

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

NEW CAPITOL PARK PLAZA)	
TENANTS ASSOCIATION, et al.,)	
)	Civil Action No. 04-CA-7465
Plaintiffs,)	Judge Neal E. Kravitz
)	Calendar No. 7
v.)	
)	
DISTRICT OF COLUMBIA, et al.,)	
)	
Defendants.)	
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**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO THE DISTRICT OF COLUMBIA'S SECOND MOTION TO
DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Plaintiffs, by and through undersigned counsel and pursuant to SCR-Civil 12-I(e), submit these points and authorities in opposition to the District of Columbia's Second Motion to Dismiss or, in the Alternative, for Summary Judgment, and respectfully request that this Honorable Court deny the relief requested in Defendants' Motion.

Defendants' argument is based upon a claim of mootness, a claim that the Agency's actions were "reasonable," and an assertion of *res judicata*. Below, Plaintiffs address each argument in turn. Because a number of Defendants' arguments are substantially identical to those they previously asserted, Plaintiffs incorporate by reference their January 10, 2005, Opposition to the District's first such motion, as well as the Plaintiffs' pending Motion for Summary Judgment and related filings. Plaintiffs likewise refer the Court to the description of the nature of this litigation and the factual background contained in those filings.

I. The case is not moot. This Court has jurisdiction to hold invalid the previously issued “Linda Harried letters” and to enter the other relief requested in the Complaint.

The District asserts that this matter is now moot in light of D.C. Law 16-15. Memorandum of Points and Authorities in Support of the District of Columbia’s Second Motion to Dismiss or, in the Alternative, for Summary Judgment (hereinafter “Def’s Memo.”) at 5-9. This argument fails because the District does not meet its burden under the law applicable to voluntary cessation of challenged conduct. Moreover, the District ignores the fact that the District issued letters specifically stating that the sales of the homes of these Plaintiffs were exempt from the Sale Act. Plaintiffs seek relief not only to ensure that DCRA’s misconduct will not continue, but also to declare invalid these past acts that were in violation of their rights.

This Court has broad authority to review Agency action and issue appropriate equitable relief. See e.g. District of Columbia v. Sierra Club, 670 A.2d 354, 358 (D.C. 1996) (holding that D.C. Superior Court has broad authority to “entertain claims for equitable relief from allegedly unlawful action by public officials.”) In that case, the Court of Appeals reiterated the century-old presumption of reviewability of agency action, id. at 358-59, as well as the importance of such review by our courts:

As Judge Ferren has written, [t]he strong presumption favoring judicial review of agency action reflects a recognition that review is essential to promoting agency responsiveness to legislative mandates. . . . [U]nreviewability gives the executive a standing invitation to disregard . . . statutory requirements. . . .

Id. at 359 (citing People's Counsel v. Public Serv. Comm'n of the District of Columbia, 474 A.2d 1274, 1278 n. 2 (D.C. 1984) (concurring opinion)).

Thus, the Court may review DCRA's action and issue appropriate declaratory as well as injunctive relief on the basis of these authorities.¹

A. *The District has a heavy burden to establish that voluntary cessation of a challenged practice renders this litigation moot.*

The subset of mootness doctrine commonly referred to as “voluntary cessation” is the proper means of analyzing a claim that legislation enacted after a lawsuit was filed renders the case moot. See National Black Police Ass'n v. District of Columbia, 323 U.S. App. D.C. 292, 108 F.3d 346, 349 (D.C. Cir. 1997) (“The intervening event arguably ending any live controversy between plaintiffs and the District was the District's enactment of the new campaign contribution legislation . . . Thus, voluntary cessation analysis governs our mootness inquiry.”)

The U.S. Supreme Court has made plain that “[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.” Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 174 (2000). The burden of persuasion is “heavy” and lies squarely with the party asserting mootness. Id. at 189.

Litigation is not mooted unless “(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” Coalition of Airline Pilots Ass'n v. FAA, 361 U.S. App. D.C. 460, 370 F.3d 1184, 1189 (D.C. Cir. 2004) (citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).

¹ Plaintiffs also note that the relief to be awarded should Defendants' Motion be denied is a distinct issue not properly raised at this time. Accordingly, Plaintiffs reserve briefing on the issue of costs and attorney fees, but note that they believe they would be entitled to such.

As described below, neither condition is satisfied here. There is no adequate assurance that DCRA will not misinterpret the new legislation just as it had previously. Moreover, the letters already issued purport to determine rights, and it is the government's position that they remain valid and continue to carry weight.

B. The change in the statutory language of the Sale Act constitutes a legislative effort to ensure proper administrative interpretation, but is not enough to render this case moot.

DCRA never had authority to issue the letters at issue in this case. Plaintiffs' October 6, 2005, filings in support of their summary judgment motion explains that DCRA never followed the procedures expressly required by the Sale Act and the D.C. Administrative Procedures Act prior to issuing the Linda Harried letters concerning the apartment homes of Plaintiffs, in the form these laws existed at all relevant times.

The only "change" relevant here is the City Council's expression of agreement that DCRA always lacked such authority. D.C. Law 16-15 provides that it was enacted, among other purposes, "**to clarify** that declaratory orders are the sole means to determine rights." D.C. Act 16-89 §§ 1, 2(d), 52 D.C. Reg. 6885-6889 (now D.C. Law 16-15, 52 D.C. Reg. 7168) (emphasis added).

The City Council made this clarification after it "concluded, through extensive hearings and questioning of both government officials and public witnesses, that the law governing the tenant opportunity to purchase has been misinterpreted by the very government officials charged with protecting tenant

rights and by representatives of land-owning interests for at least the last five years.” Committee Report at 2-3.²

Despite the City Council’s hearings and conclusion, and the authorities noted by Plaintiffs, DCRA has asserted – and continues to assert – that it was always merely “following the law” in issuing Linda Harried letters. See e.g. Def’s Response to Interrogatory No. 2,³ Def’s Response to Request for Admission No. 1,⁴ Def’s Memo. at 10.

Under the clarified statutory language, DCRA continues to assert that it will “follow the law” in the future when issuing declaratory orders concerning partial transfers. Deposition of District of Columbia at 35 (Exhibit 1). However, “a final determination has not been made as to how [DCRA] will process” a request for a determination of the applicability of the Sale Act to a partial transfer. Id.

DCRA has not crafted proposed regulations that would allow this Court to determine if DCRA’s understanding of its obligations under the Sale Act comport with the law, as now clarified. Id. at 36. Some five months after the Mayor signed the Act clarifying the law, DCRA states that it recognizes the obligation to engage in formal rulemaking – but it has not done so to date and it does not even have any specific plans to do so or to begin the process to do so. Id.

Thus, while Plaintiffs certainly are hopeful that DCRA will now recognize its obligations under the Sale Act and will act according to law, such is far from certain. Under these circumstances, the government’s reprised “trust us” approach is simply

² This document was previously provided as Exhibit 5 to Plaintiffs’ Statement of Material Facts, filed on October 6, 2005.

³ This document was previously provided as Exhibit 1 to Plaintiffs’ Statement of Material Facts, filed on October 6, 2005.

⁴ This document was previously provided as Exhibit 2 to Plaintiffs’ Statement of Material Facts, filed on October 6, 2005

insufficient. DCRA has not met its “stringent” burden to “ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”

Friends of the Earth, 528 U.S. at 189 (quoting United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)).

C. Plaintiffs are entitled to declaratory relief regarding the letters that were issued previously.

Even if this Court were to conclude that it is “absolutely clear,” *id.*, that DCRA will now begin following its obligations under the Sale Act, this case would still not be moot because of the past letters that DCRA issued concerning the sale of Plaintiffs’ rented apartment homes.

This litigation challenges specific letters that, on their face, purport to certify that the sales of Plaintiffs’ homes do not trigger any rights of these tenants under the Sale Act. Each letter is captioned “Re: Exemption from Title IV of the Rental Housing Conversion and Sale Act of 1980, as amended, D.C. Law 3-86, for [property address].”⁵

In an effort to escape this obvious matter that is still a live controversy, the District now wishes to characterizes these letters as non-binding. Def’s Memo. at 16. However, it does so only when it suits its litigation strategy. At other times, the government continues to assert that the letters carry weight. Moreover, the letters on their face purport to be determinative of rights, and the government refuses to disavow the validity of those letters.

It is the District’s position that the letters continue to carry weight. It was asked to admit that “[i]t is Defendants’ position that Linda Harried Letters do not

⁵ Copies of letters concerning the sale of Plaintiffs’ homes were previously provided as Exhibit 3 to Plaintiffs’ Statement of Material Facts, filed on October 6, 2005.

conclusively resolve or determine any matters in any fora.” The government denied this statement. Response to Request for Admission No. 18.⁶ The government repeated this denial when posed as to each of the specific letters concerning the sale of Plaintiffs’ homes. Id. at Nos. 19-21. Defendants were also asked to admit that “Defendants do not believe Linda Harried Letters have any effect in any fora.” Again, the government denied this statement. Id. at No. 22. Defendants may not now claim to the contrary.

Indeed, the District’s argument here is somewhat at odds with itself. Much of its memorandum is devoted to arguing that the letters issued remain valid and were properly issued. See Def’s Memo. at 9-16. This constitutes quite clear indication that there exists a “live controversy” for the Court to adjudicate, and thus the case cannot be called moot. Coalition of Airline Pilots Ass’n, 370 F.3d at 1189. The government may not simultaneously claim that there is no live controversy and continue to argue that the letters, on their face determinative of Plaintiffs’ rights, were properly issued and of continuing validity.

II. The issuance of these letters was not “reasonable”; and in any event, was unauthorized.

The government’s attempt to categorize the issuance of these letters as “reasonable” and merely interpretive are unavailing both as a substantive matter and due to the procedural requirements of basic principles of administrative law.

In 2003, Judge Wright of this Court held that “to find that the [95/5 transaction] did not constitute a sale would produce a result that would be not only contrary to the legislative intent but would be absurd and would produce manifest

⁶ This document was previously provided as Exhibit 2 to Plaintiffs’ Statement of Material Facts, filed on October 6, 2005

injustice.” Twin Towers Plaza Tenants Ass’n., Inc. v. Capitol Park Assoc., No. 03-CA-3376, Order Denying Defendants’ Motion for Summary Judgment at 6 (D.C. Super. Ct., Nov. 25, 2003).⁷

Plaintiffs submit that Judge Wright’s interpretation is correct, and it was never “reasonable” to conclude that these dubiously structured transactions could effect a denial of tenant rights to purchase their homes under the remedial Sale Act. As noted, the City Council has reached the same conclusion. Moreover, DCRA took no action in response to this judicial interpretation and determination. Deposition of D.C. at 57 (Exhibit 1).

In addition, and regardless of the substantive considerations, DCRA was not authorized to issue these letters. An agency may not escape its obligations to engage in formal rulemaking – hearing from the public and following a considered process – by labeling an action an “interpretive rule,” or any other moniker, when the action purports to be determinative of rights.

Interpretive rules may only concern “internal agency practice and procedure ‘primarily directed toward improving the efficient and effective operations of an agency, **not toward a determination of the rights or interests of affected parties.**” Teachey v. Carver, 736 A.2d 998, 1005 n.8 (D.C. 1999) (emphasis added) (quoting Batterton v. Marshall, 208 U.S. App. D.C. 321, 648 F.2d 694, 702 n. 34, 208 U.S. App. D.C. 321, 329 n. 34 (D.C. Cir. 1980)); see also Webb v. D.C. Dept. of Human Svcs., 618 A.2d 148, 151 (D.C. 1992) (expressly rejecting the government’s

⁷ This opinion was previously provided as Exhibit 3 to Plaintiffs’ Opposition to the District of Columbia’s Motion to Dismiss, or in the Alternative, for Summary Judgment, filed on January 10, 2005.

argument that income eligibility guidelines are simple implementation of federal law and not subject to formal rulemaking under DCAPA).

The District adopted the same stance recently when its failure to create formal rules regarding termination of disability benefits was challenged in federal court. It asserted that its actions were mere interpretations of clear statutory law, that it had acted reasonably, and that it thus need not engage in formal rulemaking. This was squarely rejected by the Court: “[W]hen the government’s policies and procedures directly affect the substantive property rights and procedural interests of those whom the program is designed to serve and benefit, those policies can hardly be characterized as ‘internal.’” Lightfoot v. District of Columbia, 339 F.Supp.2d 78, 95 (D.D.C 2004).

As noted, the Linda Harried letters on their face declare that they are determining rights. Moreover, the Sale Act specifically provides that the question addressed by these letters (the applicability of the Sale Act) is to be treated as a determination of rights and subjected to formal proceedings. An owner who is “uncertain as to the applicability” of the Sale Act “is deemed to be an aggrieved owner for purposes of seeking declaratory relief.” DC Code § 3404.02(c). Thus, Defendants’ declarations as to the applicability of the Sale Act involve a determination of an individual’s rights or responsibilities, and accordingly must follow a process established by rule.

Beyond these general principles, the Sale Act specifically requires rulemaking before DCRA may issue a determination as to the applicability of the Sale Act to any specific transaction. The District’s failure to engage in rulemaking clearly required by both the Sale Act and the DCAPA is set forth in Plaintiffs’

Motion for Summary Judgment and supporting Memorandum, which are incorporated by reference.

III. The claims are not *res judicata*.

Plaintiffs do not wish to burden the court with unnecessary duplicative briefing. The issue of *res judicata* was extensively briefed in Plaintiffs' Opposition to Defendants' first Motion to Dismiss, at pages 2-9. Plaintiffs simply incorporate by reference that argument, and again note that *res judicata* does not apply here because the parties are different (only one Plaintiff here was involved in any of the cases cited, and the government was not a party to any of those cases) and the issues to be decided are different (none of those cases considered the government's authority to issue a determination of the applicability of the Sale Act to a specific transaction). "[T]he doctrine of collateral estoppel bars relitigation only of issues **actually determined** in prior litigation. Fundamental to any application of the doctrine is that the issue or issues previously determined be **identical** to the issue or issues presently barred." Gould v. Mossinghoff, 229 U.S. App. D.C. 118, 120-21, 711 F.2d 396, 398-99 (D.C. Cir. 1983) (emphasis added) (citing Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948); McCord v. Bailey, 204 U.S. App. D.C. 334, 337, 636 F.2d 606, 609 (D.C. Cir. 1980)).

IV. Conclusion

The government asks the Court to trust that it will enforce the Sale Act, given the recent legislative clarifications. However, it misinterpreted the previous language, and it has yet to take any steps towards required proposed rulemaking or other proper implementation of the law. This falls short of its heavy burden (making it "absolutely clear") to moot a case based on voluntary cessation. Moreover, the government continues to defend and assert validity of previously

issued letters concerning the sale of Plaintiffs' homes. It has not followed the procedures required to issue a determination of the applicability of the Sale Act; and as this issue has never been decided by any Court, it is not *res judicata*. Defendants have not met their burden to entitle them to summary judgment.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court deny the relief requested in District of Columbia's Second Motion to Dismiss or, in the Alternative, for Summary Judgment.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing was served via first class mail this 24th day of October, 2005, upon:

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