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Before the District of Columbia Council
Committee on Housing and Workforce Development

Concerning the
Tenant Access to Justice Reform Act of 2009

November 30, 2009

> A landlord tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to press their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants. . .
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> *Pernell v. Southall Realty*, 415 U.S. 363, 385 (1974)

The Tenant Access to Justice Reform Act is Critical to Ensure that Tenants Have a Meaningful Ability to Enforce The Housing Code

More than 63,000 civil cases are filed each year in the Superior Court of the District of Columbia. More than two-thirds of those cases -- in excess of 44,000 actions -- are in the Landlord and Tenant Branch.[2] The Court has structured its rules so that the only cases that can be brought in the Landlord and Tenant Branch are by landlords seeking possession. There is no similar court for tenants.

The overwhelming majority of these cases are brought against tenants who are living in poverty. Only a very few tenants – fewer than 2% -- have counsel. A very high percentage of landlords have a lawyer, and many of those who don't are sophisticated real estate investors. The process in the Landlord and Tenant Branch is simple, inexpensive and designed for the convenience of landlords and their counsel.

For more than 20 years, the Landlord and Tenant Branch has been the subject of scrutiny and criticism. In recent years, the Court has implemented some reforms that have improved the Court and the quality of the justice it dispenses.[3] But these reforms are far from enough. The

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[1] Legal Aid was formed in 1932 to provide legal assistance to families and individuals living in poverty. Legal Aid staff handle cases involving domestic violence, custody, child support, housing, consumer law, and public benefits.

[2] 2008 Annual Report of the Superior Court of the District of Columbia. http://www.dccourts.gov/dccourts/docs/DCC2008AnnualReport-StatisticalSummary.pdf at page 7.

[3] These reforms have included efforts to help unrepresented litigants understand their rights (improved morning announcement, self help center, revised forms), reduced burdens on litigants (limitations on the number of cases

Court is a "landlord's court." Tenants cannot initiate litigation and their ability to pursue counterclaims is severely limited. As a result, if a landlord seeks to evict a tenant, she or he need only complete a simple form and pay a small fee to bring a case. A tenant who seeks to enforce a landlord's obligation under the housing code or the lease to maintain habitable premises, for example, has a much different experience. She or he must prepare a full complaint, file it in the civil division, pay a much higher fee, and contend with significantly more complex rules concerning the entry of injunctive relief. These barriers are so high as to be wholly ineffective for all but a small number of tenants.[4]

Tenants continue to be denied meaningful access to justice in the Superior Court. The rules and procedures of the Court have set the scales of justice seriously askew. The unjustly asymmetrical structure of the Landlord and Tenant Branch needs to be corrected. The Tenant Access to Justice Act is an important measure that will begin to reset the scales closer to level.

The District as a Whole will Benefit When Tenants Have a Simple and Effective Remedy

There is a crisis in decent affordable housing in the District. Many low-income tenants are forced to live in decrepit and poorly maintained buildings with very little recourse. The District's code enforcement process is broken and there is no easy mechanism to get into Court for a private enforcement action. This lack of a remedy has given landlords a free hand to ignore maintenance for the most vulnerable tenants and lead to the conditions that were exposed, but only partially addressed, by the "slum lord" litigation brought by the Attorney General.

The entire District benefits if tenants have an easy and effective tool to enforce the housing code. The housing stock improves, blight is reduced, families are safe and the community is strengthened.

The Court's Internal Discussions about Reform Should Not Deter the Council From Acting

Nearly a year ago, at the request of the D.C. Access to Justice Commission, Chief Judge Satterfield asked the Honorable Melvin Wright to convene a working group to explore an alternative to this legislation. The idea was to explore whether the Court could create a docket in the civil division to hear tenant housing code complaints. Both Judges Satterfield and Wright have candidly stated that the working group was motivated by the pendency of the bill and if the working group were successful, it would render the bill unnecessary.

I have had the honor to serve on the Access to Justice Commission and on the working group since its inception. Judge Wright has committed a considerable amount of time and effort

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filed on a given day, the plan to add a second judge), and mechanisms to avoid erroneous decisions (improved processes for reviewing settlements, routine review of affidavits of service, new procedures for default judgments and setting the amount to redeem a tenancy, staff attorney for the Branch).

[4] The administrative process established for tenants is both ineffective and unwieldy.

to moving the project forward. He has made himself knowledgeable of the solutions that other courts have implemented to solve this problem, has spend dozens of hours in meetings with the advocates and been a champion for the idea within the Court.

The process has, however, yielded only limited results. This is in no way a criticism of Judge Wright, but instead the byproduct of the structure of the working group and the Court's decision making processes. The Court has brought together advocates from the tenant and the landlord bar. The result is protracted discussions on often insignificant details. In such a process, it is simple to create delay and hard to move forward with dispatch. Change comes very slowly at the Superior Court and significant change that affects entrenched and powerful interests – such as those of landlords – is nearly impossible to achieve.

Over the last year, the working group has accomplished only two things: first, should a special docket be created, it was agreed that there will be no special rules for service of process, second, we drafted a form complaint. At the current pace of discussions, it will be years, not months, before the Court is in a position to implement the Housing Court Docket. Without the threat of this legislation, I fear that it will never happen.

Enactment of the bill will not render Judge Wright's efforts useless. The discussions to date, can serve as the framework for the Court's implementation of the legislation once it becomes law.

Small Changes that Would Significantly Improve the Bill

First, Oral Notice of Housing Conditions Should be Permitted: The Bill requires that tenants provide notice of the conditions to the landlord by certified mail before an action can be brought. This requirement may create an unnecessary barrier for tenants most in need of the process created by the bill. We recommend that the certified mail requirement be stricken.

The overwhelming majority of tenants who have poor housing conditions – and thus most need a remedy -- are low-income. They live in communities with poor services, the cost of certified mail may be a meaningful expense and they are at a much higher risk of illiteracy or having limited English skills.

This provision exalts form over substance. We agree that Landlords and tenants should do what they can to address concerns before bringing litigation. However, if a landlord has actual knowledge of the condition, has been told by phone, e-mail or regular mail, a tenants should not be prevented from obtaining a remedy just because the Post Office was not able to get the proper certificate on a return receipt.

Second, Service of Process Should Be Permitted on the Address Where the Tenant Pay Rent. The legislation defers to the Superior Court to determine the rules for service of process.

Under current rules,[5] should the legislation be enacted, the tenant may serve the landlord in person or by certified mail.

Certified mail service will lead to unnecessary collateral litigation which will be costly to the Court and the parties. Certified Mail service will lead to disputes about the identify of the person who signed for the mail, whether they were authorized to receive services and if they can bind the landlord. Service in person is costly and beyond the capacity of most low-income tenants. There will also be fights about whether the right party was served -- the owner, the management company, an agent or an principal?

Service of process should be simple, efficient and designed to provide actual notice to the landlord. We therefore suggest that the Council amend the bill before enactment to permit service on the person who is authorized to collect rent for the landlord. That person or entity has a trusted position with the landlord, is in regular communication and is easily identifiable by the tenant.

A uniform and clear rule will help eliminate procedural efforts to obstruct the litigation and promote judicial economy.

[5] See Rule 4, Super.Ct.R.Civ.P.