

to summary judgment as a matter of law); *Abdullah v. Roach*, 668 A.2d 801, 804 (D.C. 1995) (same).

As noted in the District’s dispositive motion (incorporated by reference herein), the District’s challenged practices here complied fully with both the Rental Housing Conversion and Sale Act (“RHSCA”) and the D.C. Administrative Procedure Act (“DCAPA”). DCRA’s interpretation of the RHSCA has been upheld by a number of local and federal courts, and hence the interpretation urged by plaintiffs must be denied as *res judicata*. Moreover, although the RHSCA has been amended since the filing of the First Amended Complaint, plaintiffs never mention (much less analyze) the likelihood that their claims may be moot, nor do they address the obvious *res judicata* issues here, as local courts have recently *rejected* legal challenges under the RHSCA to the sale of three buildings occupied by the instant plaintiffs.

Plaintiffs’ showing is plainly insufficient for a grant of summary judgment, hence their motion must be denied.

I. Argument

Plaintiffs continue to argue that DCRA improperly aided the efforts of property owners “to circumvent tenant rights to purchase” rental property. P.Mem. at 2. But plaintiffs fail to prove that keystone of their case, and discovery revealed no facts to support it.

Plaintiffs maintain that “[o]n its face, a Linda Harried letter is determinative of substantive rights,” *id.* at 3, but, in fact, discovery has shown that the opposite is true: the letters were *not* a determination of substantive rights, but simply a notice to requesting parties of DCRA’s advisory opinion, otherwise known as an “interpretive rule,” which had no impact on the legal relations between the tenants and the property owners here. *See* District’s Mot. at 17–

19. See also *Bio-Medical Applications of District of Columbia v. District of Columbia Bd. of Appeals and Review*, 829 A.2d 208, 216 (D.C. 2003) (agency not bound by document where plaintiff failed to present evidence that agency “‘intended to be bound’ or acted as if it were bound by” the draft document). See also *Moorehead v. District of Columbia*, 747 A.2d 138, 145 (D.C. 2000) (“such documents have no legal force or effect.”); *Clark v. District of Columbia*, 708 A.2d 632, 636 (D.C. 1997) (“agency protocols and procedures, like agency manuals, do not have the force or effect of a statute or administrative regulation”) (*quoting Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C. 1990)).

It is inapposite that property owners may have used DCRA’s letters for subsequent purposes, such as to secure financing for sales transactions. See District’s Mot. at 19. The key factor is whether DCRA itself *intended* to be bound by its letters.

The touchstone for enforceability [of an agency statement] is agency intent. . . . The binding quality of a particular rule or statement will depend on whether the agency intended to establish a substantive rule, one which is not merely interpretive but which creates or modifies rights that can be enforced against the agency.

Jackson v. Culinary School of Washington, 307 U.S. App. D.C. 123, 27 F.3d 573, 584 (D.C. Cir. 1994), *vacated on other grounds*, 515 U.S. 1139 (1995).

Here, as amply demonstrated by discovery and the District’s dispositive motion, DCRA’s interpretation of the RHSCA, and its issuance of the 95/5 letters, were not intended to bind anyone. See District’s Mot. at 17–19.

Plaintiffs are hoist on their own petard; they insist that the prior RHSCA “specifies the conditions under which there may be an administrative determination” of whether the Act applies to a particular transaction. P.Mem. at 4. But it necessarily follows that if the procedures in the RHSCA were not followed, there can be no *binding* interpretation of the applicability of the Act to a particular transaction. Hence, DCRA’s letters were simply advisory, and based

solely on the information provided to them by the property owners. District’s Mot. at 18. Plaintiffs cannot have it both ways—for DCRA’s determination to be binding as a “declaratory order,” it had to follow the procedures in the former RHSCA and the DCAPA, but if it did not follow those procedures, its subsequent statements could not be legally binding.³

Plaintiffs achieved the legislative solution they desired, an amendment of the RHSCA to more clearly define a “sale” and to clarify the procedures necessary for DCRA to issue a binding determination of the applicability of the law to a particular transaction. But plaintiffs cannot rewrite history. Despite all plaintiffs’ language concerning what the RHSCA *should have* done, or what the Council’s intent was in passing it, DCRA was bound first and foremost by the *language* of the prior act, not the purported goals and motivations of its sponsors, expressed contemporaneously or after the fact. *See Luck v. District of Columbia*, 617 A.2d 509, 512 (D.C. 1992) (“The proposition that plain statutory language generally trumps other considerations is hardly subject to challenge.”).

It is certainly within the province of the Council to amend a law it feels is being misinterpreted by an agency. However, the comments and testimony that accompanied that effort are no more binding on the Court than the post-enactment statements of legislators regarding legislative intent. *See President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment*, 837 A.2d 58, 67 (D.C. 2003) (“It is[, however,] emphatically the province and duty of the judicial department to declare what the law is”) (*quoting Marbury v.*

³ Plaintiffs prove the District’s argument. Plaintiffs assert that “[i]t is undisputed” that the letters were sent at the request of land owners, P.Mem. at 5, and set forth some five additional paragraphs of “undisputed” assertions. Those “facts” are true but entirely support the District here: because DCRA did not purport to attempt to comply with the procedures required by the DCAPA when issuing the 95/5 letters, those letters cannot have the effect of “declaratory orders” under that law. *Id.* (*citing* D.C. Official Code § 2-508 (2005 Supp.)).

Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). See also *Riggs Nat'l Bank of Washington, D.C. v. District of Columbia*, 581 A.2d 1229, 1237 n.11 (D.C. 1990) (“We do not think that our construction of a statute should be based in any significant measure on the views expressed after the fact” by individual legislators or those adversely affected by the legislation) (*quoting Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (“*post hoc* statements of a congressional Committee are not entitled to much weight.” (citation omitted))).

In short, DCRA was bound to follow the RHSCA as written, not as plaintiffs or others wish it “would have been.” P.Mot. at 9.⁴

III. Conclusion

For the foregoing reasons, defendants respectfully move the Court to deny Plaintiffs’ Motion for Summary Judgment and to dismiss the Complaint herein or grant summary judgment for the District, either on the basis of SCR-Civil 12(b)(1) or (b)(6) or, in the alternative, under SCR-Civil 56. Alternative proposed Orders are attached hereto.

DATE: October 24, 2005

Respectfully submitted,

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⁴ It should go without saying that the law to be applied here is the previous version of the RHSCA, not the recent amendment. See, e.g., *Childs v. Purl*, 882 A.2d 227, 238 (D.C. 2005) (“[S]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.”) (internal quotation marks and citation omitted) (*quoting District of Columbia v. Gallagher*, 734 A.2d 1087, 1093 (D.C. 1999)).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Memorandum were delivered to the Chambers of the Honorable Neal E. Kravitz, by leaving a copy in the place designated by the Clerk, and sent by U.S. mail, first-class, postage prepaid, this 24th day of October, 2005, to:

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