at [redacted] Washington, D.C. If you are not this property's owner or don't have an interest in it, please let us know that the information is wrong.

Sincerely yours,

JEFFREY A. TAYLOR
United States Attorney

By: Barry Wiegand
Barry Wiegand
Assistant United States Attorney

cc: Ms. Alicia Washington, Esq.,
Office of the Attorney-General for the District of Columbia

BW 307-0299

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

Neighborhood and Victim Services Section
Public Safety Division

December 30, 2008

[redacted]

Re: [redacted]

Dear [redacted]

Our records list you as the owner of the property listed at the above-referenced location of [redacted] Although you may not be aware of the incidents of illegal activity at your property, this letter serves as formal notice that your property is being used to facilitate illegal drug activities, and we believe – based upon our information – that your property constitutes a drug-related nuisance, pursuant to D.C. Official Code § 42-3101, *et al.*

Specifically, there have been multiple reports or complaints of illegal drug activity occurring at the above-referenced premise that may include, but are not limited to, arrest associated with drug-related activity, possession of a hand gun, drug transactions of drug dealing from the property, warrant execution, individuals ingesting drugs outside the premise at all hours of the day and evening, and/or increased pedestrian activity within the vicinity due to individuals attempting to secure drugs from the property. Most recently at your property, on October 3, 2008, the Metropolitan Police Department executed a search warrant, and found and seized marijuana, heroin, narcotics paraphernalia and documents. In carrying out service of the search warrant, police arrested one person from the property. As a result of these activities, the property is having an adverse impact upon the surrounding neighborhood.

As you may know, drug activity diminishes the quality of life for District of Columbia visitors, citizens and neighborhood residents, particularly those raising children. The fear and intimidation that results from these activities inhibit normal interactions among neighbors and interfere with their right to use and enjoy their property free from nuisance or interference.

As the property owner of the above-referenced property, you are responsible for maintaining your property in accordance with the District of Columbia law and in a manner that does not cause, create or maintain a nuisance. It is your responsibility to ensure that your property is not used in a manner that is detrimental to the welfare of the surrounding area. Simply put, you cannot allow your property to be used in any illegal manner.

This letter provides you fourteen (14) days from receipt of this letter to abate the above-described nuisances. Otherwise, you subject yourself to a fine, and/or the District may initiate a civil action against you in the Superior Court for the District of Columbia. It is also likely that the District of Columbia United States Attorney's Office has sent you notice, informing you of the possible ramifications of forfeiture of your property in light of the recent execution of the warrant.

Should you have any questions concerning this correspondence, feel free to contact me at (202) 727-4171. I thank you in advance for the prompt and proactive response I am sure you will take to eradicate this nuisance.

Sincerely,

PETER J. NICKLES
Interim Attorney General for the District of Columbia

By:

CATRINA M. JONES
Assistant Attorney General