

**Testimony of Beth Mellen Harrison
Supervising Attorney, Housing Law Unit
Legal Aid Society of the District of Columbia**

**Before the Committee on Housing & Neighborhood Revitalization
Council of the District of Columbia**

**Public Oversight Hearing Regarding the Department of Housing & Community
Development**

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The Legal Aid Society of the District of Columbia¹ submits the following testimony on the impact of the Department of Housing & Community Development (DHCD) on low-income tenants in the District of Columbia and the agency's performance.

Legal Aid represents hundreds of low-income tenants in housing cases each year. In addition to representing individual tenants in eviction and housing conditions cases, we also represent groups of tenants or tenant associations to challenge building-wide rent increases under the Rent Stabilization Program and to exercise their rights under the Tenant Opportunity to Purchase Act (TOPA). Through our building work, we often interact with various divisions of DHCD.

We have several targeted concerns about the performance of DHCD as it relates to our work representing low-income tenants. First, the Rental Conversion and Sale Division (CASD), which plays a critical role in administering and enforcing TOPA, has been without a permanent head for nearly two years. This gap in leadership must be addressed. Second, CASD should return to its prior system of coordinating closely with community-based organizations that DHCD funds to ensure that they can provide outreach, education, and technical assistance to tenants in the TOPA process before other third parties intervene. Third, the outside auditors contracted by the Rental Accommodations Division (RAD) to review hardship petitions, which seek dramatic rent increases, continue to do a poor job identifying and fixing basic calculation errors by landlords, resulting in approval of unjustified rent increases. RAD should focus on strengthening the audit process and establishing clear standards for the auditors to address these concerns. Finally, RAD also should ensure that tenants are able to get easy access to underlying documentation filed with hardship petitions, which is kept at RAD for tenant review and is critical to evaluating a proposed hardship rent increase.

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 87 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 protection.

The Rental Conversion and Sale Division Needs a Permanent Head

The Rental Conversion and Sale Division at DHCD has been without a permanent leader for nearly two years, since the Division's former head, Lauren Pair, was confirmed in June 2017 to serve as Rent Administrator. It has been over a year now since DHCD advertised and sought applications for this position, and to date no permanent head has been announced. During this period, DHCD has been forced to rely on interim heads, including individuals with other positions and job responsibilities, to lead CASD. This lack of a permanent leader should be addressed as soon as possible.

One of the primary responsibilities of CASD is overseeing the implementation and enforcement of TOPA. The Division receives and processes TOPA filings; tracks whether tenants or tenant associations exercise their TOPA rights; provides technical assistance to landlords and tenants going through the TOPA process; and receives and adjudicates administrative complaints about noncompliance with TOPA. Through this work, CASD plays a critical role in achieving the purposes of TOPA “[t]o preserve rental housing which can be afforded by lower income tenants in the District” and “[t]o discourage the displacement of tenants through conversion or sale of rental property.”²

The Committee should inquire into and monitor the status of filling this important job. CASD will function best under a permanent leader with expertise in TOPA and condominium conversion processes and the legal issues involved in their administration. The Committee also should consider whether legislation is appropriate to prevent long gaps in leadership. The Council previously enacted legislation requiring that the Mayor nominate a new Rent Administrator within 6 months of any vacancy.³ That same legislation specified that the Rent Administrator must “[p]ossess skills and expertise relevant to rental housing, preferably in the area of rent control or rent stabilization,” among other requirements, and also ensured that the Rent Administrator only can be removed for cause.⁴ The head of CASD is a comparable position but, by contrast, no legislation spells out any requirements for the position or protects its independence. The current gap in leadership illustrates why such legislation would be helpful.

We urge the Committee to inquire into and monitor the current need for a permanent head of CASD, but also to consider legislation that would address these gaps in the law.

The Rental Conversion and Sale Division Should Coordinate Closely With Community-Based Organizations to Support Tenants Seeking to Preserve Affordable Housing Through the TOPA Process

During this past year, Legal Aid has worked in conjunction with community-based organizations funded by DHCD to expand our representation of tenants and tenant organizations seeking to exercise their rights under TOPA. Our work has focused on representing smaller buildings, typically under 25 units, that are populated by low-income residents and that have affordable rent

² D.C. Code § 42-3401.02(1),(2).

³ D.C. Code § 42-3502.03a(d).

⁴ D.C. Code § 42-3502.03a(e).

levels. The primary goal of the tenants in these buildings is to use the TOPA process to partner with a developer to preserve the building as affordable housing.

We have found this work to be quite challenging. Our clients are not looking for buyouts; they seek to remain in their homes. Most for-profit developers have little to no interest in partnering with these tenants. Non-profit, affordable housing developers want to help, but sometimes are stymied by the lack of available financing and the tough economics of these deals. Through the Affordable Housing Preservation Fund, the First Right to Purchase Program, and the Housing Production Trust Fund, DHCD provides multiple funding streams to support the preservation of affordable housing. We commend this work but also believe more can and should be done. We look forward to sharing our thoughts about funding at DHCD's upcoming budget hearing.

Unfortunately, we also have seen affordable buildings lost through the TOPA process because profit-seeking realtors and attorneys have rushed out to these properties and convinced tenants that preservation is not possible. Instead, they promise tenants buyouts and convince them to waive their TOPA rights or assign them to for-profit developers. By the time community-based organizations and legal services attorneys learn that TOPA rights have been extended and seek to meet with and educate these tenants about options for preservation, it often is too late.

Legal Aid seeks to empower tenants to make their own choices in the TOPA process. Tenants may opt for buyouts, even when that means their affordable rental units will be lost. But tenants should do so with full information, aware of their rights and the possible options for partnering with an affordable housing developer to preserve their housing and avoid displacement instead.

There is a relatively simple step that CASD could take to ameliorate this profit-seeking rush to convince tenants to waive their TOPA rights. In the past, the Division had been willing to share notice of recent TOPA filings with the community-based organizations that it funds before making that information public. This allowed the organizations to reach out to tenants and provide information and technical assistance first, better empowering tenants to enter the TOPA process with full knowledge and leverage to negotiate for whatever outcome they seek. CASD should return to this process.⁵

We urge the Committee to inquire about CASD's efforts to provide notice of TOPA filings to community-based organizations and to monitor any efforts by the Division in this regard. To the extent CASD declines to accept this recommendation, the Committee should consider a legislative change to TOPA to address the issue and ensure that tenants do not waive or assign TOPA rights until they have had a chance to learn about and understand the full range of options available to them.

⁵ Unfortunately, DHCD cut funding for community-based organizations providing these services last year by 36 percent, though the Department partially restored the funding following public pressure. The Committee should publicly recognize the essential TOPA services that these organizations provide by increasing their funding beyond fiscal year 2018 levels in the fiscal year 2020 budget, a topic we will return to at the upcoming DHCD budget hearing.

The Rental Accommodations Division Should Focus on Improving the Audit Process for Hardship Petitions

Hardship petitions are one of many mechanisms by which affordable units in the District are being lost. Under the Rent Stabilization Program, landlords who are not earning a 12 percent return on their equity in a rental property may file a hardship petition seeking an extraordinary rent increase. The average hardship petition seeks a rent increase of over 90 percent; some petitions seek increases of 200 percent or more.⁶

One of the key protections for tenants facing a hardship petition is the statutory requirement that RAD perform an audit to test the landlord's calculations. On average, these audits result in lowering the approved rent increase from just over 90 percent to just under 60 percent.⁷ When a hardship petition audit is performed well, the chances are higher that the landlord and tenants can avoid protracted litigation and reach an agreement on a modified rent increase. When the audit fails to catch miscalculations, on the other hand, tenants have little choice but to challenge the petition.

Legal Aid often represents tenant associations and groups of tenants seeking to challenge hardship petitions. We have two active cases and are providing initial advice in two other cases. Through this work, we continue to see problems in the audit process, with the audit reports failing to catch fairly basic accounting errors. Among the most common errors we have seen over the years are: 1) capital expenses that should be depreciated over time are not reduced; 2) extraordinary expenses that are non-recurring and do not reflect annual expenses for the property are not excluded; 3) claimed expenses for which there is insufficient documentation are not excluded; and 4) expenses falling outside of the 12-month period selected by the landlord are not excluded. Finally, landlords often miscalculate the maximum possible rental income for the property, an error that RAD or the auditor often can correct by examining RAD's own records about the current rent charged for all units and whether the landlord has taken recent annual rent increases. Unfortunately, this step does not appear to be part of the current audit process.

There are several concrete steps RAD should take to address these issues. First, RAD should ensure that it employs an auditor with sufficient familiarity with rental housing and rent stabilization in the District and that the auditor is able to catch errors with capital expenses, extraordinary expenses, and the maximum possible rental income calculation, as well as other issues. Second, RAD should require that the auditor make specific findings on all of the above issues. Third, RAD should make available information that will allow the auditor to check the maximum possible rental income calculation. Finally, RAD should consider performing quality control checks on a sampling of the audit reports, to ensure that the auditor is meeting these requirements.

We urge the Committee to inquire about this issue and monitor any efforts by RAD in this regard. To the extent meeting these goals requires additional budgetary authority to provide additional compensation to the auditor or employ additional staff at RAD, the Committee should

⁶ Data compiled by Legal Aid based on hardship petitions filed between 2006 and 2018, obtained from RAD through FOIA requests.

⁷ *Id.*

explore the extent of the need with RAD and DHCD. Legal Aid would support additional funding to ensure that RAD is able to perform high-quality, comprehensive audits of all hardship petitions.

The Rental Accommodations Division Should Ensure That Tenants Have Access to the Documents Underlying Hardship Petitions

When filing a hardship petition, a landlord is required to submit detailed documentation of its claimed expenses that justify the requested rent increase.⁸ While tenants receive notice and a copy of a hardship petition, the underlying documentation is filed with RAD but not provided to the tenants directly. This makes practical sense, because the underlying documentation may amount to hundreds or even thousands of pages. Instead, the notice RAD sends to tenants informs them of “the right of each tenant and the designated tenant representative to review or obtain a copy of the hardship petition including all supporting documentation at the office of the Rent Administrator.”⁹

Legal Aid has been able to work successfully with RAD over the past year to obtain copies of the underlying documentation for hardship petitions where we are advising the tenants and considering representation. We appreciate RAD’s willingness to work with us on this process. We find our review of the underlying documentation filed with a hardship petition to be invaluable in understanding the landlord’s claims and properly advising tenants about the possible bases to challenge the requested rent increase.

At the same time, we have concerns about whether RAD has processes in place to ensure that unrepresented tenants also are able to obtain access to these documents. Legal Aid has been asked to submit formal FOIA requests in order to obtain the documents underlying hardship petitions. As attorneys, this process is relatively straightforward, but we have questions about whether unrepresented tenants are required to go through a similar process in order to obtain access to these critical documents, which they are guaranteed by law.

On this issue, we urge the Committee to inquire about the current process, recommend any appropriate changes, and monitor implementation.

Thank you for this opportunity to testify about the performance of DHCD. We look forward to continuing to work with the Committee to monitor the Department’s progress in selecting a new head for CASD; CASD’s progress in coordinating with community-based organizations to further the goals of TOPA, particularly with regard to preserving affordable housing; and RAD’s progress in improving the audit process for hardship petitions and ensuring that tenants have access to the underlying documentation for these petitions.

⁸ 14 DCMR § 4209.17 (requiring a housing provider to provide “underlying documents to substantiate the income and operating expense schedule of the housing accommodation”, including copies of bills, checks and bank statements, and ledgers, journals, and similar records).

⁹ 14 DCMR § 4209.20(c).