

A Critique of DC's Approach to Eviction Process & Affordable Housing Measures

HANNAH JURICIC*

INTRODUCTION

Apart from being a center for political change, the District of Columbia's ongoing housing crisis has inspired landmark cases, progressive legislative tactics, judicial activism, and creative funding campaigns. Despite decades of effort, the District still faces a chronic affordable housing shortage.¹ Tenant advocates argue that the issue is perpetuated by lack of funding, lack of oversight, and unequal access to justice, while others counter that the regulations have resulted in an ineffective rental market and expansive tenant rights. Regardless of the source, affordable housing is often out of reach of low- and moderate-income households. Because lawyers form an integral part of the landlord/tenant method of dispute resolution process, the legal community has an obligation to scrutinize factors contributing to these landlord/tenant relations and determine whether current policies sufficiently address the factors contributing to DC's affordable housing issue. Therefore, this Note limits itself to a critique of the historical and current housing policies affecting landlord/tenant relations in the District of Columbia. This Note seeks to answer the following question: given the current status quo, what incremental changes to landlord/tenant disputes and zoning policies would help achieve the goal of securing affordable, stable housing for low- and moderate income families?

First, this Note will review relevant historical influences, regulations, and landmark case law originating in the District of Columbia. Then, the Note will set out common perspectives and arguments on the tenant advocate and landlord side. Next, the Note will articulate why access to legal services in eviction cases is likely to exacerbate the current housing crisis, especially in light of DC's use of long-term rent control measures. Finally, this Note will suggest alternate solutions to court appointed attorneys in eviction case. The solutions are incremental, building on current legislation and funding already in place. First, this Note suggests that when habitability is raised as a defense for nonpayment of rent, the court should separate the issues and refer the case to the housing conditions court.

* J.D. Georgetown University Law Center (Expected December 2020); B.A., Liberal Studies, Georgetown University School of Continuing Studies © 2019, Hannah Juricic.

1. *See, e.g.*, BENJAMIN ORR & ALICE M. RIVLIN, AFFORDABLE HOUSING IN THE DISTRICT—WHERE ARE WE NOW? 27 (2011).

The next focuses on improving housing conditions by revamping and repurposing the existing housing stock to maximize affordability for low- and moderate-income households.

I. GENERAL BACKGROUND: INFLUENCING FACTORS IN AND OUT OF COURT

A. RELEVANT DISTRICT-SPECIFIC REGULATIONS AND CASE LAW

Once DC government formally recognized that there was an affordable housing crisis, the DC Council approved Title IV of the Rental Housing and Conversion Sales Act of 1980, otherwise known as the Tenant Opportunity to Purchase Act, or TOPA.² The legislator made its intent clear up front: the purposes of TOPA are to:

- (1) discourage the displacement of tenants through conversion or sale of rental property, (2) strengthen the tenants' bargaining position without unduly interfering with the rights of property owners to the due process of law, (3) preserve rental housing which can be afforded by lower income tenants, (4) prevent lower income elderly and disabled tenants from being involuntarily displaced when their rental housing is converted, and (5) balance . . . the . . . conflicting goals of creating homeownership for lower income tenants, preserve affordable rental housing, and minimize displacement.³

After passing TOPA, in 1985, the City Council passed another law, DC Law 6–10, otherwise known as the Rental Housing Act of 1985, colloquially known as the Rent Control Act.⁴ The Rent Control Act places all units under rent control, unless the owner qualifies for an exemption.⁵ The four common exceptions to rent control are: (1) those federally or District-subsidized; (2) those built after 1975; (3) those owned by a natural person who owns no more than four rental units in D.C.; (4) those vacant when the Rental Housing Act took effect.⁶ In 2010, the City Council approved a ten-year extension of the Rent Control Act, so the legislation is still active as of the writing of this note.⁷

Apart from measures directly affecting landlord/tenant relations, DC employs various zoning ordinances to encourage affordable housing. For example, DC passed the Inclusionary Zoning Implementation Act (IZA) in 2007.⁸ In the IZ Act, real estate developers building properties with ten or more units must set aside eight to ten percent of the location for affordable dwelling units that will be

2. Rental Housing and Conversion Sales Act of 1980, D.C. CODE §§ 42-3401 – 42-3405 (2001).

3. D.C. CODE § 42-3401.02.

4. D.C. CODE § 42-3501.01.

5. D.C. CODE § 42-3502.05.

6. *See, e.g.*, D.C. DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, <https://dhcd.dc.gov/service/rent-control> [<https://perma.cc/VF3N-QTX2>] (last visited Feb. 22, 2019).

7. ORR, *supra* note 1, at 72.

8. Inclusionary Zoning Implementation, D.C. CODE § 6-1041.01 (2007).

sold or rented to targeted households.⁹ According to the DC Office of Planning, the IZA was designed to help “make a percentage of new units affordable to targeted incomes.”¹⁰

In addition to regulations, the District also has a specific Housing Fund for affordable housing, called the Housing Production Trust Fund (HPTF), established in 1988.¹¹ As noted by the D.C. Department of Housing and Community Development (DHCD), the HPTF is a “major tool used to produce and preserve affordable housing.”¹² The funds can be used to maintain, rehabilitate, or construct affordable housing. Between 2001 and 2018, over 9,000 affordable housing units have been produced.¹³

In an effort to resolve the affordable housing crisis, in 2016 the City Council passed the Expanding Access to Justice Act of 2017.¹⁴ The Expanding Justice Act found that individuals have a right to counsel when “fundamental human needs are at risk.”¹⁵ Covered proceedings include evictions, suits where the property is in violation of housing code violations, or rent increases within rent controlled housing. The bill was enacted after a number of pilots were successful at nonprofits such as the Legal Aid Society of the District of Columbia, the D.C. Bar Pro Bono Center, and Legal Counsel for the Elderly.¹⁶ The Expanding Justice Act found that although “[t]he existing legal services and pro bono networks are strong, [] they lack sufficient resources to meet the overwhelming need.”¹⁷ Further, the Expanding Justice Act found that “[s]afe, secure, and accessible housing is essential to achieving equal access.”¹⁸ Although the bill was enacted in 2017, because the executive deadline passed, the bill has not moved forward. Regardless of where the bill stands, the funding and pilot programs remain,¹⁹ and the Expanding Access to Justice Act demonstrates DC's commitment to ending the affordable housing crisis by funding legal services

9. Inclusionary Zoning, D.C. MUN. REGS. Tit. 11, § 2602 (2016); Charissa Morningstar, *Reaching 10 x 10: District-Based Solutions to D.C.'s Affordable Housing Deficit*, 22 GEO. J. POVERTY LAW & POL'Y 567, 572 (Spring 2015).

10. DC Office Of Planning, *Inclusionary Zoning and Affordable Housing*, <https://planning.dc.gov/page/inclusionary-zoning-and-affordable-housing>. [<https://perma.cc/MX7W-MBQY>] (last visited Jan. 1, 2019).

11. Housing Production Trust Fund Act of 1988, D.C. CODE § 42-2801 (2001); Morningstar, *infra* note 9, at 577.

12. Dc.gov, HOUSING PRODUCTION TRUST FUND, <https://dhcd.dc.gov/page/housing-production-trust-fund> [<https://perma.cc/B98E-S2DB>] (last visited Feb. 7, 2019).

13. *Id.*

14. Expanding Access to Justice Act of 2017, Council of the Dist. of Columbia, B. 24 (D.C. 2017). [hereinafter Expanding Access to Justice Act]. The bill failed to pass due to the session being adjourned.

15. *Id.*

16. D.C. Landlord Tenant Court-Based Legal Services Project, LEGAL AID SOC'Y OF D.C. (July 19, 2017), <https://firstfocus.org/wp-content/uploads/2017/07/Congressional-Briefing-7.19.17-Handout.pdf> [<https://perma.cc/EYX5-EV96>].

17. Expanding Access to Justice Act, *supra* note 14, at 1.

18. *Id.* at sec.101(f).

19. See DC Bar Foundation, *Grants*, <https://dcbfoundation.org/grants/> [<https://perma.cc/W4H9-T7W7>] (last visited March 18, 2019).

organizations, which provide legal advice and representation to tenants facing wrongful evictions.²⁰

Apart from legislation and funding, DC's housing market has inspired cases that have nationwide impact. Ideas such as the implied warranty of habitability and automatic month-to-month leases originated in DC, where judges recognized the ongoing struggle between landlords and tenants.²¹

A seminal case, *Block v. Hirsh* held that the Supreme Court would not deem a holdover provision of a lease unconstitutional when the provision allowed tenants to remain in possession of the property after the lease expired, as long as the tenants paid rent, because Congress found a "public exigency."²² The Court specifically noted that "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."²³ Notably, D.C. still requires leases to go month-to-month automatically, effectively making the public exigency from the *Block* holding a permanent fixture in landlord/tenant relations.²⁴

After the *Block* case, in 1954, the Supreme Court found in *Berman v. Parker* that a redevelopment plan involving a blighted area of the Southwest Quadrant did not violate the Fifth Amendment Takings Clause, and that the agency acquiring the land could lease or sell the land to private parties.²⁵ Despite the development plan in 1954 to create "homes . . . churches, parks, streets, and shopping centers," and although the purported purpose of the holding was to ensure that poor housing conditions did not "suffocate the spirit by reducing the people who live there to the status of cattle,"²⁶ the results from the judgment were disastrous for residents. The decision displaced twenty-three thousand residents, seventy percent of whom were black and ninety percent poor.²⁷ Many of these residents did not return to the areas, given that the newly built units were too expensive for the displaced residents.²⁸ Today, the Southwest Quadrant is still occupied by a water treatment facility, a military base, a small waterfront entertainment area, and land designated for a soccer stadium.²⁹

In addition to these significant cases, one of the most important changes to landlord/tenant relations began in DC. In 1970, Judge Wright helped spark a

20. *Id.* at <https://dcbafoundation.org/keeping-families-in-their-homes/> [<https://perma.cc/TJ4R-VJFY>] (last visited March 18, 2019).

21. *See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080 (D.C. Cir. 1970); *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

22. *Block v. Hirsh*, 256 U.S. at 156.

23. *Id.* at 157.

24. District of Columbia Tenant Bill of Rights, D.C. CODE §§ 42-3531.07(8).

25. *Berman v. Parker*, 348 U.S. 26, 34 (1954).

26. *Berman*, 348 U.S. at 34-5.

27. *See, e.g.*, YESIM SAYIN TAYLOR, TAKING STOCK OF THE DISTRICT'S HOUSING STOCK xiv (2018).

28. *Id.* at xv.

29. Charlotte Allen, *A Wreck of a Plan*, THE WASH. POST, (July 17, 2005), at 1; TAYLOR, *supra* note 27, at 13.

tenants' rights movement³⁰ by holding that the D.C. Housing code required that a warrant of habitability "be implied into all contracts for urban dwellings."³¹ Commonly now referred to as the implied warranty of habitability (IWH), it requires owners to keep the property "habitable" pursuant to housing codes, such as maintaining working plumbing, providing secure doors and windows, and providing adequate heat, lighting, and ventilation.³² Apart from being a breakthrough case for tenant rights, the *Javins* case also established that a tenant's obligation to pay rent can be suspended if the tenant can demonstrate serious violations of the D.C. Housing Code.³³ This law currently plays a major role in DC landlord/tenant disputes.

Despite the fact that these cases were designed to specifically improve housing in DC, affordable housing is still beyond the reach of many DC residents. Affordable housing remains such an issue that the "emergency" Rent Control Act of 1985 is still in effect as of 2019.

B. HISTORIC INFLUENCES

Washington, DC was specifically designed to be the nation's capital, and the housing market has grown around that assumption. The city experienced its first boom beginning in the 1940s, and by 1960, African Americans made up a majority of the population.³⁴ The city was highly segregated, and the black population suffered from this segregation. Although African Americans owned half of all owner-occupied units, they occupied seventy to eighty percent of properties in poor condition.³⁵

Eventually, beginning in the 1950s and 60s, tension from housing grievances, unemployment, and racism increased dramatically within DC.³⁶ The civil unrest culminated on April 4, 1968 after radios announced that Dr. King had been shot in Tennessee.³⁷ Apart from the political fallout, residents felt the economic consequences of the riots that followed for decades.³⁸ Finally, although antidiscrimination housing laws were passed, the city remained segregated based on race and income for years afterwards.³⁹ The city's former mayor, Marion Barry, noted in

30. Richard H. Chused, Saunders (*a.k.a.* Javins) v. First National Realty Corporation, 11 GEO. J. POVERTY L. & POL'Y 191, 193 (2004).

31. *Javins*, 428 F.2d at 1080.

32. *Id.* at 1074.

33. *Id.* at 1083.

34. Lawton, *Tenant Purchase as a Means of Creating and Preserving Affordable Homeownership*, 20 GEO. J. POVERTY LAW & POL'Y 55, 58–59 (2012).

35. *Id.*

36. *Id.* at 60–61.

37. See, e.g., Paul Schwartzman & Robert E. Pierre, *From Ruins to Rebirth*, THE WASH. POST (Apr. 6, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/05/AR2008040501607_pf.html [<https://perma.cc/JW7P-EM9K>].

38. See, e.g., Lawton, *supra* note 34, at 62.

39. TAYLOR, *supra* note 27, at 35.

1980 that “instead of older housing stock filtering down to lower income families, housing is actually filtering up to those with higher incomes who are now competing for housing in traditionally low income neighborhoods.”⁴⁰ DC started out segregated, and that economic and geographic segregation is still present today. The city’s segregation contributes to a disparity of wealth between white and black DC residents,⁴¹ which contributes to economic segregation today.⁴²

C. DC’S AFFORDABLE HOUSING MARKET TODAY

DC’s housing makeup has expanded and changed over time, but certain characteristics have remained constant over the decades. One DC neighborhood characteristic that remains true today is the suburban feel to many neighborhoods,⁴³ especially those in the Northeast and Northwest quadrants.⁴⁴ Current zoning regulations enforce the neighborhood makeup by restricting many neighborhoods to single-family homes, with limited mixed-use or other options.⁴⁵ Another historic, but still present characteristic in the city is the geographic and socioeconomic segregation of the population.⁴⁶ According to one study by Yesim Taylor at the D.C. Policy Center, the most affordable housing for low- and moderate-income families remains on the east end of the city, while the most expensive units remain in the Northwest quadrant.⁴⁷

Apart from these historically entrenched factors that contribute to the overall lack of available housing, the DC housing market is highly competitive. The city’s population expanded by about thirteen percent between 2010 and 2016, but the overall housing stock increased by only five percent.⁴⁸ Further, the income disparities between low- and moderate-income households compared to affluent households continues to rise.⁴⁹ The lack of available mixed-use housing, combined with restrictive zoning regulations in a low-density city, spurred by a

40. *Rental Housing Conversion and Sale: Hearing on H. Con. Res. 420 and Council Act 3-204 Before the Comm. on the District of Columbia*, 96th Cong. 60 (1980) (statement of Marion Barry, Jr., Mayor, District of Columbia) at 148.

41. CLAIRE ZIPPEL & JODI KWARCIA NY, DC HAS MORE TO DO TO ENSURE RESIDENTS OF COLOR CAN ACCESS GROWING PROSPERITY, CENSUS DATA SHOW (2017).

42. *See, e.g.*, DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION, JUSTICE FOR ALL?, at 71 (2008). [hereinafter JUSTICE FOR ALL?]

43. TAYLOR, *supra* note 27, at 31 (showing that 30% of the housing stock in DC are single-family units, but these units make up 80% of the building density, leaving low building density in much of the city).

44. *Id.* at 15, fig.9.

45. *Id.* at 14–15. Although there are exceptions to this rule, such as Ward 8 and the high concentration of apartment buildings, figure 9 shows that, for the most part, single family homes are geographically separated from mixed use residential options such as apartment buildings.

46. *Id.* at 31 (“High and low-income residents in the city live far away from each other.”); *see also* fig.21; *see also* ZIPPEL, A BROKEN FOUNDATION: AFFORDABLE HOUSING CRISIS THREATENS DC’S LOWEST-INCOME RESIDENTS 3 (2016). [hereinafter A BROKEN FOUNDATION].

47. TAYLOR, *supra* note 27, at 31 fig.21.

48. *Id.* at 3.

49. CLAIRE ZIPPEL & JODI KWARCIA NY, DC HAS MORE TO DO TO ENSURE RESIDENTS OF COLOR CAN ACCESS GROWING PROSPERITY, CENSUS DATA SHOW (2017).

competitive market, results in low- and moderate-income earners competing with affluent households. Unsurprisingly, higher income earners are able to out-bid low- and moderate-income households for the more desirable homes,⁵⁰ leaving low- and moderate-income families in less desirable neighborhoods,⁵¹ where they are often unable to afford anything other than poor quality housing.⁵²

When low- and moderate-income families compete for the same housing stock as affluent income earners, these higher earning households can afford to out-bid their competitors.⁵³ The cost of housing is not solely based on this competition, but is a relevant factor, specifically in the DC housing market.⁵⁴ The rising cost of housing means that many of these households pay more than the recommended thirty percent of their income on housing.⁵⁵ This leaves many tenants vulnerable to frequent or unexpected relocation, and each move has costs such as higher rental rates, moving costs, other related transaction costs.⁵⁶ The threat of increased costs from unexpected or frequent relocations means that low- and moderate-income households are especially motivated to find affordable, long-term housing, and many argue that tenants have a right to long term, affordable, stable housing in good condition.⁵⁷

In sum, the DC housing market remains largely unaffordable to low- and moderate-income households for a variety of factors. Because many households pay more than what is considered affordable, they are vulnerable to frequent relocation in a market that is highly competitive, and families may only be able to afford poor quality housing. This highly competitive housing market results in tension between landlords and tenants, especially when rent or habitability becomes an issue. Typically, the parties will attempt to bargain, and will often employ these broad arguments during their negotiations.

II. LANDLORD AND TENANT PRE-LITIGATION BARGAINING PROCESS

Before landlords and tenants turn to the law to solve their issues, both parties usually attempt to bargain, because both parties have the same goal: reasonably priced housing, in good condition, sustainable over the long term. Tenant concerns typically include maintenance or property updates, rent increases, return of

50. TAYLOR, *supra* note 27, at 28, 32.

51. *Id.* at 4–5.

52. A BROKEN FOUNDATION, *supra* note 46, at 9.

53. TAYLOR, *supra* note 27, at 32.

54. *Id.* at 27, 32; *see also* A BROKEN FOUNDATION, *supra* note 46, at 10.

55. The U.S. Census Bureau defines unaffordable housing as paying more than thirty percent of household income towards housing. *See* JUSTICE FOR ALL? *supra* note 42, at 8, 71.

56. *See, e.g.*, Geoff Williams, *The Hidden Costs of Moving*, U.S. NEWS & WORLD REP. (Apr. 30, 2014), <https://money.usnews.com/money/personal-finance/articles/2014/04/30/the-hidden-costs-of-moving> [<https://perma.cc/7RNR-5BU3>].

57. Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. POVERTY LAW & POL'Y 393, 436–37 (2012) (arguing that establishing a right to housing should exist, and that the establishment of this right would break down barriers to stable, long-term, affordable, adequate housing).

the security deposit, retaliation, and payment options in case of a missed rent payment. Landlord concerns typically include timely rent payments, upkeep of the premises from the tenant side, increasing the rent enough to offset depreciation or long-term updates, and ability to transfer or change the use of the property when necessary or desirable.

Before turning to litigation tactics, landlords and tenants typically try to resolve their disputes outside of the litigation-based process in an effort to retain the landlord/tenant relationship, or to avoid legal costs. For example, when the tenant is unable to make timely rent payments, landlords will offer voluntary agreements in exchange for a move out date. A voluntary agreement might include an agreement to vacate by a specific date in exchange for a sum of money or payment of move out costs. Tenants also bargain by offering to vacate the premises within a certain number of days if the landlord refrains from taking legal action, or tenants offer the security deposit to cover the last month's rent.

When these pre-litigation agreements are successful, both parties walk away from the bargaining process feeling that they have gained something of value. However, when this bargaining process breaks down, the parties turn to the legal system to resolve the dispute. Each side approaches the legal issue from their perspective, which shape their legal arguments.

A. LANDLORD AND TENANT PERSPECTIVES OF DC RENT STABILIZATION POLICIES

Landlords assert that market forces dictate the rent, and landlords raise the rent only to the point where the population can afford those increases.⁵⁸ Landlords argue that because there are few ways to make a property appeal to a resident—namely the price and the location⁵⁹—landlords can lower vacancy rates by dropping the price. When the rent rises beyond the means of the average tenant, renters will exit the market, and landlords must drop the price to an affordable level.⁶⁰ Therefore, theoretically, market rates should always be affordable to residents. So, landlords argue that there should be no limit to any rent increases, because landlords will adjust the price in accordance with market conditions.⁶¹ They further argue that rent control measures arbitrarily inflate prices, which contributes to the overall affordable housing issue, and reduces the available supply

58. Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 553–54 (1984).

59. Traditionally, the three factors affecting housing are price, location, and condition. The condition of DC's housing stock is not addressed in this note in order to keep a narrow focus on the issues. A housing conditions court will become an argument later in this note, as a method of solving the affordable housing crisis.

60. *Id.* at 575.

61. Rabin, *supra* note 58, at 555.

of rental units.⁶² Lastly, landlords argue that rent control only benefits residents who can secure a rent-controlled unit.⁶³

The argument is essentially the following: the rent-controlled price is determined at a specific point in time, so low rents benefit residents who stay put, and therefore, rent control does not necessarily benefit those who need affordable housing, namely, low-income families.⁶⁴ Further, because rent controlled apartments are essentially taken out of the market, the supply of market rate housing shrinks, so prices rise faster than they otherwise would.⁶⁵

Tenant advocates argue that regulation is necessary to prevent rents from rising beyond the means of the average tenants,⁶⁶ and that without these measures, prices would soar even beyond the current unreachable prices.⁶⁷ There are a few factors that may contribute to housing prices: apart from depreciation of homes over time and the rising cost of building new housing, other variables change the “market rate” of the DC rental inventory.⁶⁸ In support of this view, DC has employed various rent regulations, such as the Rental Housing Act of 1985 and TOPA. However, some argue that these measures actually contribute to the affordable housing issue.⁶⁹

So, landlords and tenants argue over whether rent control has had a positive or negative impact on DC's affordable housing issue, and advocates can find influential reviews and studies supporting either argument. Because both arguments have merit, and both rely on a complex, ever changing housing market, both landlords and tenants can employ the information as a reactionary measure. For example, a tenant might argue that the landlord is increasing rent beyond what is reasonable,⁷⁰ and landlords can respond that they are not the problem, the housing market in DC is the source of the rising rents.⁷¹

B. FUNDAMENTAL RIGHTS: LANDLORD VERSUS TENANT

Once landlords and tenants move away from pre-litigation agreements and into the legal system, landlords and tenants are placed in an adversarial position, with both parties fighting over fundamental rights. Landlords wish to protect their right

62. See, e.g., LISA STURTEVANT, *THE IMPACTS OF RENT CONTROL: A RESEARCH REVIEW AND SYNTHESIS* 6-7 (2018).

63. STEPHEN K. MAYO & SHLOMO ANGEL, *HOUSING ENABLING MARKETS TO WORK* 17, 124 (1993).

64. See, e.g., STURTEVANT, *supra* note 62, at 6-7.

65. *Id.*

66. Rabin, *supra* note 58, at 575.

67. MARGERY A. TURNER, *HOUSING MARKET IMPACTS OF RENT CONTROL: THE WASHINGTON, D.C. EXPERIENCE* xiii (1990).

68. Rabin, *supra* note 58, at 575.

69. STURTEVANT, *supra* note 62, at 6-7.

70. See, e.g., Aaron Wiener, *Losing Control*, THE WASH. CITY PAPER, (December 12, 2014), at 10, <https://www.washingtoncitypaper.com/news/article/13046333/losingcontrol-dcs-rent-control-laws-are-supposed-to-keep> [<https://perma.cc/J3AE-ZAS3>].

71. See, e.g., Brian McCabe, *Rent Control, explained*, GREATER GREATER WASH., (September 13, 2016), at 4-5, <https://ggwash.org/view/42843/rent-control-explained> [<https://perma.cc/9EJN-238X>].

to use their property as they see fit, while tenants wish to protect their right to remain in affordable housing that is in good condition, which was initially provided by the lease.

From the landlord perspective, landowners argue that DC tenants are in a unique position of power and influence.⁷² Tenants have a Tenant Bill of Rights, rent control, the implied warranty of habitability, the option to exercise their TOPA rights and prevent the sale of a home, and the opportunity to extend their lease on a month-to-month term indefinitely except for ten reasons listed in the Rental Housing Act of 1985.⁷³ For example, a landlord may evict a tenant for conducting illegal activities.⁷⁴ However, if a landlord plans on renovating, rehabilitating, or converting the unit, the tenant's month-to-month, indefinite lease will supersede the landlord's right to terminate the contract.⁷⁵ Further, if a landlord moves forward in this renovation process, the landlord must provide a relocation plan and payment assistance for the cost of the moving.⁷⁶ So, tenants effectively have the right to remain at a property indefinitely, once the lease is in effect. To protect these rights, tenants have a variety of options when exercising their rights: tenants may bring a claim in the DC Housing Conditions Court, consult the Office of Tenant Advocacy when faced with eviction proceedings, and low-and moderate-income tenants are often eligible for representation through legal services projects.⁷⁷

Tenants argue that even with these measures, landlords wield ultimate control. Landlords often have more experience in legal disputes. In DC, most landlords have attorney representation, while most tenants still defend themselves pro-se.⁷⁸ Therefore, while DC may have enacted expansive tenant rights in DC, these rights are in response to the inherently unequal power balance between landlords and tenants, so the tenant-friendly legislation is necessary. For example, DC established a Housing Conditions Calendar in 2010, in part because of the continued shortage of affordable housing, and the inadequate conditions of the affordable housing stock.⁷⁹ A limited study of this Housing Conditions Calendar (HCC) shows that when a tenant brought a meritorious claim, "the landlord abated 92 percent of housing code violations."⁸⁰ In contrast, tenants who engage in the

72. Edward Allen, *Justice Delayed: Tenants' Quest for Administrative Redress in the District of Columbia*, 13 UDC/DCL L. REV. 179, 188 (Summer 2010).

73. D.C. CODE § 42.3505.01(a)-(j), §42.3505.01(f)(1)(B)(v).

74. D.C. CODE § 42.3505.01(b).

75. D.C. CODE §42.3505.01(f)(1)(A)(v)(II).

76. D.C. CODE §42.3505.01(f)(1)(B)(v).

77. 77. See, e.g., *D.C. Landlord Tenant Court-Based Legal Services Project*, LEGAL AID SOC'Y OF D.C. (July 19, 2017), <https://firstfocus.org/wp-content/uploads/2017/07/Congressional-Briefing-7.19.17-Handout.pdf> [<https://perma.cc/3Y9K-WBE5>]. ("With this funding, the Project represented 625 families, primarily defending against eviction cases.")

78. JUSTICE FOR ALL? *supra* note 42, at 8.

79. Jessica K. Steinberg, *Access to Justice: Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1063 (Fall 2017).

80. *Id.* at 1072.

traditional adversarial process by withholding rent, and then allege a housing code violation, often find themselves unsuccessful in eviction proceedings.⁸¹ This disparity highlights the tenant advocate's argument that tenant-friendly legislation is necessary to balance out this disparity and ensure that tenants are protected. Specifically, tenant advocates argue that when the tenant is forced to use habitability as a defense in an eviction proceeding, a meritorious claim can fail because landlords are more experienced, wealthier, and generally have more command of the legal system than a tenant. Therefore, tenant advocates argue that measures such as the HCC are necessary to balance the unequal power dynamic inherent to landlord and tenant relations.

In sum, there are strong arguments from both the landlord and tenant perspective on rental rates and housing conditions in a particular situation. The arguments involve complex economic influences, unsettled areas of law, and questions involving landlord/tenant power dynamics. Further, because the dispute involves fundamental rights between landlords and tenants, the stakes are high and neither side is likely to be persuaded by the other's arguments. Therefore, once pre-litigation agreements fail and the parties pursue remedies through the court system, neither side is likely to concede. This next section compares the similarities between landlord/tenant and nuisance cases. These similarities will establish why alternatives to the litigation process are necessary to achieve a goal of long-term, affordable housing.

C. COMPARISON OF TENANT & LANDLORD ISSUES TO NUISANCE CASES

When bargaining between landlords and tenants breaks down, the issue is resolved by going to court. Once the parties begin the litigation process, the situation is similar to a number of nuisance cases studied by Professor Ward Farnsworth in *Do Parties to Nuisance Cases Bargain After Judgment?*⁸² After studying twenty nuisance cases and the possibility of bargaining post judgment, Professor Farnsworth found that none of the parties bargained after the judicial decision.⁸³ This was attributed to "acrimony between the parties and to attitudes the parties held toward their rights."⁸⁴ Although taking these cases and applying them to the DC landlord/tenant disputes requires extensive extrapolation, the nuisance analysis sheds light on why litigation based solutions exacerbates, rather than resolves, the affordable housing crisis.

In nuisance cases, judgments are often delivered after a "long series of previous moves" between the parties, whether in or out of court.⁸⁵ Similarly, in landlord/tenant disputes, although a lawyer may handle the legal issue, the parties had

81. Steinberg, *supra* note 79, at 1064; JUSTICE FOR ALL? *supra* note 42, at 8.

82. See generally, Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (Spring 1999).

83. *Id.* at 421.

84. *Id.*

85. *Id.* at 396.

extensive contact prior to the legal dispute. Further, because landlord/tenant cases are often plagued by delays for months or years,⁸⁶ the parties are forced to mediate prior to trial, and during litigation, the landlord and tenant will likely interact via maintenance requests or rent payments. If the housing dispute results in a judgment where the tenant remains at the property, the landlord and tenant will continue to interact post-judgment.

Additionally, because the object of contention is the fundamental right to housing and property, landlords and tenants are bargaining over rights that affect them in a deeply personal manner. This deeply personal right is similar to disputes in nuisance cases, where one neighbor substantially and unreasonably interferes with the use and enjoyment of the other neighbor's land. Finally, as in all court-based solutions, the final step in these disputes is where "one side will be vindicated and the other will be made a loser."⁸⁷ So, in landlord/tenant disputes and nuisance cases share two important similarities: (1) the parties are litigating over a deeply personal right; and (2) unless one party relocates, the parties will be forced to continue to interact.

These interactions are likely to be fraught with tension, and so, bargaining after litigation has initiated is less likely. This limited review of on nuisance cases specifically highlights the unlikelihood of bargaining after the adversarial process has taken place. The similarity between nuisance and eviction cases allows the inference that pursuit of eviction cases through the adversarial process will likely leave the parties in a similar situation as the parties in the nuisance cases: neither party wants to bargain, and neither party wants to relinquish a right. In the nuisance cases, the adversarial process results in both parties feeling that the other side is unreasonable.⁸⁸ Similarly, because the nature of landlord/tenant relationships will force repeated interactions, the adversarial process is likely to exacerbate tensions between landlords and tenants. Instead of the traditional adversarial process, an alternative resolution may offer more success.

III. RESOLUTION OF ISSUES OUTSIDE OF THE ADVERSARIAL PROCESS: HOUSING CONDITIONS COURT

In DC, tenants also have the option of bringing a housing condition claim brought in the Housing Conditions Calendar/Court (HCC): if the property provided by the landlord does not meet the minimum standards as set out by the DC Housing Code, tenants may sue the landlord.⁸⁹

The approach used in housing conditions cases is procedurally different from the process used in the Landlord-Tenant Branch. The HCC is described as informal, designed to be problem solving rather than adversarial, with the goal of

86. Allen, *supra* note 72, at 185.

87. Farnsworth, *supra* note 82, at 413.

88. See, e.g., *id.* at 384.

89. Housing Conditions Calendar, *supra* note 49; Steinberg, *supra* note 79, at 1060–61.

“addressing an underlying social problem.”⁹⁰ Although the results are based on a small sample, mediation-based approach in the HCC resulted in abatement of poor housing condition, or resulted in the tenant abandoning the litigation at an early stage.⁹¹

Additionally, the court will not hold a hearing if an eviction is already initiated in the landlord-tenant court.⁹² Because the cases brought through the HCC are entirely separate from eviction proceedings, the information gained from studying HCC cases is limited when analyzing the affordable housing crisis issue in DC. However, the tools employed by HCC judges are useful when attempting to construct a solution for tenants facing eviction proceedings, especially when the eviction is accompanied by poor housing conditions.

Although there are many differences between eviction proceedings and a housing condition case, the most relevant for this topic is the tone taken during the hearings. The author of *Access to Justice* notes, “it is often difficult to determine the moment at which liability is adjudicated in the HCC” because “judges regularly issue ambiguous directives.”⁹³ The author concludes that this ambiguous, informal attitude helps shape the parties’ behaviors by attempting to mediate a dispute, rather than making formal findings of liability and issuing an order.⁹⁴

The analysis of the HCC claims is enlightening in two other ways: (1) the HCC has a specific set of inspectors that participate in housing conditions hearings; and (2) of the cases where an inspector confirmed that there were housing code violations, the landlord abated 92 percent of the violations.⁹⁵ This demonstrates that, when tenants are able to bring housing conditions claims without fear of retaliation, the landlord is likely to abate the violations. In contrast to eviction proceedings, where the landlord and tenant are already in contention⁹⁶ issues of rent and habitability are intertwined, and the parties may conflate issues of payment and habitability to their advantage. However, by separating the issues of habitability and rent payments, the HCC has been able to successfully resolve a high number of cases.

The success of the HCC can inform the Landlord-Tenant Branch in DC. Currently, HCC cases cannot be heard if an eviction is in process.⁹⁷ In housing conditions cases, this ensures that landlords cannot retaliate against tenants through eviction proceedings, and ensures that tenants cannot use a habitability claim as a dilatory tactic. Therefore, although the focus of the analysis is limited,

90. Steinberg, *supra* note 79, at 1062.

91. *Id.* at 1070.

92. *Id.* at 1063.

93. Steinberg, *supra* note 79, at 1069.

94. *Id.*

95. *Id.* at 1072–73.

96. In order for a tenant to assert the habitability claim, the tenant must stop paying rent, then raise the affirmative defense.

97. Steinberg, *supra* note 79, at 1063.

the method to resolve DC housing conditions claims is effective, and key aspects of the HCC may be useful in resolving the underlying issues that contribute to the affordable housing crisis. These aspects are: (1) separating issues of late rent and housing conditions; (2) establishing an independent source to verify any allegations of housing conditions early on in the proceedings; (3) directives that avoid assigning liability, but instead encourage problem solving. These factors, when used in eviction cases, will help transform the current adversarial process and will solve the underlying issues related to affordable housing.

A. TRANSFORMING THE ADVERSARIAL PROCESS

Based on the extensive legislation, funding, programs, and judicial opinions in support of tenant rights, furthering the adversarial process will not solve the underlying affordable housing crisis in DC. Supporters of rent control, tenant appointed counsel, or other reactionary measures will argue that these methods are necessary to protect tenants from becoming homeless.⁹⁸

This argument does not take into consideration the underlying issue in many eviction cases: regardless of whether the tenants have a valid affirmative defense of habitability, low- and moderate-income tenants pay an excessive amount of their income towards poor quality housing, leaving these tenants constantly on the edge of eviction or homelessness. Although eviction is the final step before loss of housing and the surrounding community, reactionary measures such as court appointed- attorneys will not solve the affordable housing crisis, because the issue is twofold: low- and moderate-income households are priced out of the competitive market, and the available housing stock is poor quality.

Further, the adversarial nature of eviction proceedings will negatively affect the landlord-tenant relationship. When nonpayment of rent and housing conditions are litigated together, the stakes involve not just money or housing conditions, but also the fundamental right of the landlord or tenant, because the case involves a potential eviction. As noted by Professors Farnsworth, when the stakes involve a right, the parties are not likely to engage in post judgment bargaining.⁹⁹ Although landlords and tenants are still adversaries in the HCC, by employing the less formal Housing Conditions Court, the landlords and tenants are more likely to resolve the dispute, because the issue isn't being litigated, it's still being mediated, and "judges regularly issue ambiguous directives."¹⁰⁰

Litigating the issue in landlord/tenant court is also disadvantageous because low- and moderate-income tenants still pay for unaffordable housing, so tenants are likely to face the possibility of eviction multiple times. Apart from negatively affecting the tenant's rental history record, this means that the parties may have to turn to the law, again, to resolve the issue. However, the landlord and tenant

98. A BROKEN FOUNDATION, *supra* note 42, at 6.

99. Farnsworth, *supra* note 82, at 421.

100. Steinberg, *supra* note 79, at 1069.

are less likely to bargain this time, because of the animosity from the previous legal battle. Various hypotheticals can be employed here, but instead, the focus should be on the cycle: issues of habitability and nonpayment arise, one party wins, but because housing is still unaffordable, the problem returns.

Lawyers participate in DC's affordable housing crisis by representing landlords and tenants in these legal disputes, so the legal community has an obligation to scrutinize the current method of dispute resolution when it's apparent that the current policies and measures are not effective. This next section outlines incremental changes to the court system and to zoning policies that, over time, would help move landlord/tenant disputes away from the current adversarial and ineffective process.

B. ADJUSTMENTS TO CURRENT POLICIES

Rather than leaving tenants and landlords to battle over eviction cases, small adjustments to current policies would help maximize the effort to end the affordable housing crisis. First, the model of the Housing Conditions Court should be used as a paradigm in eviction proceedings. When a landlord brings a suit for nonpayment of rent, and the tenant asserts an affirmative defense of habitability, the matter should be immediately treated as a housing conditions case. The case should be expedited, and the parties should be provided with an independent source to verify any housing conditions as soon as possible. As with housing condition cases, the judge should take a problem-solving approach, and should also keep the maintenance and payment issues separate.

In nonpayment of rent issues, the following questions may be asked: assuming that housing conditions are repaired, is the tenant capable of paying the past due rent? If the tenant has habitually paid the rent late, what resources are available to assist the tenant? If no resources are available, what options are available to the landlord to secure timely payment or secure the property, other than pursuing eviction again? In order to completely separate the nonpayment of rent and habitability issues, the judge could make an initial inquiry about the general habitability of the unit. For example, the judge could send an independent, experienced inspector to initially determine if the unit is essentially habitable. Essentially habitable factors could include: working plumbing and heating, no major structural issues, working doors, locks, and windows, or other factors that basically render the unit habitable over the next few months. This initial determination should be made within days of a tenant bringing a claim at HCC.

If the property is deemed initially habitable, the judge could suggest payment of rent into a non-judicial escrow account,¹⁰¹ opened by either the landlord or the tenant. The payment into the escrow account should also be made within a matter of days.

101. I suggest a non-judicial escrow account because payments into a court registry may be burdensome to the parties.

If the judge finds that the property is not initially habitable, the judge can remind the landlord that he can relocate the tenant until the unit is at least initially habitable, and to protect the tenant's belongings in the meantime. The focus in these initial inquiries should be efficiency, and the judge should use directives that avoid assigning liability, even during these initial inquiries. This problem-solving approach may help the parties avoid litigation altogether. If the parties are essentially told that the goal of landlord/tenant relations is affordable housing in good condition, where the landlord receives timely rent payments, the parties may attempt to take a problem-solving approach if the issue comes up again, rather than turning to the courts.

Because the current landlord/tenant system encourages parties to resolve through litigation, the judge should also consider the history of the parties when making these initial inquiries. For example, if the landlord habitually faces housing violation allegations, the judge should inquire of the source of the issue: is the landlord facing hardship, or is the landlord using eviction proceedings to systematically bully or intimidate tenants? If a tenant regularly brings a meritless housing conditions claim in court, is the tenant essentially coercing a landlord into making frivolous or unnecessary repairs?

This problem-solving approach in the courts will help landlords and tenants avoid animosity in the long run. If landlords know that a judge is likely to suggest that the tenant pay the full rent into an escrow account, the landlord will be reassured that the funds will be paid, as long as the landlord has not breached the IWH. Further, the landlord will feel that there are options if it is clear during the initial inquiry that the tenant is insolvent. On the other hand, if the tenant knows that a judge is willing to suggest relocation if a property is not initially habitable, the tenant will feel more secure paying the funds into the escrow account, knowing that the funds will be reimbursed if the landlord has breached the IWH.

The goal is still affordable, long-term housing in good condition. Therefore, to target the affordable housing issue, an adjustment to DC's restrictive land use policies is necessary. Currently, the majority of single-family homes that are accessible to desirable amenities such as good schools, public transportation, and safe neighborhoods are unaffordable to low- and moderate-income households. These desirable, amenity rich areas of the city appeal not just to low- and moderate-income households, but also to smaller, affluent households, who are able to price other households out of the market. These neighborhoods mostly comprise of low-rise, low-density buildings, i.e., single or double family homes.¹⁰² The study proposes an increase of density in these neighborhoods. Because of DC's Inclusionary Zoning Act, some of these units would be guaranteed for low- and moderate-income households. Additionally, incremental changes that allow for

102. TAYLOR, *supra* note 27, at 14.

higher density in desirable neighborhoods would increase the amount of DC's available housing stock.

Another possible zoning modification is to remove or lessen character restrictions on neighborhoods,¹⁰³ and replace character restrictions with a goal of efficient repurposing of existing housing. Incremental shifts in zoning, combined with a problem-solving approach in landlord/tenant disputes, would go further in solving the affordable housing crisis than further funding of litigation-based approaches in landlord/tenant disputes.

CONCLUSION

Historically and today, DC's housing market presents the complex problem of providing quality housing to residents in a highly competitive environment. Although the Supreme Court, local courts and DC legislators have attacked the issue for decades, the city remains segregated based on income, and low to moderate-income earners are often out-bid for properties, leaving them to pay more than affordable rates in poor quality housing. When these households face tension in a landlord/tenant dispute, both the landlord and tenant can marshal effective arguments as to why the other side is unreasonable, and because both landlords and tenants see housing as a personal, specific right, neither party is likely to empathize or capitulate to the other. When the parties turn to the legal system and engage in the traditional adversarial process, the legal community becomes a part of the affordable housing problem affecting DC. As participants in these landlord/tenant disputes, the legal community has an obligation to scrutinize current policies. As demonstrated throughout this Note, current policies and measures have not been effective, but incremental changes can help resolve the underlying factors that perpetuate DC's affordable housing issue.

First, the DC courts should separate the issue of rent and housing conditions. When faced with a case where there are issues of nonpayment of rent and questions of habitability, the court should ask whether a unit is essentially habitable, and whether the tenant is likely to pay the back due rent. The court should take an inquisitorial, creative approach to these issues, instead of simply relying on current methods of landlord/tenant dispute resolution.

Next, incremental steps should be taken to revise zoning where possible. Revising the current methods of determining neighborhood character, or allowing small increases in density with an emphasis on multifamily dwellings, would solve part of the competition crisis between affluent single/couples households and low to moderate income households.

103. D.C. CODE MUN. REGS. Tit. 11-A § 101.2 (2016).

Ultimately, low- and moderate-income households would be better served by increased housing options and by with expedited approach utilized by the HCC, rather than through the traditional landlord/tenant court or through representation through legal service providers. Therefore, lawyers engaged in landlord/tenant disputes not only have an obligation to encourage their clients to resolve rent and maintenance disputes without going to court, but the legal community also has an obligation to encourage these court and zoning reforms, so that the underlying housing issues are addressed at their source.