

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

**Before the Committee on Housing & Executive Administration
Council of the District of Columbia**

**Performance Oversight Hearing Regarding the Department of Housing & Community
Development and the Housing Production Trust Fund**

March 9, 2021

The Legal Aid Society of the District of Columbia¹ submits the following testimony regarding the performance of the Department of Housing & Community Development (DHCD).

The COVID-19 global health pandemic is worsening existing economic inequalities in the District, imposing disproportionate burdens on Black and Latinx residents and deepening the District's longstanding affordable housing crisis. DHCD will play a critical role in preventing tenant displacement and supporting the preservation of affordable rental housing as the District emerges from this crisis. This Committee can support that work through the upcoming budget process and by passing emergency and permanent legislation to protect tenants' rights.

Legal Aid recommends the following:

1. DHCD should prepare for a coming wave of activity under the Tenant Opportunity to Purchase Act (TOPA), by ensuring that its online reports of new TOPA filings are updated promptly and by updating its forms and notices to provide critical information to tenants about their rights and how they can receive help;
2. This Committee should strengthen and then reintroduce and enact the TOPA Reporting Amendment Act of 2020 (Bill 23-694), to improve access to information about new

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.” Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 89 years, Legal Aid staff and volunteers have been making justice real – in individual and systemic ways – for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

TOPA filings for organizations that provide free technical and legal assistance to tenants and to create a cooling-off period before tenants can waive or assign their rights;

3. DHCD should prepare for a potential coming wave of landlord petitions for extraordinary rent increases in rent-stabilized units — and in particular hardship petitions — by improving its existing audit process, updating its forms and notices to provide critical information to tenants about their rights and how they can receive help, and resuming its prior practice of sharing monthly updates of new petition filings with tenant organizers and legal services providers; and
4. This Committee should support temporary legislation to extend the current freeze on rent increases for all tenants for at least one year past the end of the public health emergency, and then should take up legislation to expand and strengthen the rent stabilization program.

Finally, we reiterate testimony that we provided last year on the need for DHCD and this Committee to use the oversight and budget process to ensure that the Housing Production Trust Fund can meet its current statutory requirement of at least 50 percent of all funding being used to produce or preserve units affordable to tenants with incomes at 30 percent of the area median income or below. DHCD's latest numbers show that only 18 percent of funds last fiscal year and a projected 27 percent of funds for the current fiscal year will go to such units.

The Coronavirus Pandemic Is Exacerbating the District's Existing Affordable Housing Crisis, Putting Tens of Thousands of Tenants at Risk of Eviction

In a city where the average rent for a one-bedroom apartment now tops \$2,000 per month, households with low and moderate incomes — many headed by people of color — are being left behind.² Since 2002, the District has lost over half of its low-cost rental units, those renting for \$800 or less.³ As private market affordable options continue to disappear, subsidized housing remains out of reach for most tenants. The centralized waiting list for subsidized housing maintained by the D.C. Housing Authority (DCHA) has been closed for seven years and still numbers just under 40,000 families.⁴

The result of this deepening affordability crisis is that low-income families are paying far too much of their limited incomes for housing. Nearly two-thirds of extremely low-income households in the District pay half or more of their monthly income towards rent, a threshold that

² RentCafe, *Washington, DC Rental Market Trends*, available at <https://www.rentcafe.com/average-rent-market-trends/us/dc/washington/>.

³ D.C. Fiscal Policy Inst., *Going, Going, Gone: DC's Vanishing Affordable Housing* (March 2015), available at <https://www.dcfpi.org/wp-content/uploads/2015/03/Going-Going-Gone-Rent-Burden-Final-3-6-15format-v2-3-10-15.pdf>.

⁴ D.C. Hous. Auth., *2020 Performance Oversight Hearing - Committee on Housing and Neighborhood Revitalization Responses to Pre-Hearing Questions* (March 2020), p. 28, available at <https://dccouncil.us/wp-content/uploads/2020/03/dcha.pdf>.

HUD classifies as “severely housing cost burdened”.⁵ In fact, nearly half of these families pay 80 percent or more of their monthly income towards rent.⁶ And this issue also is one of racial equity; of the approximately 27,000 extremely low-income, severely rent-burdened households, 88 percent are headed by a person of color.⁷

The shortage of affordable housing, and accompanying heavy rent burdens are having devastating effects on Washingtonians with low incomes, particularly Black households. A study by the National Community Reinvestment Coalition found that about 40 percent of the District’s lower-income neighborhoods experienced gentrification between 2000 and 2013, giving the city the greatest “intensity of gentrification” of any city across the country for that period.⁸ The District also saw the highest number of Black displaced — more than 20,000 — largely replaced by white, affluent, recent transplants.⁹ An updated study covering 2013 to 2017 found that the District “still has a high intensity of gentrification” with displacement continuing.¹⁰ This ongoing displacement is caused in part by eviction, which disproportionately impacts majority-Black areas of the District with high concentrations of poverty.¹¹

Against this backdrop, over 40 percent of District residents have lost employment income since mid-March 2020.¹² As a result, 15 percent of tenants in the District are not current in their rent payments, and 17 percent have little or no confidence in their ability to pay March 2021 rent.¹³ The burden of this economic and housing crisis is falling disproportionately on low-income Black and Latinx families. Eighty percent of the families reporting that they are not current in

⁵ D.C. Fiscal Policy Inst., *A Broken Foundation: Affordable Housing Crisis Threatens DC’s Lowest Income Residents* (Dec. 8, 2016), p. 3, available at <https://www.dcfpi.org/all/a-broken-foundation-affordable-housing-crisis-threatens-dcs-lowest-income-residents/>.

⁶ *Id.*

⁷ *Id.* at 1.

⁸ National Cmty. Reinvestment Coal., *Shifting Neighborhoods* (March 2019), available at <https://ncrc.org/gentrification/>.

⁹ *Id.*

¹⁰ National Cmty. Reinvestment Coal., *Gentrification and Disinvestment 2020* (June 2020), available at <https://ncrc.org/gentrification20/>.

¹¹ See Brian J. McCabe & Eva Rosen, Georgetown Univ., *Eviction in Washington, DC: Racial and Geographic Disparities in Housing Instability* (Fall 2020), pps. 18-21, available at <https://georgetown.app.box.com/s/df0d4mruf59wcvqm6cqo9a8pyu8ukeuk>. McCabe and Rosen found that nearly sixty percent of all eviction cases in the District are filed against tenants living in Wards 7 (22.6 percent) and 8 (34 percent), both of which have populations that are over 90 percent Black, even though those two Wards account for only 25.7 percent of all renter households.

¹² U.S. Census Bureau, *Week 24 Household Pulse Survey: Feb. 3-15 – Detailed Tables, Employment Table 1*, available at <https://www.census.gov/data/tables/2020/demo/hhp/hhp22.html>. The Census Household Pulse Survey has collected survey data from jurisdictions across the United States, including the District, since the week of April 23, 2020. The latest data reflects surveying between February 3 and 15, 2021.

¹³ *Id.*, Housing Table 1b., 2b.

their rent and 90 percent of the families with no confidence in their ability to pay March 2021 rent are Black or Latinx.¹⁴

DHCD has responsibility over critical affordable housing programs that can help to reverse these long-term trends, as well as ensure stability and prevent displacement in the short-term as the District emerges from the current economic crisis. Chief among these responsibilities are oversight over the Tenant Opportunity to Purchase Act and the rent stabilization program.

DHCD and This Committee Should Prepare Now For a Coming Wave of TOPA Activity

Under emergency legislation enacted by the Council, all deadlines for tenants to exercise their rights under TOPA have been tolled during the public health emergency.¹⁵ TOPA requires tenants to form tenant associations and act collectively to exercise their rights, steps that have been difficult to accomplish during the pandemic. When the public health emergency ends and tolling comes to a close, we expect to see a wave of TOPA activity from pent-up demand. This market turnover could present an important opportunity for tenants and the District to exercise rights under TOPA and (where necessary) DOPA to preserve affordable rental housing. But the success of any such effort will depend in part on the ability of DHCD and this Committee to take steps now and through the upcoming budget process to prepare.

Tenant organizers at community-based organizations play a critical role in assisting tenants with navigating the TOPA process, providing technical assistance and connecting tenants with attorneys. Examining District properties that received TOPA notices between 2015-2019, 65 percent of those where tenants received technical assistance successfully registered for their TOPA rights, compared to only 21 percent of properties where tenants did not receive this support.¹⁶ In recent years, Legal Aid has partnered with these organizations to provide legal services to tenants in small buildings (ranging from four to fourteen units) in navigating the TOPA process. Legal Aid has found this to be a lengthy, challenging, though ultimately highly-rewarding process for the tenants in these buildings. Each property is unique, yet in every project Legal Aid has worked on, tenants were able to secure the long-term affordability of their units along with needed repairs and upgrades through the TOPA negotiation process.

Unfortunately, as DHCD has previously acknowledged to this Committee, “The general public, tenants and housing providers do not have significant awareness of their rights or obligations under [TOPA] and [this] can present challenges and prevent tenants from exercising these rights. ... Often despite their best efforts our [community-based organization] partners are unable to reach tenants before they make decisions regarding their rights such as assigning their right to

¹⁴ *Id.*

¹⁵ D.C. Code § 42-3405.10b.

¹⁶ See Scott Bruton & Gretchen Nicholls, Coal. For Nonprofit Hous. & Econ. Dev. and Twin Cities LISC, Opportunity to Purchase Policy Options for the City of Minneapolis (Jan. 2021), p. 27, available at <https://cnhed.org/wp-content/uploads/2021/01/Opportunity-to-Purchase-Policy-Options-for-the-City-of-Minneapolis.pdf>.

purchase for consideration other than a guarantee of affordable housing.”¹⁷ Under the status quo, tenants are signing away rights that they do not fully understand, with little to no understanding of the universe of other options they are forgoing.

There are several steps DHCD can take to improve the TOPA process and support tenants’ ability to make informed choices about the future of their buildings, including by getting access to free technical assistance and legal services:

1. DHCD should ensure it updates its online reports of new TOPA filings in a timely manner. Organizers funded by DHCD to provide technical assistance to tenants and tenant associations rely on these online reports to provide outreach and help connect tenants to affordable housing developers and financiers, as well as attorneys who can help them navigate the TOPA process. At times during the past few years (including in recent months), we have seen delays in how promptly the online reports are updated, exacerbating the existing race to the properties and putting tenants at risk of waiving their TOPA rights with little consideration in return. DHCD should update the online reports weekly, with each update covering all filings received in the prior week.¹⁸
2. DHCD should review and update all of its TOPA notices and forms to ensure they are accessible and informative. The first notice that tenants receive of a pending sale of their building typically is a DHCD-approved form that contains critical information about the pending sale, tenants’ rights, and free resources available for technical and legal assistance. DHCD should review all of these forms and notices to ensure they are easy-to-read and convey all needed information.

The TOPA Reporting Amendment Act of 2020, Bill 23-694, sought to address the current problems by requiring DHCD to update its online reports on a weekly basis with all recent filings. While ensuring weekly updates is helpful, this step alone will not be enough. We urge the Committee to strengthen this prior bill and then reintroduce it, including by adding provisions to 1) require DHCD to provide advance notice about new TOPA filings to community-based organizations funded by DHCD to assist tenants with the TOPA process, before this information is released to the general public and becomes available to private realtors and attorneys who may use this information to exploit tenants, and 2) implement a statutory “cooling off” period during which third parties may not approach tenants with offers to waive or assign their rights, again with the goal of ensuring tenants have time to seek technical and legal assistance, speak with affordable housing developers, and otherwise explore their rights and options before making any final decision to assign their TOPA rights.

¹⁷ Department of Housing and Community Development FY18-FY19 YTD Performance Oversight Pre-Hearing Responses, Response to Question 13 (Feb. 2019), *available at* <https://dccouncil.us/wp-content/uploads/2019/02/dhcd19.pdf>.

¹⁸ DHCD’s oversight responses indicate that all TOPA filings are updated online within two weeks. *See* DHCD Oversight Responses, Attachments 26 and 29. That has not been the experience of Legal Aid and other providers. For example, filings for the weeks of Feb. 8, 15, and 22 appeared all at once on March 4, 2021.

DHCD and This Committee Should Take Steps to Protect Tenants From Future Rent Increases As the District Emerges From the Pandemic

Under emergency legislation enacted by the Council, all deadlines for tenants to exercise their rights under the Rental Housing Act have been tolled, including deadlines to defend against landlord petitions for extraordinary rent increases in rent-stabilized units.¹⁹ As with TOPA, we fear that the end of the pandemic may bring an increase in these filings, and in particular we expect more landlords will claim hardship under the District’s generous 12-percent guaranteed rate of return provision, with hardship petition filings already up for 2020 and expected to rise even more in 2021 and beyond.²⁰

Legal Aid has testified before about some of the weaknesses we have seen in DHCD oversight over landlord petitions, and in particular hardship petitions.²¹ There are three important steps DHCD can take to ensure that hardship petitions are properly vetted before any rent increase is approved and that tenants are able to understand their rights and get access to free technical assistance and legal services:

1. DHCD should review and update all of its landlord petition notices and forms to ensure they are accessible and informative. The first notice that tenants receive of a pending landlord petition is a DHCD-approved form. As with TOPA forms and notices, we believe the forms and notices provided in rent stabilization petition cases would benefit from a comprehensive review to ensure they are easy-to-read and convey all needed information about tenants’ rights and free resources available for technical and legal assistance.
2. DHCD should resume its prior practice of providing monthly updates to tenant organizers and legal services providers of new landlord petition filings. Organizers funded by DHCD to provide technical assistance to tenants and tenant associations rely on these monthly reports to provide outreach and help connect tenants to attorneys who can help them understand and, where necessary, defend against a landlord petition. While these updates were happening regularly before the pandemic, we have not received a new report in approximately a year.
3. DHCD should implement changes to ensure a comprehensive audit process for hardship petitions that catches landlord errors and ensures fair outcomes. Legal Aid has testified before about steps DHCD can take on its own, without any new legislation, to strengthen the hardship petition audit process. These steps include hiring auditors who are certified public accountants with experience in rental housing, and then requiring the auditors to

¹⁹ D.C. Code § 42-3509.11.

²⁰ DHCD reports only two hardship petitions were filed in 2017 and 2018, three in 2019, but eight in 2020. See DHCD Oversight Responses, Attachments 26 and 29.

²¹ Written Testimony of Beth Mellen Harrison, Committee on Housing & Neighborhood Revitalization, “Performance Oversight Hearing on the Department of Housing & Community Development” (Feb. 26, 2019), pp. 4-5, available at <https://www.legalaiddc.org/wp-content/uploads/2019/02/Legal-Aid-FY18-19-DHCD-Oversight-Testimony-FINAL.pdf>.

make detailed findings about common landlord errors, including failing to depreciate capital expenses and exclude extraordinary expenses. Fixing these errors through the audit process will ensure a fairer outcome for tenants and potentially avoid litigation.

These issues also highlight the ongoing need for comprehensive reform to expand and strengthen the existing rent stabilization program, including various measures aimed at curbing landlord abuses and protecting tenants in the hardship petition process. As a member of the Reclaim Rent Control Coalition, Legal Aid supports reintroduction of Bill 23-873, the Rent Stabilization Program Reform and Expansion Amendment Act of 2020, which would expand the scope of the rent stabilization program, provide greater affordability for tenants living in rent-stabilized units, and close loopholes that too often allow landlords to impose extraordinary rent increases that price out existing tenants. Many of these same reforms also were contained in separate bills introduced by Chairwoman Anita Bonds last session, including Bill 23-972, the Hardship Petition Reform Amendment Act of 2020.

As this Committee considers these and other long-term solutions, it is critical that the debate not be unduly influenced by current landlord claims of financial distress and hardship. The current economic crisis undoubtedly is causing hardship for some landlords, but we remain confident that the coming distribution of hundreds of millions of dollars in federal rental assistance will go a long way to address these concerns. Meanwhile, thousands of District tenants will face months and years of unemployment and unstable employment, lower income, and higher costs, all against the backdrop of the District's existing affordable housing crisis. A global health pandemic that has disproportionately impacted Black and Latinx tenants already struggling with low wages and high rents must not become an excuse to stop long-term, needed reforms — or indeed, as many landlords already are calling for — to dismantle existing tenant protections, including rent stabilization and the Tenant Opportunity to Purchase Act.

In addition to these long-term solutions, short-term protections will play a critical role. Under emergency legislation enacted by the Council, all tenants in the District are protected from rent increases during the public health emergency.²² Along with other emergency protections that put a hold on eviction notices and case filings and prohibit late fees, this rent increase freeze is helping to protect tenants from eviction. As the District emerges from the pandemic, extending this rent freeze for at least another year after the end of the public health emergency would help to stabilize rents and prevent displacement while tenants' economic circumstances gradually readjust.

DHCD Should Present a Detailed Plan to Ensure That the Housing Production Trust Fund Meets Its Goals for Producing and Preserving Deeply Affordable Units

In a March 2018 report, the D.C. Auditor found that only 19 percent of rental units produced or preserved by the Trust Fund between 2001 and 2016 are affordable to families with extremely-low incomes, even though the statute at the time required that a minimum of 40 percent of expenditures be targeted to this group.²³ An independent analysis by the D.C. Fiscal Policy

²² D.C. Code §§ 42-3502.08(a)(1)(H), -3509.04(c),(d).

²³ Office of the District of Columbia Auditor, *Stronger Management of the Housing Production Trust Fund Could Build More Affordable Housing* (Mar. 2018), pps. 9-10, available at

Institute similarly found that the Trust Fund met its annual target for deeply-affordable units only once in Fiscal Years 2014 through 2019.²⁴ DHCD's oversight responses now indicate that only 18 percent of funds for Fiscal Year 2020 went to such projects, and the agency projects only 27 percent of funds for Fiscal Year 2021 will fund deeply-affordable units.²⁵ This is unacceptable.

The Fiscal Year 2020 Budget Support Act included provisions increasing the requirement for the Trust Fund to produce and preserve deeply-affordable units. The statute now requires 50 percent of all HPTF expenditures to fund these units, with at least 50 percent of those funds going to rental units.²⁶ Given the Trust Fund's track record, meeting this goal will require significant new investments in the budget and careful strategic thinking by DHCD. As the Mayor and the Council move forward to shape the budget for Fiscal Year 2022, we urge this Committee — just as we did at this time last year — to ask DHCD to present a detailed plan for how the Trust Fund will meet the statutory goal, including an analysis of what it will cost to get there.

DCFPI has found that almost all deeply affordable projects within reach of extremely low-income households and funded by the HPTF have included a combination of Trust Fund investments for up-front purchase and capital expenses plus ongoing operating support through the Local Rent Supplement Program (LRSP).²⁷ Ongoing operating assistance often is necessary for projects with rents that are affordable to extremely low-income households, because the rents levels those households can pay often are below per-unit operating costs.²⁸ In addition to increasing funding for the HPTF, it is equally important that the Council provide increased funding for operating assistance through LRSP or a similar program. DHCD will continue to face challenges funding projects that are affordable for extremely low-income households unless the budget includes sufficient funding for project-based LRSP or similar operating assistance for new affordable housing projects.

Conclusion

Thank you for this opportunity to testify about how DHCD and this Committee can protect tenants' rights and preserve affordable housing as the District emerges from the COVID-19 crisis. We looking forward to working with DHCD and this Committee on the path forward.

<http://dcauditor.org/report/stronger-management-of-the-housing-production-trust-fund-could-build-more-affordable-housing/>.

²⁴ Claire Zippel, D.C. Fiscal Policy Institute, *Building the Foundation: A Blueprint for Creating Affordable Housing for DC's Lowest-Income Residents* (April 2018), p. 5, available at <https://www.dcfpi.org/all/building-the-foundation-a-blueprint-for-creating-affordable-housing-for-dcs-lowest-income-residents/>.

²⁵ See DHCD Oversight Responses, Attachments 26 and 29

²⁶ D.C. Law 23-16. Fiscal Year 2020 Budget Support Act of 2019, codified at D.C. Code § 42-2802(b-1)(2).

²⁷ *Id.* at 4.

²⁸ See *id.*