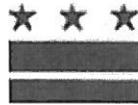


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**Government of the District of Columbia**



**Office of the Tenant Advocate**

Testimony of

**Johanna Shreve**  
Chief Tenant Advocate

**IN THE MATTER OF: TENANT OPPORTUNITY TO PURCHASE ACT EXEMPTION  
CLARIFICATION**

**COMMITTEE ON HOUSING AND WORKFORCE DEVELOPMENT  
THE HONORABLE MARION BARRY, CHAIR**

**COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS  
THE HONORABLE MURIEL BOWSER, CHAIR**

**PUBLIC OVERSIGHT ROUNDTABLE**

Council of the District of Columbia

Thursday, April 30, 2009

Room 412  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Washington, DC 20004  
12:00 p.m.

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Thank you, Chairperson Bowser and Chairperson Barry, for holding this public oversight roundtable regarding TOPA Exemption Clarification. Also, thank you both for your leadership in protecting the rights of the 55 to 60 percent of District residents who are renters. I am Joel Cohn, the Legislative Director for the Office of the Tenant Advocate. Chief Tenant Advocate Johanna Shreve regrets that she could not be here today. She has asked me to deliver this testimony on her behalf.

## **INTRODUCTION**

As you know, Councilmember Graham has introduced legislation -- Bill 18-242, the "Tenant Opportunity to Purchase Exemption Clarification Amendment Act of 2009" -- that implicates two different exemptions in the District's tenant opportunity to purchase law ("Tenant Opportunity to Purchase Act of 1980," D.C. Official Code § 42-3404.01 *et seq.*).

First, Bill 18-242 addresses a serious threat to the tenant right of purchase posed by a recent Superior Court decision regarding the TOPA exemption for "Court orders and Court-approved settlements" (D.C. Official Code § 42-3404.02(c)(2)(M)). Specifically, Bill 18-242 would clarify the Council's intention that this exemption applies only narrowly in those instances where tenants had an opportunity to participate in the litigation.

Second, Bill 18-242 addresses the disturbing trend of tenants being confronted with eviction actions, or threats of eviction, on the basis of foreclosure -- despite the fact that foreclosure is not a lawful basis for evicting tenants in the District of Columbia. Specifically, the legislation would require a Notice of Tenant's Rights whenever a rental property is foreclosed upon. Also, a Notice of Transfer to the Mayor and/or to the

tenants is required for every other TOPA exemption; thus Bill 18-242 as introduced would require a Notice of Transfer in the event of foreclosure on a rental property. From the standpoint of the OTA, however, the critical provision is the Notice of Tenant's Rights during Foreclosure.

### **EXEMPTION FOR COURT ORDERS AND COURT-APPROVED SETTLEMENTS**

First I will discuss the exemption for “court orders and court approved settlements.” So far as we know this exemption was never the subject of any controversy until the DC Superior Court’s novel interpretation in a decision issued just last month. As a result of the decision in Biltmore Tenants Ass’n v. Wynne-Wynne Situation Properties, LLC (Case No. 2008 CA 00022 R(RP)), this previously inconspicuous exemption suddenly looms very large. It is not a stretch to say that it conceivably threatens to swallow the tenant right of purchase itself.

#### **The Biltmore decision**

In Biltmore, the DC Superior Court applied the exemption to a settlement agreement between heirs in a probate dispute. In that case, the heirs agreed as part of the settlement agreement to sell the rental property in order to split the cash proceeds, and get the probate court to declare that this **prospective** sale is exempt from TOPA as part of a “court-approved settlement.” The Court did so, and 9 months later the heirs sold the property without offering the tenants their TOPA rights. When the Biltmore Tenant Association sought to vindicate their TOPA rights, the DC Superior Court essentially responded that the exemption empowers any Court anywhere anytime, with no notice to the tenants, to abrogate TOPA rights on the basis of any pending or any prospective sale.

This very loose interpretation violates standard rules of statutory construction regarding the effectuation of legislative purposes. It also violates the fundamental due process principle that a court may not dispose of the rights of persons who are not parties to the case before them. Moreover, it is a mischievous decision in that it invites “friendly” if not collusive law-suits to evade the District’s TOPA law. Already at least one broker has seized upon the Biltmore decision by marketing 2 properties that are in receivership (2620 16<sup>th</sup> Street, NW and 5100 Connecticut Avenue, NW, with a total of about 90 units) and are subject to Court-ordered sales as being exempted from TOPA, thereby “facilitating a quick transaction.”

### **Legislative history**

The Council never intended for this exemption to serve as an easy by-pass of tenants’ rights under TOPA. Nor did the Council intend that an owner and a third party could completely circumvent the tenant right of purchase without any notice to tenants. The context for the exemption -- Councilmember Graham’s 2005 TOPA reform legislation -- shows just the opposite intention on the part of the Council. As Councilmember Graham said at first reading on April 5, 2005, the overriding purpose of the reform measure was to make the TOPA process -- including exemptions -- as transparent as possible; to put an end to transfers by “secret process” whereby tenants were kept “in the dark”; to “excise a malignancy” in the TOPA law; and to “re-affirm the tenant opportunity to purchase.” On second reading on May 3, 2005, Councilmember Graham described the bill as having “narrowly focused purposes”; “**very narrow limited exceptions**”; and the salutary effect of providing tenants with notices of transfers in the absence of the tenant right of purchase.

Furthermore, the rationale for an Amendment moved by Councilmember Graham on second reading indicates how narrow this and other exemptions were intended to be. The Amendment exempted certain transfers -- including the “court order and court-approved settlement” exemption -- from the requirement that Notices of Transfer be provided to the tenants, although a notice of transfer to the Mayor was still required. The rationale for dispensing with notice to tenants was that the transfers are “**either already a matter of public record**, or as (exempted sales) **need not (be) the subject of further notice** to tenants.” Thus, the clear expectation was that tenants would have received prior notice of a court order or court-approved settlement, most likely because it was assumed that tenants would be parties to the relevant litigation.

**What Bill 18-242 would do**

Bill 18-242 would restore the Council’s intention regarding the exemption, and protect the tenant right of purchase, by **clarifying** that the exemption applies only where tenants were parties to the litigation, or at least had an opportunity to be heard regarding their TOPA claims. Specifically, Bill 18-242 would clarify that the exemption applies only where:

1. The Court has **jurisdiction** over TOPA claims;
2. An **actual contract exists**;
3. Each affected tenant or tenant organization has received **written notice of the opportunity to participate in the action**; and
4. The court determines that approval of the exemption under the totality of the circumstances is **not contrary to the purposes of the Act**.

To provide further clarity to the bill as introduced, we recommend that points 3 and 4 be prefaced with the following language: “in the event that tenants are not already parties to the litigation”. The purpose is simply to make it clear that, if tenants are already parties to the litigation, no further notice is required regarding the opportunity to participate in the action, nor is a judicial determination that applying the exemption comports with TOPA’s purposes.

## **FORECLOSURE**

Regarding the foreclosure provision of the bill, there are 10 permissible bases to evict a tenant under the Rental Housing Act of 1985 (D.C. Official Code § 42-3505.01), and foreclosure is not one of them. Thus, if the landlord fails to pay the mortgage, District tenants have a right to continue their tenancies, and the bank or the foreclosure purchaser becomes the landlord.

### **Scope of the problem**

Nevertheless, our office regularly hears from tenants who are being threatened with eviction due to foreclosure, or who have received notices to quit that are either clearly illegal or sometimes ambiguously illegal, or have already been sued for eviction at Landlord & Tenant Court (we receive approximately 10 complaints relating to foreclosure per week). Attorneys and legal service providers with whom we work report similar experiences. They also cite the steady stream of eviction actions at Landlord & Tenant Court in which no effort is made to distinguish between tenant-occupied and non-rental properties, or between those defendants who have no right to stay and those who do because they are tenants. Furthermore, we believe that for every tenant under

threat of a “foreclosure eviction” who seeks information and help, there are many more who leave their homes only because they are unaware of their rights.

An Urban Institute white paper to be released next week underscores what we have observed -- that the impact of foreclosure on tenants in the District is stark and growing problem. The Urban Institute permitted us to convey their findings that since 2006 foreclosures have increased for every rental property type – single family dwellings, dwellings with 2 to 4 units, and multifamily dwellings with 5 or more units. The report’s first policy recommendation is to “Make sure tenants are notified when their home is facing foreclosure and are informed of their rights.”

**OTA “dear occupant” and Rent Administrator “cease and desist” letters**

OTA is attempting to do just that. In February of this year, the OTA began sending “dear occupant” letters to every property in the foreclosure auction listings in the Washington Post and the Washington Times. The letter sets forth the basic right of any tenant to stay and provides contact information for the OTA and legal service providers. It also provides a form to be sent by the tenant back to any foreclosure purchaser, or bank, to announce themselves as tenants having rights under DC law. For any unlawful notice to quit that we see, we write a letter informing the sender of the tenants’ rights. In some instances we request that the Rent Administrator take appropriate action, including issuing a notice of non-compliance under the Rental Housing Act which could lead to a fine and possibly civil action.

**Why TOPA notice is the best solution**

But these are reactive approaches to a problem that increasingly is like trying to keep water from seeping in under the door. What is needed is a much more proactive,

more preventative approach. The District has a regulatory structure in place regarding “transfers” of rental properties. That structure includes well-developed notice provisions that link rental property transferors, transferees, tenants, and government. It offers a far greater measure of sunlight and accountability than anything now in place to prevent illegal foreclosure evictions. It empowers the government, where appropriate, to sanction “willful” violations of the law (§510). Of course that structure is TOPA. Whether we use the Notice of Transfer provision -- or even just a stand-alone Notice of Tenant’s Rights during Foreclosure -- we believe TOPA offers the most effective solution to this problem.

It should be noted that under TOPA there are a total of 15 exemptions from the tenant right of purchase. Of these 15 exemptions, ***foreclosure is the only one that requires absolutely no notice*** of the transfer either to the Mayor or to the tenants (D.C. Official Code § 42-3404.02(d)(1)(C)). Thus, the one instance where notice is most sorely needed gets the only free pass regarding notice.

**What Bill 18-242 would do**

First, Bill 18-242 would keep the TOPA exemption for foreclosures completely intact (D.C. Official Code § 42-3404.02(c)(2)(C)). But it would repeal that unique exception for foreclosures regarding notice. As introduced, the legislation would require that a “transferee” pursuant to foreclosure:

1. Provide each occupant of the accommodation and the Mayor with a written Notice of Transfer within 5 business days after the date of the transfer;

2. Provide each occupant, the Mayor, and the OTA with a “Notice of Tenants’ Rights During Foreclosure” to be substantially in a form that OTA prescribes.

**Industry concerns**

In our discussions with AOBA, we have heard several concerns which we understand to be as follows:

1. These requirements may unduly delay the foreclosure process and add an unacceptable degree of uncertainty regarding the transfer of title;
2. Under TOPA’s Notice of Transfer provision, tenants could challenge the use of the exemption, and claim that the foreclosure transfer is actually a sale and therefore triggers the tenant right of purchase; and
3. The failure of a transferee to provide a Notice of Transfer would create a “rebuttable presumption” that the transfer constitutes a sale (D.C. Official Code § 42-3404.02(d)(4)).

We do not discount these concerns, but we do believe that at least to some degree they fail to take into account an important difference between the proposed Notice of Transfer requirement for foreclosures and the Notice of Transfer requirement in the current law. The current law requires that Notice of Transfer be provided to the Mayor and/or to the tenants 90 days prior to the transfer. But Bill 18-242 would not require Notices of Transfer in the case of a foreclosure until 5 days after the transfer. That means that prior to any issuance of a Notice of Transfer the *bona fides* of the exemption would have already been documented -- for instance in a certificate of a winning bid at a foreclosure auction. Thus, should a party fail to provide the notice triggering the presumption, it seems that documentation would still be dispositive and would

trump any “presumption” of a sale. Moreover, a court would likely deem any tenant challenge to the exemption under these circumstances to be frivolous, and quite likely subject to sanction.

Again, however, we do not discount the concerns as we understand them. The primary purpose of a post-foreclosure Notice of Transfer is not to invite unwarranted tenant challenges, but simply to provide all parties with notice of the basis for the transfer that has taken place along with notice of tenant rights. It is quite possible to eliminate the requirement of a formal Notice of Transfer and still achieve that objective -- namely, with a stand-alone Notice of Tenant Rights during Foreclosure, which would serve the purpose of the Notice of Transfer which is to provide the basis for the transfer and the fact that it is exempt from the tenant right of purchase, as well as provide notice of tenant rights. This would eliminate any specific trigger for a tenant challenge, which we believe should moot many of the concerns we have heard.

This concludes my testimony and I am happy to answer any questions you may have. Thank you once again Chairperson Bowser and Chairperson Barry for holding this roundtable on matters of great concern to the OTA and to District tenants. We look forward to working with you and all stakeholders on this important legislation.