

**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.)	
)	Next court event: 3/4/05
DISTRICT OF COLUMBIA, et al.,)	Initial Scheduling Conference
)	
Defendants.)	
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**PLAINTIFFS’ OPPOSITION TO DISTRICT OF COLUMBIA’S MOTION TO
DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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

I. The nature of this litigation

The government’s motion rests entirely on a mischaracterization of the nature of this litigation, of the misconduct challenged, and of the relief sought. It seeks to turn this case into something that it is not, and only from that point is it able to present legal argument that might be persuasive, if it were not irrelevant. This case, however, raises far more serious issues concerning the proper functioning of the Department of Consumer and Regulatory Affairs, and is not suited to summary disposition at this time.

Fundamentally, this is public interest litigation challenging the abuse of governmental power. “This lawsuit challenges the unlawful practices of public officials with the D.C. Department of Consumer and Regulatory Affairs that undermine tenant

rights and frustrate the purposes of the Rental Housing Conversion and Sale Act (hereinafter “Sale Act”) by facilitating what have become known as “95/5” sales of rental properties.” Compl. ¶ 1. “Specifically, DCRA issues letters to developers – without authority and essentially upon request – purporting to certify exemption from the Sale Act of any transaction that effects a transfer of a 95% ownership interest in a rental property.” Id. at ¶ 3. In their Motion, Defendants appear to acknowledge that DCRA issues such letters without following any particular set of procedures nor acting pursuant to properly adopted rules. It is this unauthorized exercise of governmental authority that is challenged in this case. See e.g. id. and at ¶¶ 22-30, 55-56.

From this, it follows that the government’s arguments concerning *res judicata* and standing are unavailing. These arguments are addressed in greater detail in turn, before addressing the overall merits of the claims presented in this action.

II. Principles of *res judicata* are not applicable to this case

The government may not preclude advancement of this action by noting various cases involving other parties, challenging other acts, and seeking other relief. Specifically, the government argues that this case is precluded by two other cases brought by different plaintiffs against their landlords. See Def’s Memo. at 9. In both of those cases, the sole issue was whether or not the landowners violated the tenants’ rights in executing real estate transactions without following the procedures required by the Sale Act. No government activity was challenged. No government entity was made a party to either case. The question of what, if any, rules and procedures must be adopted and followed by the government before it may issue letters purporting to exempt a transaction

from the Sale Act was neither raised nor decided in either of the cases cited by Defendants (nor any other case of which counsel is aware).

In contrast, this is litigation against the government, alleging the unauthorized exercise of government authority, and seeking declaratory and injunctive relief concerning such unauthorized exercise of government authority. It does not name any landowner or former landowner as defendants, it does not challenge any real estate transaction, and it does not seek the rescission of any real estate transaction nor damages against any seller or purchaser of real property. Only one of the thirteen Plaintiffs in this action was party to any of the cases relied upon by the government. No Defendant in this action was party to any of the cases relied upon by the government.

A. Overview of *res judicata*

Defendants were not very precise in their discussion of *res judicata*. Plaintiffs will offer an overview of the applicable law. In the end, however, Defendants' argument fails for the simple reason that this litigation is different from the cases they cite, involving different parties and different issues.

The touchstone statement concerning *res judicata* (both claim preclusion and issue preclusion) for courts and commentators alike remains this passage from the Fifth Circuit:

The rules of *res judicata*, as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first such doctrine is "claim preclusion," or true *res judicata*. It treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach.

The second doctrine, collateral estoppel or "issue preclusion," recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered.

Kaspar Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530, 535-36 (5th Cir. 1978) (citations omitted) (quoted in Wright & Miller, Juris. § 4402).

Thus (and without parsing the nuances of *res judicata* more than necessary for resolution of the issue before the Court) there are two considerations most directly relevant here under either doctrine. The case to be given preclusive effect and the case in which it is to be applied must involve the same parties to be bound, and they must involve the same claim or issue.

B. This case involves different parties

There is no suggestion that Defendants were parties to either case they suggest should preclude litigation of this matter.¹ This alone is sufficient to defeat their *res judicata* arguments. This is so because the courts recognize that positions are taken by parties in litigation on the basis of who they are litigating against and the issues actually presented:

The rule of collateral estoppel . . . does not go so far as to make the finding in one man's case in a personal action a conclusion of ultimate truth. A law suit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants. That which is settled as a fact between them through a given piece of

¹ Although Plaintiffs are troubled by the various indicia that DCRA is a "captured agency," they do not go so far as to argue a true agency-principal relationship between DCRA and the developers, and trust that Defendants likewise do not believe the government to be in privity with the developers.

litigation under the principles of *res judicata*, binds only the parties themselves and those who are in such relation to the parties as to be considered in privity with them.

Hornstein v. Kramer Bros. Freight Lines, 133 F.2d 143, 145 (3rd Cir. 1943).

Neither Defendant in this case, nor any other governmental entity, was a party to the cases relied upon by the District here.² See Exhibit 1 at 1 (docket sheet for *1816 Kalorama Road, NW, Tenants Association*); Exhibit 2 at 1 (docket sheet for *Twin Towers Plaza Tenants Association*).

In addition, the Plaintiffs in this matter are different. There are thirteen Plaintiffs in this case, consisting of three associations and ten natural persons. One of those associations was, indeed, a party to one of the cases cited by the District. (This is not determinative because, as described in the next section, it advances different claims here and is not precluded from doing so.) None of the other twelve Plaintiffs in this case were party to the cases that the District would give preclusive effect. See Exhibits 1 & 2.

The District relies upon a sweeping proposition that two previously decided cases involved “the tenants of three buildings occupied by plaintiffs in the instant matter.” Def’s Memo. at 7. There is no basis for deeming every individual tenant in these building “parties” for the purposes of applying *res judicata*.

² This is particularly noteworthy given SCR-Civil 24 and 24-I, which specifically provide for intervention by the District and governmental officials “[w]hen a party to an action relies for ground of claim or defense upon any statute or executive order . . . or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order” SCR-Civil 24(b). The Rules further provide for mandatory notification of the District in certain circumstances concerning when “an order, regulation, or enactment of any type affecting the public interest of the District of Columbia is drawn into question,” SCR-Civil 24(c), and requires the Court to permit intervention by the District under such circumstances, SCR-Civil 24-I. No such joinder, notification, or intervention occurred in the cases cited by the District here. See Exhibits 1 & 2.

The District largely defeats its own argument in this regard. The very case that it desires to give preclusive effect was, as it notes, dismissed because “a tenant association representing tenants in both the Capitol Park Plaza and the Capitol Park Twin Towers lacked standing to maintain an earlier suit, because it could not establish ‘that it represents a majority of the tenants’” Defs’ Memo at 7. Yet, the government somehow wants that determination to estop individual tenants from bringing this litigation. *Id.* at 7. This is patently untenable.

The plaintiff tenant association in *Twin Towers Plaza Tenants Association* was a different tenant association than the Plaintiff in this case, New Capitol Park Plaza Tenants Association. There is no suggestion, nor could there be, that there is any overlap in the control of the two associations, nor that any of the Plaintiffs in this case were officers or otherwise controlled the other association or the prosecution of the other case.

Although determining the preclusive effects of associational plaintiff cases can be challenging, this case presents no difficult questions. The issue has been most addressed in the context of trade associations:

Plaintiffs argue that Viacom is bound by the *Alliance* stay under the doctrine of collateral estoppel because Viacom is a party to the *Alliance* litigation by virtue of its membership in the National Cable Television Association (“NCTA”), an intervenor in *Alliance*. This contention fails for two reasons. First, there is no evidence that Viacom actually authorized NCTA to represent Viacom in the *Alliance* case. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1278-84 (9th Cir. 1992). . . .

Second, there is no evidence that the NCTA “adequately represented” Viacom in *Alliance*. *Class Plaintiffs*, 955 F.2d at 1283. *See generally Van Pool v. City and County of San Francisco*, 752 F. Supp. 915, 923 (N.D.Cal 1990), *aff’d sub nom. O’Shea v. City of San Francisco*, 966 F.2d 503 (9th Cir. 1992).

Altmann v. Television Signal Corp., 849 F. Supp. 1335, 1345 (N.D.Cal. 1994).

Here, not only is there no suggestion of authorization or adequate representation, but, as Defendants note, the prior litigation *determined* that the other plaintiff association did not represent the tenants in those buildings. Thus, that case cannot be used to preclude advancement of this action. “As the Supreme Court stated in *Martin v. Wilks* [490 U.S. 755, 761 (1989)], ‘[i]t is a principle of general application . . . that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party.’” United States of America v. Andrews, 146 F.3d 933, 938 n.5, 330 U.S. App. D.C. 420, 425 n.5 (D.C. Cir. 1998).

This requirement that only parties may be bound is of Constitutional dimension, and must be adhered to strictly. In Richards v. Jefferson County, 517 U.S. 793 (1996), a challenge to a county-imposed tax was brought first by the city government itself and then, when the city lost, by a group of taxpayers. Id. at 795. The State Supreme Court held that the taxpayers’ suit was precluded by the earlier suit by the city. Id. at 796. The US Supreme Court reversed, characterizing the State Court’s finding of preclusion as an example of “extreme applications of the doctrine of *res judicata*,” id. at 798, and holding “that the State Supreme Court’s holding that petitioners are bound by the adjudication in [the City’s lawsuit] deprived them of the due process of law guaranteed by the Fourteenth Amendment,” id. at 797.

C. This case presents a different issue / cause of action

Perhaps more substantively, this litigation presents wholly different issues than the cases Defendants wish to give preclusive effect. It is fundamental that *res judicata* is inapplicable where a different issue or cause of action is raised by the later case. “[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, 711 F.2d 396, 398-99, 229 U.S. App. D.C. 118, 120-21 (D.C. Cir. 1983) (emphasis added) (citing Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948); McCord v. Bailey, 636 F.2d 606, 609, 204 U.S. App. D.C. 334, 337 (D.C. Cir. 1980)).

This requirement that the issues be identical is quite literal. The Fifth Circuit considered the cases of a woman who had refused to take an oath when called for jury service, even after being offered a version without a reference to God. Society of Separationists, Inc. v. Herman, 939 F.2d 1207, 1209 (5th Cir. 1991). When jailed for contempt, she filed and lost her petition for a writ of *habeas corpus*. Id. at 1210. She then lost a second lawsuit challenging the practice of requiring oaths for Jurors, on the basis of the establishment clause of the First Amendment. Id. She then filed a third lawsuit alleging that her imprisonment for contempt had been unconstitutional, again based on the First Amendment, but this time advancing a free exercise argument. Id. at 1210-11. In this third case arising from her refusal to take an oath, the Fifth Circuit held that neither *res judicata* doctrine was applicable. The Court held that claim preclusion (true *res judicata*), could not apply because the defendant in this third suit “was not a defendant in the first suit.” Id. at 1213. The Court then held that “issue preclusion (collateral estoppel)” could not apply because “a Free Exercise claim is altogether different from an Establishment Clause claim.” Id.

This is consistent with the judicial practice of strictly requiring truly identical issues between the cases. See e.g. De Llano v. Berglund, 183 F.3d 780 (8th Cir. 1999) (prior loss in Title VII action for wrongful termination against university did not preclude

subsequent Title VII action against individuals allegedly involved in the termination); Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359 (2d Cir. 1995) (prior *in rem* litigation against a ship did not preclude action against the ship charterer); Arab African Int'l. Bank v. Epstein, 10 F.3d 168 (3d Cir. 1993) (no preclusion in later case by bank against attorney drafters of an opinion letter even though prior suit against the defaulting party expressly determined that the bank had not relied upon the opinion letter).³

In sum, neither doctrine of *res judicata* has preclusive effect on any aspect of this case. As briefly noted in Part I, *supra*, this case is a challenge to unlawful governmental activity. The government seeks to dismiss this fact by suggesting that it knows better what the Plaintiffs' "true dispute" is, Def's Memo. at 9, but the government may not escape review of its activity so easily. This is public interest litigation alleging that certain actions of government officials are without lawful authority. The fundamental issue here is what, if any, steps must the government take prior to issuing letters to developers purporting to certify that their real estate transaction is exempt from the Sale Act. This is a different issue from whether or not a landowner violated tenant rights when it sold the property, which was the sole issue before the Courts in the cases cited by Defendants. Because this case involves different parties and different issues, Defendants may not preclude advancement of this action.⁴

³ In addition, the fact that the government was not a party to the cases it seeks to give preclusive effect, as discussed above, is relevant here as well. A suit against a different defendant is generally considered a different cause of action. "A single plaintiff likewise has as many causes of action as there are defendants to pursue . . ." Wright & Miller, *Juris.* § 4407, at 153.

⁴ Cases cited by Defendants are not to the contrary. I.A.M. Nat. Pension Fund v. Industrial Gear Mfg., 723 F.2d 944, 945 (D.C. Cir. 1983) rejected an attempt to use *res*

III. All Plaintiffs have standing.

A. Sale Act standing considerations do not apply

As with its other arguments, the government relies upon a mischaracterization of this litigation in order to suggest a requirement for standing that is simply inapplicable here. Specifically, it looks to cases against landowners under the cause of action created by the Sale Act. See Def’s Memo. at 10-13. This litigation, however, is different. It does not allege that a landowner has breached its obligations to the tenants, and thus the cases relied upon by the government are irrelevant. Quite simply, Plaintiffs do not need this statutory cause of action in order to maintain this action.

The Sale Act sets out obligations of an owner of rental property. Defendants argue that “only a properly constituted tenants association representing a majority of the tenants in a building has standing to sue under the RHSCA.” Id. at 10. The lawsuits Defendants cite involved the statutory cause of action created by the Sale Act, codified at D.C. Code § 42-3405.03. The standing requirement under that statutory cause of action makes some sense in the context of certain suits, in which it needs to be apparent that it is the plaintiff association with which the defendant landlord was obligated to negotiate

judicata in a case involving a union suing an employer for inaccurate reporting of contribution obligations to a retirement fund, where the same plaintiff had previously sued the employer for inadequate contributions to the fund. “[T]he two causes of action differ in that each asserts different rights, alleges different injuries, and arises from different facts.” Id. at 949. Newell v. District Of Columbia, 741 A.2d 28 (D.C. 1999) rejected an attempt to use offensive collateral estoppel. Its relevance is difficult to see, and certainly does not help the District here. Carr v. Rose, 701 A.2d 1065, 1076 (D.C. 1997) rejected an attempt to deem one group of tenants to be in privity with other tenants under the same lease. It also held that collateral estoppel could not apply because the question of an estate’s liability was not the same as the question of liability for a set of tenants. Id. at 1077. In Shin v. Portals Confederation CO., 728 A.2d 615 (D.C. 1999), unlike in this case, all of the parties were also parties in the prior litigation. The Court restated that *res judicata* applies to “the same cause of action between the original parties or those in privity with them.” Id. at 618.

under the Sale Act. However, this case does not advance that type of claim, and those questions and considerations do not apply.

Most fundamentally, Defendants' standing arguments are foreclosed by District of Columbia v. Sierra Club, 670 A.2d 354 (D.C. 1996). That lawsuit involved a challenge by the Sierra Club to the government's suspension of the curbside recycling program, arguing that the government's suspension of that program was in violation of the DC Recycling Law. Id. at 356.

The Court in Sierra Club set out a number of considerations that are relevant to this case. It reiterated the extensive and longstanding precedent that suits against the government alleging that an action is without lawful authority are maintainable under this Court's general jurisdiction statute – even if the plaintiff cannot make out a cause of action under the related law.

We have held that the Superior Court may entertain claims for equitable relief from allegedly unlawful action by public officials pursuant to D.C. Code § 11-921(a)(6) (1995), which vests that court with jurisdiction over “any civil action or other matter, at law or in equity, brought in the District of Columbia.”

Id. at 358.

As here, in Sierra Club the government argued that the underlying law did not create a cause of action that the plaintiff could use to challenge the government's action. This argument was rejected as irrelevant. “Judicial reviewability of agency action does not depend on the creation of a private right of action in the statute sought to be enforced.” Id. at 359.

Thus, the standing requirements in order to make use of the private right of action created by the Sale Act are irrelevant where, as here, the Complaint “seeks equitable relief from adverse and allegedly unlawful action by a public officer.” Id. at 357.

B. The injury to Plaintiffs here is sufficient and is of a kind broadly recognized by the courts

Ten of the Plaintiffs here are natural persons who were renters in the properties when DCRA issued a letter purporting to certify that they would not benefit from the protections of the Sale Act. See Compl. ¶ 13. There is nothing “generalized” about their grievances. As a result of the DCRA practice and *de facto* rule challenged here, the government issued letters purporting to certify that these tenants would not benefit from the rights and procedures of the Sale Act in specific transactions.

Two other Plaintiffs are tenants associations, which represent individual renters in the properties when DCRA issued a letter purporting to certify that they would not benefit from the protections of the Sale Act. Id. at ¶¶ 11-12. These associational Plaintiffs have standing to bring this action on behalf of their members, under well-recognized principles of representational standing. See e.g. Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333, 347 (1977).

These two tenant associations also have standing to bring this action on their own behalf, as does the last of the thirteen Plaintiffs, the Tenants’ Advisory Coalition. All three associations have expended resources in response to the DCRA action challenged here. Compl. at ¶¶ 10-12. TENAC is an association that helps tenants form tenant associations, assists individuals and associations wishing to advance rights under the Sale Act, and counsels individuals and associations concerned about sales of their rental homes. Id. at ¶ 10. The ability of tenants to exercise their rights under the Sale Act is a

central concern for TENAC. Id. Its ability to provide these services and assist tenants in exercising their rights under the Sale Act is plainly harmed by DCRA's misconduct challenged here. TENAC has devoted resources to efforts to change this practice. Id.

This is sufficient to confer standing. The US Supreme Court considered the standing of a nonprofit organization to challenge racially discriminatory "steering" practices by a housing provider. "If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

In the District of Columbia, the Federal Court found that a fair housing advocacy group had standing where the complaint alleged that its counseling, referral, and educational services were burdened by the defendant's allegedly discriminatory practices. National Fair Housing Alliance v. Prudential Ins. Co., 208 F. Supp.2d 46 (D.D.C. 2002).

The DC Court of Appeals case District of Columbia v. Sierra Club has already been discussed. Fundamentally, it cannot be gainsaid that all the Plaintiffs in this action are at least as interested and impacted by the government's actions in issuing letters to developers purporting to certify that they need not offer these Plaintiffs any of the rights and procedures outlined in the Sale Act, compared with the Sierra Club's interest in the suspension of curbside recycling throughout the city. The Court in Sierra Club also discussed general principles applicable to this case, and surveyed the weight of authority

that actions of this type are the proper purview of this Court. See Sierra Club, 670 A.2d at 357-59 & gen'ly.⁵

A number of courts have considered similar questions of standing in challenges to governmental policies and practices. See e.g. El Rescate Legal Serv. v. Executive Office, 959 F.2d 742, 748 (9th Cir. 1991) (organization has standing to challenge government's alleged practice of using of incompetent translators, because it frustrated the organization's ability to provide services to incarcerated persons); Charles H. Wesley Education Foundation, Inc. v. Cox, 324 F. Supp.2d 1358, 1364 (N.D.Ga. 2004) (organization that conducts voter registration drives has standing to challenge state policy concerning voter registration); Islamic Society of Fire Dept. Personnel v. City Of New York, 205 F. Supp.2d 75, 89 (E.D.N.Y. 2002) (nonprofit organization has standing to sue city in case alleging religious discrimination; allegation of difficulties in recruiting new members and drains on resources was sufficient allegation of injury to the organization); Gay-Straight Alliance v. Visalia Unified School Dist., 262 F. Supp.2d 1088, 1105 (E.D.Cal. 2001) (standing found where the plaintiff organization's "purpose is to end intolerance, discrimination, harassment, and violence in schools, directed at member gay and lesbian students, and those perceived to be gay or lesbian. Those goals are directly frustrated by Defendants' alleged policies of transferring gay or lesbian students, and ignoring complaints regarding the safety, harassment, and discrimination against gay and lesbian students, and those perceived to be gay or lesbian.") (citation omitted).

The cases relied upon by Defendants are not to the contrary. Friends of Tilden Park involved an organization that had no members and thus could not assert

⁵ In the appeal, the District of Columbia abandoned its challenge to Sierra Club's standing. Sierra Club, 670 A.2d at 357 & n.2.

representational standing. Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201, 1208 (D.C. 2002). It also could not point to anything that harmed it as an organization. Id. at 1210-13. The other case upon which Defendants rely most heavily is York Apts. Tenants Ass'n v. District of Columbia Zoning Comm'n, 856 A.2d 1079 (D.C. 2004). The complaint there concerned the George Washington University's proposal to change construction plans, so the new building would be built "not as an office/condominium structure, but as a classroom/dormitory structure." Id. at 1085. The Court simply held that the plaintiff's belief that this change could ultimately lead to some of their members suffering a loss of quiet enjoyment of neighboring properties was too "conjectural and hypothetical." Id.

C. All necessary parties are named as Defendants in this matter

Finally, Plaintiffs note that no necessary party is absent from this litigation. Plaintiffs will not repeat the above description of the true nature of this case and the relief actually sought, but simply note that, given those facts, there is no third party whose rights would be unfairly prejudiced. A simple reading of the applicable Rule makes it even clearer that there is no need for joinder. The Rule requires joinder only where:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest.

SCR-Civil 19(a).

Regarding consideration (1), the Complaint seeks equitable relief against government action, and accordingly the District and the responsible agency are the only

arguably necessary parties to accord the relief requested. Regarding consideration (2), the government proffered no person who has claimed an interest in the subject of this action. Even were such a person to come forward, they could not establish any interest or obligation that would be prejudiced by their absence from this case. Presumably whenever unlawful government action is challenged, anyone who might have benefited from continuing unlawful action might be “interested” in seeing the case go the other way; but there simply is no authority for requiring joinder of such persons.⁶

IV. This Complaint properly challenges actionable misconduct

The government presents a generalized argument that the Complaint lacks merit, relying primarily upon the above-described irrelevant decisions to suggest that DCRA’s actions are in compliance with the Sale Act. They argue that “95/5 transactions,” in which a 5% ownership interest is retained by the existing owner, cannot be subject to the Sale Act. First, it is far from settled law whether the Sale Act properly covers 95/5 transactions. Moreover, and as discussed above, this litigation presents a different issue, involving the government’s obligation to act openly and in accordance with established procedures and criteria. See e.g. Compl. ¶¶ 50-61.

A. 95/5 transactions are subject to the Sale Act

On the first issue, at least one Judge of this Court has held that a sale of a 95% ownership interest in a property does require the landowner to follow the procedures required by the Sale Act. Defendants attempt to make much out of Judge Wright’s determination that other parties lacked standing in a lawsuit against landowners. As

⁶ Even if joinder were needed, dismissal would not be appropriate. Rather, the Court should require joinder or evaluate claims that joinder is not feasible. See SCR-Civil 19(b); Raskauskas v. Temple Realty Co, 589 A.2d 17, 20 (D.C. 1991).

discussed above, that analysis is irrelevant to this case. Defendants, however, fail to bring to the Court's attention that Judge Wright, before dismissing that case on standing grounds alone, determined that a 95/5 transaction should be subject to the Sale Act.

Judge Wright 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 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) (Exhibit 3 at 6).

Plaintiffs submit that Judge Wright's analysis of the legislative history, statutory language, and related caselaw is thorough, thoughtful, and disposes of Defendants' misguided arguments that the Sale Act should not include 95/5 transactions. The decision is attached as Exhibit 3. In the interest of litigant and judicial efficiency, Plaintiffs incorporate by reference the analysis set forth in Judge Wright's opinion, and will only briefly address the arguments put forth by Defendants.

First, the existence of the figure "100%" in the statute is not dispositive of the issue presented in this case. See Def's Memo at 18-19; D.C. Code § 42-3404.02(c). This is the only time that the concept of a partial transfer is presented in the language of the statute, and it specifically refers only to "the transfer of 100% of all partnership interests in a partnership which owns the accommodation as its sole asset . . . or of 100% of all stock in a corporation which owns the accommodation as its sole asset" D.C. Code § 42-3404.02(c). Thus, this language addresses a very specific situation: where a partnership or corporate entity exists only to own the property at issue, and that entity is sold.

Similarly, the preceding subparagraph offers some discussion of other circumstances that “the terms ‘sell’ or ‘sale’ include,” id. at 3404.02(b), but again does not squarely address the question of 95/5 transactions. Rather, subparagraph (b) closed a purported loophole involving leases with purchase options. That provision thus addressed only agreements concerning possessory interests that also included a purchase option; it did not address agreements that are fundamentally and from the start concerned with ownership interests. See DC Law 8-49, 36 D.C. Reg. 5790 (1989).

The Council did not see any need at that time to address any agreement that is not a lease but rather, as here, involves ownership rights – quite simply because the Council thought it apparent that any transfer of an ownership interest constitutes a sale. “[T]he Committee feels that the use of any agreement that transfers rights that are associated with ownership would make any transfer of tenant-occupied property subject to review.” Committee on Consumer and Regulatory Affairs, Report on the Tenant Opportunity to Purchase Clarification Act of 1989, at 7 (1989).

The District cites no controlling precedent directly dealing with the question of whether 95/5 transfers should be subject to the Sale Act. Defendants’ reliance upon the Wallasey case is really quite absurd. That case involved an individual owner who, partially in an effort “to responsibly plan for his estate,” sought to switch the property ownership from Mr. Fairbairn’s own name into the name of Fairbairn Properties. Def’s Exhibit 6 at 1. Mr. Fairbairn owned 99% of Fairbairn Properties, and “[t]he remaining 1% was owned by Fairbairn Properties, L.L.C., a company whose sole member and owner was Fairbairn himself.” It self-evidently is not the sort of transaction at issue in this case.

The only enactments by the City Council related to the Sale Act have been to clarify the scope of the law as quite expansive. At least one Judge of this Court has concluded that 95/5 transactions are subject to the Sale Act, because “the clear legislative history and intent of the Sale Act were to treat *any* transfer of ownership interest as a ‘sale.’” Exhibit 3 at 8. That the Council has not acted to address squarely the specific issue presented in this litigation surely is not enough to entitle the Defendants to summary judgment.

B. DCRA must act pursuant to established criteria and procedures

Defendants appear to acknowledge that DCRA issues letters purporting to certify certain transaction as exempt from the Sale Act in the absence of any regulations establishing either the procedure by which such determinations are made or the criteria applied in making such determinations. See Def’s Memo. at 15-17. The government’s argument that rulemaking is not required fails even on its own criteria; moreover, rulemaking is specifically required by the statute in this instance.

This case involves the practice by DCRA of acting upon requests from developers and landowners by issuing letters purporting to certify that particular transactions are exempt from the Sale Act. The Sale Act contemplates that such may be done, but specifically requires that it be done pursuant to properly enacted rules.

An aggrieved owner, tenant, or tenant organization may petition the Mayor for declaratory relief under provisions of this chapter. Upon a showing of reasonable grounds, the Mayor shall grant a hearing and may issue findings of fact, conclusions of law, and declaratory orders and take other enforcement actions provided by this subchapter.

D.C. Code § 42-3405.03a.

Even from this, it is apparent that letters of the type issued by DCRA may not be issued informally or on an *ad hoc* basis. There must be a “showing of reasonable grounds,” followed by a hearing, followed by a formal decision. Moreover, the Sale Act specifically requires that powers exercised pursuant to it be codified through formal rulemaking. “The Mayor shall issue rules for the implementation of this chapter.” D.C. Code § 42-3405.01(a) (“Rule making; publication requirements”).

It is undisputed that no rule concerning the proper evaluation of 95/5 transactions, nor the procedures and criteria to be followed in responding to any request for a determination as to the applicability of the Sale Act, was ever properly adopted. DCRA’s practice in this area cannot be said to reflect an “interpretive rule,” as Defendants seek to argue. Def’s Memo. at 15. Although litigants’ contentions concerning what constitutes a “rule” can frequently lead to unnecessarily Byzantine argument, this is not a close case.

It is apparent that actions of the type challenged in this case involve a determination of rights and responsibilities, and therefore reflect application of a *de facto* rule requiring formal notice and comment rulemaking. 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.” *Id.* at 3404.02(c). Thus, Defendants’ declarations as to the applicability of the Sale Act involve a determination of an individual’s rights or responsibilities.

True interpretive rules, in contrast, 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) (quoting Batterton v. Marshall,

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

Where the matter at issue is an Agency’s policy, practice, interpretation – or any other term Defendants may wish to select – that is directed towards determining individual rights and responsibilities, it is a rule. In addition to the provisions of the Sale Act itself noted above that require rulemaking when powers under the Sale Act are exercised, the DC Administrative Procedures Act requires notice and comment rulemaking before any agency may adopt a rule. See D.C. Code § 2-505.

Construing the DCAPA, the Federal Court in this jurisdiction recently had occasion to address arguments put forth by the District of Columbia that are similar to those it advances here. Lightfoot v. District of Columbia (Civil Action No. 01-1484 (CKK)) is currently pending in US District Court for the District of Columbia, and challenges the failure of the DC government to adopt formal rules concerning the criteria to be applied in determining whether or not to terminate disability benefits. As it has in this case, the District sought to argue that it is merely following what it deems common sense and a reasonable interpretation of the relevant statutory provisions, and that its “internal” rules do not require formal rulemaking. The Court rejected this argument:

[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.” Indeed, the broad language of the [DCAPA statute], which grants a right of even unaffected members of the public to comment on an “agency’s statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or

policy,” D.C. Code § 2-502(6), guards against a reading of an “internal v. external” distinction.

Lightfoot v. District of Columbia, 339 F.Supp.2d 78, 95 (D.D.C 2004).

Similarly here, the Complaint alleges that the government issues letters purporting to determine whether or not a specific transaction requires the landowner to offer tenants the benefits of the procedures and rights of the Sale Act. DCRA does so without following any procedures and by applying a criteria and process that is a *de facto* rule, but that has never been properly considered, debated, and adopted. See e.g. Compl. ¶¶ 50-61. Such action is reviewable by this Court, and the case should not be dismissed.⁷

V. This case simply is not suited to pre-discovery summary disposition

Defendants seek disfavored relief, and simply have not met the substantial burden applicable to their pre-discovery dispositive motion. Defendants’ burden in this Motion is a substantial one:

A complaint may not be dismissed under Rule 12(b)(6) unless it appears that a plaintiff can prove no facts in support of the claim which would entitle the plaintiff to relief. When considering a motion under this rule,

⁷ The background of the cases relied upon by Defendants is instructive, as those cases involve rather modest implementations of extensive regulatory schemes that had been properly codified. Interport, Inc. v. Magaw, 135 F.3d 826, 328 U.S. App. D.C. 414 (D.C. Cir. 1998) simply held that the Bureau of Alcohol, Tobacco and Firearms had ample authority under existing laws concerning machine guns to require importers to present a valid government purchase order before machine guns would be released. Moreover, the Court went on to conclude that BATF’s seizure of the machine guns was unlawful because it did not cite any statutory or regulatory authority that expressly authorized seizure under those particular circumstances. Id. at 830. Stevenson v. Board of Elections & Ethics, 683 A.2d 1371 (D.C. 1996), as relevant here, involved a claim that the APA required publication of an internal manual specifying the process employees follow when verifying petitions for ballot referenda. This was rejected because “[t]he Board has published rules pertaining to the initiative process. They are codified at 3 DCMR Chapter 10 (1994).” Id. at 1378. In Barrick Goldstrike Mines, Inc. v. Whitman, 260 F. Supp.2d 28, 42-43 (D.D.C. 2003), the Court concluded that the EPA’s interpretation of the term “processed” was unreasonable.

the court must construe the complaint in the light most favorable to the plaintiff, assuming for purposes of the motion that the allegations of the complaint are true.

Vincent v. Anderson, 621 A.2d 367, 372 (D.C. 1993) (citations omitted).

Defendants also caption their Motion as one seeking summary judgment under Rule 56, in the alternative. Properly considered, however, this is not a motion for summary judgment, and should be evaluated pursuant to Rule 12(b)(6). This is a pre-discovery motion, filed in lieu of an Answer. See SCR-Civil 12(b). Substantively, it is an attempt to suggest that the Complaint is insufficient and should be dismissed based on questions of law. See Aronoff v. Lenkin Co., 618 A.2d 669, 684 (1992) (“the legal sufficiency of the complaint” is the issue in a Rule 12(b)(6) motion).

Presumably Defendants include their reference to Rule 56 because they attached judicial rulings and related materials filed in those actions, as well as public records. However, the DC Court of Appeals has concluded that attachments of this nature do not transform a motion to dismiss into a motion for summary judgment:

In filing her motion to dismiss, Buchanan attached a number of opinions and orders, as well as a brief and a transcript. We hold that these materials do not constitute "matters outside the pleading" requiring consideration of the motion as a motion for summary judgment under Super. Ct. R. of Civ. P. 56. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994) (documents filed in other state court proceedings not considered "matters outside the pleadings"); *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (administrative records and reports and matters of public record not "matters outside the pleadings"); *Nix v. Fulton Lodge No. 2*, 452 F.2d 794, 797-98 (5th Cir. 1972) (court opinions), *cert. denied*, 406 U.S. 946, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972); *Implement Serv., Inc. v. Tecumseh Prods. Co.*, 726 F. Supp. 1171, 1175-76 (S.D.Ind. 1989) (public records and documentary complaint exhibits). In addition, "[p]roceedings in related cases may be judicially noticed" and considered in the context of a motion to dismiss. *Cannon v. District of Columbia*, 569 A.2d 595, 597 n. 3 (D.C. 1990).

Smith v. Public Defender Svc., 686 A.2d 210, 212 (1996).⁸

Although Plaintiffs agree that many of the issues in the case are properly categorized as questions of law, nevertheless *some* factual development is appropriate in this case. Such matters as the procedures followed by DCRA prior to issuing the challenged letters, the means by which this action is requested, the precise scope of the practice, the precise scope of ratification of the practice, other policies and practices considered by DCRA in deciding to implement and in carrying out the challenged practice, Defendants' policies and practices concerning the conclusiveness of such letters in possible subsequent proceedings in any forum, and other matters may be relevant to the claims presented and to the relief sought. Obviously, this information is uniquely within the knowledge of the government. Pre-discovery disposition of this case is not appropriate.

VI. Conclusion

Defendants have failed to meet their burden to support pre-discovery summary disposition of this matter. Under the law of *res judicata*, which standards must be strictly applied, there can be no preclusive effect of the prior cases the government relies upon, which involve different parties and different issues. This matter involves a valid challenge to the exercise of governmental power in ways alleged to be unlawful and without authority, which directly impacted Plaintiffs. Serious questions exist as to the validity of the actions challenged. Such claims are properly before this Court.

⁸ Defendants' burden, of course, would not be meaningfully lessened in any event. "Summary judgment is an extreme remedy that is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law. The moving party has, of course, the burden of establishing that there is no issue of material fact, and all inferences that may be drawn from subsidiary facts must be resolved against him." Maddox v. Bano, 422 A.2d 763, 764 (D.C. 1980).

WHEREFORE, Plaintiffs respectfully request that this Honorable Court deny the relief requested in Defendants' Motion.

Respectfully submitted,

Zachary Wolfe (DC Bar No. 463548)
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Certificate of service

I certify that a copy of the foregoing was served via first class mail this 10th day of January, 2005, upon:

Andrew Saindon
Assistant Attorney General
441 4th Street, NW, 6th Floor South
Washington, DC 20001

Zachary Wolfe

**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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**ORDER DENYING DISTRICT OF COLUMBIA’S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Upon consideration of Defendants’ District of Columbia’s Motion to Dismiss, or in the Alternative, for Summary Judgment, Plaintiffs’ Opposition thereto, and the record herein, it is this _____ day of January, 2005, hereby:

ORDERED that Defendants’ Motion be, and the same hereby is, DENIED; and it is further

ORDERED that Defendants shall file an Answer to the Complaint within ten days of the date of this Order.

Judge Neal Kravitz

copies to:

Zachary Wolfe
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1725 I Street, NW, Suite 300
Washington, DC 20006

Andrew Saindon
Assistant Attorney General
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