

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

**Public Roundtable Regarding
“District’s Opportunity to Purchase Act”**

April 21, 2021

The Legal Aid Society of the District of Columbia¹ submits the following testimony regarding the District’s Opportunity to Purchase Act (DOPA) and changes proposed to DOPA in Bill 24-0168, the District’s Opportunity to Purchase Amendment Act of 2021.

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. When the current public health emergency ends, we expect to see a wave of sales of rental housing properties, triggering tenants’ rights under the Tenant Opportunity to Purchase Act (TOPA) and the District’s rights under DOPA.² This market turnover could present an important opportunity for tenants and the District to use TOPA and DOPA to preserve affordable rental housing. The success of any such effort will depend in part on the Department of Housing & Community Development (DHCD) and this Committee taking steps now and through the upcoming budget process to prepare, including moving forward with passage of Bill 24-0168.

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.

² 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. *See* D.C. Code § 42-3405.10b. TOPA requires tenants to form tenant associations and act collectively to exercise their rights, steps that have been difficult to accomplish during the pandemic.

The Council enacted DOPA in 2008, providing the District with an opportunity to purchase multi-unit rental buildings that meet certain affordability requirements where tenants do not exercise their rights under TOPA.³ For nearly 10 years, DHCD did not issue implementing regulations, and the District did not have any program or policies in place for exercising its right to purchase. DHCD finally published proposed regulations in December 2017, followed by revised and final regulations in June 2018 and November 2018 respectively. Legal Aid participated in a working group convened by the Coalition for Non-Profit Housing and Economic Development (CNHED) and DC Appleseed to provide comments to DHCD on these regulations. We also testified on a prior version of the bill, the District's Opportunity to Purchase Amendment Act of 2019 (B23-0136). Since the hearing on that bill in July 2019, we have been in active communication and negotiation with DHCD, CNHED, and several private attorneys who work on affordable housing redevelopment to revise the bill, with help from Chairwoman Bonds' staff.

Bill 24-0168 is the product of those negotiations, and our testimony today is informed by our participation in that working group, including the perspectives shared with us by affordable housing developers. DOPA is designed so that the District can assign its rights to affordable housing developers, who ultimately will own and operate the targeted properties, and this basic design provides the context for Legal Aid's comments. Our goal throughout this process has been to ensure that DOPA is sufficiently flexible and financially-feasible so that it can actually be utilized and will be attractive to affordable housing developers in real-world scenarios, while at the same time maximizing tenant and affordability protections. Legal Aid believes Bill 24-0168 accomplishes these goals, by making the following proposed changes to DOPA:

- Section 2(a) of the bill would expand the District's opportunity to purchase to all multi-unit rental buildings, rather than limiting that right to buildings with current affordability.
- Section 2(b) of the bill would allow new owners of buildings transferred under DOPA to impose annual rent increases but would limit any such increases for existing tenants.
- Section 2(c) of the bill would require that rent and income restrictions for buildings transferred under DOPA be made permanent through an affordability covenant, while providing limited flexibility to increase rents for units that are vacant.
- Section 2(d) of the bill would require new owners to maintain current affordable units, to restrict those units to low-income families, and to expand affordable units where possible.

The Coronavirus Pandemic Is Exacerbating the District's Existing Affordable Housing Crisis, Putting Black and Latinx Tenants at Risk of Displacement

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

³ The District's opportunity to purchase always remains subordinate to tenants' rights under TOPA, and DOPA rights are only triggered if tenants at the property fail to exercise their superior TOPA rights. *See* D.C. Code § 42-3404.32(a).

behind.⁴ Since 2002, the District has lost over half of its low-cost rental units, those renting for \$800 or less.⁵ 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.⁶

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 HUD classifies as “severely housing cost burdened”.⁷ In fact, nearly half of these families pay 80 percent or more of their monthly income towards rent.⁸ 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.⁹

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.¹⁰ The District also saw the highest number of Black residents displaced — more than 20,000 —largely replaced by white, affluent, recent transplants.¹¹ An updated study covering 2013 to 2017 found that the District “still has a high intensity of gentrification” with displacement continuing.¹² This ongoing displacement is caused in part by eviction, which

⁴ RentCafe, *Washington, DC Rental Market Trends*, available at <https://www.rentcafe.com/average-rent-market-trends/us/dc/washington/>.

⁵ 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>.

⁶ 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>.

⁷ 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/>.

⁸ *Id.*

⁹ *Id.* at 1.

¹⁰ National Cmty. Reinvestment Coal., *Shifting Neighborhoods* (March 2019), available at <https://ncrc.org/gentrification/>.

¹¹ *Id.*

¹² National Cmty. Reinvestment Coal., *Gentrification and Disinvestment 2020* (June 2020), available at <https://ncrc.org/gentrification20/>.

disproportionately impacts majority-Black areas of the District with high concentrations of poverty.¹³

Against this backdrop, over 40 percent of District residents have lost employment income since mid-March 2020.¹⁴ As a result, 16 percent of tenants in the District were not current in their rent payments as of the end of March 2021, and 18 percent had little or no confidence in their ability to pay April 2021 rent.¹⁵ The burden of this economic and housing crisis is falling disproportionately on low-income Black and Latinx families. Ninety-five percent of the families reporting that they are not current in their rent and over 80 percent of the families with little or no confidence in their ability to pay April 2021 rent are Black or Latinx.¹⁶

At the recent oversight hearing on the performance of DHCD before this Committee, Legal Aid shared several ideas we have for ways DHCD can prepare for a coming wave of TOPA activity as the District's rental housing market emerges from the COVID-19 pandemic.¹⁷ CNHED estimates that at least 100 rental housing properties covering 4,000-plus units already are in the pipeline for sale once emergency protections tolling TOPA timelines are lifted, with more properties likely coming on market behind them. Ensuring that DOPA remains a strong tool available to the District to preserve affordable rental housing should be part of an overall strategy to build back better, by expanding opportunities for Black and Latinx District residents to live in safe, affordable, stable housing.

¹³ 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.

¹⁴ U.S. Census Bureau, *Week 27 Household Pulse Survey: Mar. 17-29 – Detailed Tables, Employment Table 1*, available at <https://www.census.gov/data/tables/2021/demo/hhp/hhp27.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 March 17 and 29, 2021.

¹⁵ *Id.*, Housing Table 1b., 2b.

¹⁶ *Id.*

¹⁷ Written Testimony of Beth Mellen, Committee on Housing & Executive Administration, “Performance Oversight Hearing on the Department of Housing & Community Development and the Housing Production Trust Fund” (Mar. 9, 2021), pp. 4-5, available at <https://www.legalaiddc.org/wp-content/uploads/2021/03/Legal-Aid-FY20-FY21YTD-Oversight-Testimony-re-DHCD-FINAL.pdf>. Our recommendations for the necessary District funding for affordable housing preservation and production to go with our oversight recommendations will be the focus of our upcoming budget testimony.

Legal Aid Recognizes the Need to Expand Eligibility for DOPA, While Maintaining Strong Protections and Prioritizing Preservation of Deeply-Affordable Units

DOPA is designed to focus on the preservation of affordable housing. The law currently does this in two ways, by limiting the District’s opportunity to purchase to affordable housing developments and by requiring that existing affordable rents at such properties be maintained. Bill 24-0168 shifts the balance struck under current law by expanding the District’s opportunity to purchase while simultaneously strengthening the affordability requirements that go hand-in-hand with the District’s right. Legal Aid believes the bill strikes the right balance to respond to the current realities of the District’s rental housing market, but DHCD and this Committee also should monitor implementation closely to identify and respond to any unidentified consequences.

In its first change, Bill 24-0168 will increase flexibility by expanding the District’s opportunity to purchase to all rental properties with 5 or more units. Under current law, in order for the District to exercise its rights under DOPA at a particular property, at least 25 percent of the units must currently be affordable to households with incomes at 50 percent or less of area median income.¹⁸ Affordable for these purposes means that the existing rent is 30 percent or less of household income.¹⁹ Using 2021 figures, this means that rent for a family of three would have to be \$1,452 per month or less.²⁰

DOPA’s strict rent limit was put in place to ensure that the District would only be able to exercise its rights at properties with existing affordability, with the very targeted goal of preserving those existing affordable rents. Unfortunately, given the District’s rapidly escalating rental market, the reality is DOPA’s current rent limit has proven to be too strict. DHCD also believes there may be opportunities for affordable housing developers to preserve and expand affordability at other properties that do not fit neatly into the current statutory formula.

While Legal Aid supports more flexibility under DOPA, the District should continue to prioritize preservation of deeply-affordable units, including targeting properties with these units for its exercise of DOPA rights. We understand DHCD already intends “to prioritize DOPA transactions that represent the most significant opportunities to preserve affordable housing” and that any prioritization must be flexible and thus may be difficult to enforce.²¹ Nonetheless, we

¹⁸ D.C. Code § 42-3404.32(c).

¹⁹ *Id.* § 42-3404.32(c)(2).

²⁰ U.S. Dep’t of Hous. & Urban Dev., *Income Limits – 2021 Tables for Section 8 Income Limits*, available at <https://www.huduser.gov/portal/datasets/il/il21/Section8-IncomeLimits-FY21.pdf>. The income limit for very low-income families, i.e. families at 50 percent of area median income or below, is \$58,050 for a family of three. Monthly rent at 30 percent of this income level would be \$1,452 per month.

²¹ DHCD has published property selection criteria that will be considered in evaluating possible DOPA projects. See *Selection Criteria for Prioritizing Building(s) for district opportunity to purchase act (DOPA) Purchase and Assignment of Rights*, available at https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/service_content/attachments/DOPA%20Selection%20Criteria.pdf. However, the published criteria do not specifically give higher priority to

still believe codification of this goal represents an important statement of affordable housing policy. The Committee should consider amending the bill to add a new subsection to D.C. Code § 42-3404.34(c) to require that more affordable housing developments will receive priority:

In exercising the opportunity to purchase under this subchapter, the Mayor shall give priority to housing accommodations in which at least 25% of the rental units are affordable to households with an income of 50% of the area median income, using the same formula.

Expanding DOPA eligibility carries some potential risks. DHCD has published a list of pre-qualified developers who will be eligible to apply for assignment of DOPA rights at specific properties. In any situation in which the government is conferring a benefit on a particular developer in an active, competitive real estate market, there is a risk that existing political or other relationships will carry undue influence. Legal Aid believes this risk is mitigated sufficiently by DOPA's relatively-strict affordability requirements. Nonetheless, any expansion of DOPA eligibility should be monitored closely to ensure it is not misused and does not result in any unintended consequences.

Legal Aid Recognizes the Need for Annual Rent Increases and Supports the Bill's Strict Limits on These Increases for Existing Tenants

The second change under Bill 23-0136 will allow owners of properties acquired under DOPA to impose annual rent increases, including for existing tenants. Under current law, the owner of a property acquired through DOPA must limit the rents for existing tenants occupying affordable units to the lower of the existing rent at the time the property is offered for sale or 30 percent of the household's income.²² This rent limit is fairly extraordinary and ultimately has proven to be a poison pill for DOPA's success. Taken literally, DOPA requires a new owner to treat all existing tenants in affordable units similar to subsidy holders, but without the ongoing government operating subsidy necessary to make these rent limits viable. While these protections for existing tenants appear quite strong, they also are not feasible for deeply-affordable, low-rent units without existing subsidies in place — precisely the types of units that should be preserved under DOPA.

DHCD has published regulations implementing DOPA that allow for annual rent increases on affordable units.²³ Bill 24-0168 codifies and strengthens this approach, freezing rents for all existing tenants (not just those occupying affordable units) for the first 12 months of new ownership, but then allowing for annual rent increases subject to strict limits. The prior bill and DHCD's regulations do not contain any limits on the amount of these annual rent increases beyond what current law already requires. Legal Aid advocated in favor of limiting annual increases to those allowed under the rent stabilization program for all units, whether they

projects with more deeply-affordable units. Codifying a priority for more affordable projects will ensure that this remains a primary selection criterion.

²² D.C. Code § 43-3404.33(b).

²³ See 14 DCMR §§ 2406.4, 2499.1.

currently are subject to rent stabilization or not. The current bill now contains this limit and also provides for a lower increase for those units already covered by a local or federal rental affordability program where those programs are even more protective. This type of rent limit is common in affordable housing redevelopment deals, and Legal Aid believes it strikes the right balance to protect tenants while ensuring ongoing financial feasibility for DOPA projects.

Legal Aid Supports Provisions Clarifying and Strengthening DOPA's Requirements to Maintain Affordable Rents

Finally, Bill 24-0168 contains several provisions to clarify and strengthen DOPA's requirements that the new owner of a property acquired through DOPA maintain affordable rents on affordable units. Legal Aid supports this package of amendments, which ensure long-term affordability for DOPA projects.

First, Bill 24-0168 ensures that DOPA's rent restrictions for affordable units will be permanent. Under current law, DOPA states that affordable rents must be maintained for affordable units "as long as the housing accommodation remains a housing accommodation owned by the District."²⁴ Given that the District typically will assign its rights under DOPA to a private affordable housing developer that will own and operate the property, this affordability restriction might not mean that much. The bill will ensure long-term affordability restrictions, by requiring the District to record a permanent affordability covenant on the property, ensuring that DOPA is used to preserve affordable rents for the long term.

Second, Bill 24-0168 clarifies that affordable units not only will be rent-restricted but also will be income-restricted, i.e. reserved for low-income families, as they become vacant. Under current law, units in a DOPA-acquired property that were affordable to households at 30 percent or 60 percent of area median income must maintain rents affordable at those income levels as they become vacant.²⁵ While these rent restrictions are helpful, they do not ensure that rent-restricted units will be occupied by low-income families in need. The bill clarifies that these units not only are rent-restricted, but also income-restricted, to target families in need.

Balancing out these affordability protections, the bill provides limited flexibility to new owners to ensure the financial feasibility of DOPA projects in two respects. In line with recent changes to the federal Low-Income Housing Tax Credit (LIHTC) program, the bill allows owners to meet the required income restrictions with income averaging, i.e. averaging incomes of families in income-restricted units. Income averaging provides helpful flexibility and may even allow owners to include more deeply-affordable units in the property mix. By offering affordable units to households with income at 70 or 80 percent of area median income, for example, an owner may be better positioned to offer affordable units to households with incomes at or below 30 or 40 percent of area median income. While Legal Aid supports this additional flexibility, it should

²⁴ D.C. Code § 42-3404.33(c)(1).

²⁵ *Id.* § 42-3404.33(c)(2).

be accompanied by additional restrictions, similar to those found in the new LIHTC income-averaging regulations.²⁶

The bill also provides limited flexibility by allowing the Mayor to grant a waiver to DOPA's affordability requirements for any units that are or become vacant before the new owner executes the required affordability covenant. Such a waiver may only be granted in order to increase the financial feasibility of the purchase and operation of the property, and any such units still would be covered by the overall affordability plan for the property. Like the limited allowance for annual rent increases, this type of flexibility for vacant units is common in affordable housing redevelopment deals, and Legal Aid believes it strikes the right balance to protect tenants while ensuring ongoing financial feasibility for DOPA projects.

Conclusion

Thank you for this opportunity to testify. We look forward to continuing our dialogue with DHCD and this Committee about ways to strengthen DOPA and ensure that it is an effective tool for affordable housing preservation.

²⁶ To give a specific example: LIHTC's income-averaging rule allows a property to meet the requirement that 40 percent of units are occupied by households at 60 percent of area median income or below by showing that: 1) 40 percent of the property's units have an average income at or below 60 percent of area median income, 2) household incomes in these units do not exceed 80 percent of area median income, and 3) all of these units restrict rents to the applicable income band for that household, i.e. 30 percent of income for households at 30, 40, 50, 60, 70, or 80 percent of area median income.