

**Testimony of Beth Mellen Harrison
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**Before the Committee on Housing & Neighborhood Revitalization
Council of the District of Columbia**

Public Hearing Regarding:

**B23-0048,
“Housing Conversion and Eviction Clarification Amendment Act of 2019”**

and

**B23-0123,
“Housing Production Trust Fund Transparency Amendment Act of 2019”**

June 17, 2019

The Legal Aid Society of the District of Columbia¹ submits the following testimony regarding two bills pending before the Committee: the Housing Conversion and Eviction Clarification Amendment Act of 2019, B23-0048, and the Housing Production Trust Fund Transparency Amendment Act of 2019, B23-0123. Legal Aid supports both bills, but urges the Committee to make amendments to each. Legal Aid’s proposed amendments would:

- Strengthen B23-0048’s proposed penalty for landlords who abuse the eviction process by falsely claiming that they are evicting a tenant for the landlord’s personal use and occupancy of the unit.
- Strengthen B23-0123’s public disclosure requirements about Trust Fund awards, including limiting the discretion currently afforded to the Director of the Department of Housing and Community Development.

**The Housing Conversion and Eviction Clarification Amendment Act of 2019 Will
Protect Tenants From Bad-Faith Evictions**

Legal Aid represents hundreds of low-income families facing eviction each year. While many eviction cases are filed over legitimate disagreements between the landlord and the tenant, we

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, immigration, and consumer protection. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

also see far too many cases that are brought for retaliatory reasons, including cases where the landlord falsely claims they intend personally to use and occupy the unit.

Under the Rental Housing Act, a landlord may evict a tenant if the landlord intends, in good faith, immediately to personally use and occupy the unit as the landlord's dwelling.² Similarly, a landlord who is selling the property to a new owner who intends immediately to personally use and occupy the unit as a dwelling can evict a tenant to make way for the new owner.³ In these cases, a landlord must provide a 90-day notice – more time than the standard 30-day notice required for lease violation claims. A landlord who retakes possession of a rental unit under either of these provisions is barred from demanding or receiving rent for the unit for the following 12 months.⁴ The personal use and occupancy provision is a sensible way to balance the rights of tenants with the personal property interests of landlords. Unfortunately, it is a provision that also is rife with abuse.

While evictions for personal use and occupancy are rare, they also tend to be characterized by bad faith and retaliatory motivations. In Legal Aid's experience, a claim of personal use and occupancy often is made when a landlord gets fed up with a tenant's complaints about housing code violations or when the landlord decides that renting to a tenant with a voucher is too much of a burden. In other instances, a landlord claims personal use and occupancy only to turn around and re-rent the unit for hundreds of dollars more.

- In a recent case, a landlord filed a personal use and occupancy case after the tenant, who has a voucher, complained to the D.C. Housing Authority (DCHA) about ongoing, substantial housing code violations. DCHA inspected and cut off payments to the landlord based on these conditions, and the landlord then threatened the tenant and served a personal use and occupancy notice. The landlord dismissed the case once the tenant obtained an attorney through Legal Aid and served discovery requests.
- In another case, a landlord filed a personal use and occupancy case within 30 days of the tenant winning a large judgment in a tenant petition at the Office of Administrative Hearings. Legal Aid represented the tenant and got the eviction case dismissed.
- In another case, a landlord filed a personal use and occupancy case after the tenant, who has a voucher, complained to DCHA about an illegal rent increase. When the landlord learned that he could not increase the rent without DCHA approval, and could not simply refuse to rent to a tenant with a voucher, he served the tenant with a personal use and occupancy notice and sued. The landlord dismissed the case once the tenant obtained an attorney through Legal Aid and served discovery requests.

² D.C. Code §§ 42-3505.01(c), (d).

³ *Id.*

⁴ *Id.*

- Legal Aid also represented three tenants in parallel cases where the landlord claimed personal use and occupancy as to the entire building. The tenants all were long-term, Latino residents in a 5-unit, rent control building with affordable rents in a rapidly-gentrifying area of Columbia Heights. After purchasing the building, the new landlord failed to respond to complaints about conditions and then served notices for personal use and occupancy on all three remaining tenants, despite the fact that two other units in the building were vacant, and that the landlord owned multiple other units in the District. Legal Aid represented all three tenants to defend against the eviction cases. Once the tenants rejected buyout offers, the landlord agreed to dismiss the cases.
- In yet another case, the landlord filed a personal use and occupancy case after the tenant complained to the Department of Consumer & Regulatory Affairs about housing code violations and the landlord was cited. At the time that the landlord sued the tenant, another unit in the same building currently was vacant and available for the landlord to move in. The tenant reported to Legal Aid that the landlord had made similar claims against a different tenant in the building until that tenant finally moved out. Legal Aid represented the tenant and litigated the case for several months until the landlord finally admitted that she did not in fact intend to move into the unit. The landlord then promptly dismissed the case.

While every case is different, Legal Aid has seen that landlords often back down and dismiss a personal use and occupancy claim once a tenant gets an attorney to fight the case. These landlords know that they will have to answer questions, provide documents, and testify about their plans to move in. Once that becomes apparent, they often dismiss the unfounded claim for eviction. But in a court where 90 percent of tenants still lack access to an attorney, tenants cannot always rely on the court process to ferret out bad faith claims for eviction.

Tenants facing a personal use and occupancy claim often ask us what their remedy will be if the landlord does not in fact move in to the unit. While we believe tenants in this situation may have various tort and contract claims available to them, these legal claims would be novel and difficult to pursue without an attorney. This lack of clarity about remedies when landlords pursue personal use and occupancy claims in bad faith, coupled with the reality that many tenants facing such claims or threatened claims are unrepresented, means that landlords are not adequately deterred from filing such claims for bad faith or retaliatory motives.

The Housing Conversion and Eviction Clarification Amendment Act of 2019 will provide this deterrent by codifying new penalties for landlords who file a claim for personal use and occupancy, retake possession of a rental unit, and then either re-rent the unit or otherwise fail to personally use and occupy it. As introduced, the bill would require a landlord to pay the improperly-ousted tenant for reasonable relocation expenses and damages in the amount of the last monthly rent charged multiplied by the numbers of months that the landlord fails to personally use and occupy the unit, with a cap of twelve months.

Legal Aid supports these provisions and recommends strengthening the bill by changing the damages calculation to include the amount of the last monthly rent charged or the current small

area fair market rent published by the U.S. Department of Housing & Urban Development (HUD), whichever is higher. This would ensure that tenants in lower-rent units – who may find that they have to pay significantly higher rent to move following a spurious claim of personal use and occupancy – are fairly compensated for those damages.⁵

The Housing Production Trust Fund Transparency Amendment Act of 2019 Will Improve Oversight of Trust Fund Award Decisions

Every day, Legal Aid sees the devastating impact of the District’s affordable housing crisis on countless families who are struggling to make ends meet. The Housing Production Trust Fund (HPTF) remains one of the most important funding sources the District has at its disposal for creating affordable housing opportunities for low-income residents. Legal Aid believes that funding decisions made by the Department of Housing & Community Development (DHCD) in awarding Trust Fund dollars should be public and transparent, and that final decisions regarding awards should be clearly and publicly explained. We support B23-0123, but urge the Committee to go further, so that the Council and stakeholders can fully understand how DHCD makes its decisions.

A Recent Report of the Office of the D.C. Auditor Highlights the Need for Greater Transparency of Trust Fund Award Decisions

In its recent report, *Low-Ranked Projects Secure Affordable Housing Funds*, the Office of the D.C. Auditor takes a closer look at the June 2018 round of Trust Fund awards by DHCD.⁶ Based on confidential information received from an inside source at DHCD – information that is not publicly available and that DHCD itself refused to produce – the Auditor highlights “red flags” in the HPTF award process that undermine the transparency and integrity of the Trust Fund.⁷

Staff in the Department’s Development Finance Division (DFD) had scored submitted proposals and recommended awards for nine projects that would have resulted in the production or preservation of 1,125 total units, including 222 units affordable to tenants with incomes at 30% area median income (AMI) and another 603 units affordable to tenants with incomes at 50% AMI.⁸ Yet, the Director’s ultimate decision bypassed five of these proposals, instead selecting five different projects that staff had scored lower and resulting in only 772 units produced or

⁵ The Council recently codified this measure of market rent in the Rental Housing Affordability Re-establishment Amendment Act of 2017, using the Small Area Fair Market Rent for the D.C. area as established by HUD. *See* Rental Housing Affordability Re-establishment Amendment Act of 2017, Law 22-0202, § 2(b) (to be codified at D.C. Code § 42-3502.09(a)(1)(B)(ii)). We recommend using the same language in Bill 23-0048.

⁶ Office of the D.C. Auditor, *Low-Ranked Projects Secure Affordable Housing Funds* (May 30, 2019), available at <http://dcauditor.org/report/low-ranked-projects-secure-affordable-housing-funds-2/>.

⁷ *Id.* at 2, 8-10.

⁸ *Id.* at 5.

preserved, with only 127 units affordable at 30% AMI and only 381 units affordable at 50% AMI.⁹ As the Auditor concludes, “This 2018 decision-making process raises serious concerns about HPTF integrity and transparency.”¹⁰

DHCD follows a fairly transparent and objective process in soliciting and receiving proposals for HPTF funding and scoring those proposals. The Department’s Requests for Proposals (RFPs) detail how proposals will be evaluated on a range of selection criteria, including points available for each category.¹¹ DFD follows a comprehensive, multi-part review process to confirm the eligibility of all submitted proposals and then score them against the publicly-released criteria.¹² As the Auditor notes, “DFD’s scoring phase appeared to be designed to be a competitive method for ensuring only the most qualified developers were selected and the projects delivering the most public benefit (i.e. deeply affordable units) would be selected.”¹³ DFD follows internal controls in this process to ensure objectivity and consistency. This internal review is followed by an interagency consultative process, ultimately resulting in a set of recommendations to the Director, who maintains ultimate decision-making authority over HPTF awards.

The breakdown in the recent funding round occurred at this stage. The transparent, competitive, and objective process followed by DFD staff was undone by the Director in making her ultimate award decisions. Five of the six proposals that were scored highest by the DFD staff were not selected. Instead, projects scoring 11th, 12th, 15th, 19th, and 20th, out of 20 proposals scored, received awards.

Most troubling is that the Director’s decision resulted in a set of awards that run counter to the HPTF’s statutory mandate to award 40% of funds to projects providing housing to extremely low-income households earning 30% AMI or less.¹⁴ As DHCD’s RFP itself stated, the greatest gap between the need for and supply of affordable housing is for these households. Yet, the Director’s award decision cut the number of deeply-affordable units that will be produced or preserved in half.

While the Director undoubtedly should have some discretion in making ultimate HPTF award decisions, this discretion should be cabined and guided. Employing a transparent, competitive, and objective RFP and scoring process will not achieve better outcomes if the Director is free to disregard this process. This is particularly true if the ultimate decisions remain shrouded in secrecy. Were it not for a DHCD insider providing confidential information to the Auditor, the

⁹ *Id.* at 6.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 3.

¹² *Id.* at 3-4.

¹³ *Id.* at 4.

¹⁴ The recently-enacted Budget Support Act of 2019 will increase this target to 50% of Trust Fund awards.

degree of discretion that the Director has to disregard the scoring process and her exercise of that discretion might never have come to light.

The Auditor's report raises serious questions about the integrity of the HPTF award process, and this Committee and the full Council can and must respond. The HPTF award process should be as public and transparent as possible, to ensure that this Committee, the Council, stakeholders and advocates can exercise oversight and consider future reforms to the decision-making process, all with an eye toward ensuring that the Trust Fund can achieve its goal of producing and preserving deeply affordable units for the District's lowest-income residents.

The Bill Will Improve Transparency and Should Be Strengthened, Consistent with Recommendations from the D.C. Auditor

The Housing Production Trust Fund Transparency Amendment Act of 2019 includes some initial steps to improve transparency around the HPTF award process. The bill would require DHCD to release key information about all applications to the Trust Fund, including the location, number of units, and income levels served; the amount of funding awarded; and the scores of each application. Legal Aid recommends strengthening transparency with three additional amendments.

First, the bill should require DHCD to update its public database of HPTF-funded projects to include additional information. Legal Aid supports the recommendations put forth by the Coalition for Non-Profit Housing and Economic Development (CNHED) to include more detailed information about the project's location, owner, number of proposed and produced units, bedroom sizes, and subsidy status, and to require annual updates to the database. The database is a critical tool to monitor the effectiveness of Trust Fund awards in expanding the production and preservation of deeply affordable housing units. We also support CNHED's recommendation that this same information be included in the public announcement of each Trust Fund award.

Second, following the recommendations of the D.C. Auditor, the HPTF statute should be amended to require public release of the Department staff's recommendations to the Director, the final signed Decision Memorandum from the Director, and the Director's written justification for any differences from the Department staff's recommendations.¹⁵ Making this information public would allow monitoring and oversight to bring to light and address the red flags in the award process identified by the Auditor.

Finally, and also in line with the recommendations of the Auditor, the HPTF statute should be amended to include requirements that address when and how the DHCD Director can exercise discretion in the RFP process.¹⁶ Specifically, Legal Aid recommends that the statute both 1) codify the existing RFP application and review process, and 2) add new requirements that the Director make ultimate award decisions guided by staff recommendations, with limited allowance for discretion and a requirement that any departures be justified.

¹⁵ *Id.* at 10.

¹⁶ *Id.*

As to the application and review process, the key points to codify would be:

1. That the request for proposals include a detailed description of how proposals will be evaluated, including a list and explanation of all eligibility and selection criteria and points available for each selection criterion;
2. That Department staff will conduct an initial review of all proposals to ensure compliance with all published eligibility criteria;
3. That Department staff will conduct a secondary review of all proposals that meet eligibility criteria against the published selection criteria and create a score for each proposal based on those criteria; and
4. That, based on this review, Department staff will issue a set of recommendations to the Director as to which proposals should receive Trust Fund loans.

As to the Director's decision-making process, the key requirements should be:

1. That the Director's decision be based on the Department's review of the published selection criteria and scoring of the proposals;
2. That the Director only be authorized to depart from the Department staff's recommendations if necessary to fund proposals that will produce or preserve additional deeply-affordable units for extremely low-income households,¹⁷ serve special populations (e.g., individuals with disabilities, homeless families), or otherwise affirmatively further fair housing; and
3. That any award decision that departs from the Department staff's recommendations must be supported by a detailed written decision from the Director, including an explanation of any additional criteria that were considered.

Together these changes would help to ensure transparency and oversight of HTPF award decisions. With this information in hand, this Committee and the entire Council will be better positioned to consider additional reforms that may be needed to ensure that the Trust Fund achieves its goal of producing and preserving deeply affordable units for the District's lowest-income residents.

¹⁷ Legal Aid primarily represents extremely low-income households (incomes up to 30 percent of AMI), and these families have the greatest need for affordable housing. The Council also may want to consider allowing the Director to exercise discretion for projects that serve very low-income households (incomes up to 50 percent of AMI).

Conclusion

We appreciate this opportunity to testify on the Housing Conversion and Eviction Clarification Amendment Act of 2019 and the Housing Production Trust Fund Transparency Amendment Act of 2019. We look forward to working with the Committee and other stakeholders to strengthen both bills and secure their enactment during this Council period.