

**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: none scheduled
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, by and through undersigned counsel and pursuant to SCR-Civil 56(a) and 12-I(k), respectfully request that this Honorable Court grant summary judgment in favor of Plaintiffs and enter the relief requested in the First Amended Complaint. A Memorandum of Points and Authorities in support of this motion is filed herewith, as is a statement of material facts as to which there is no genuine issue, and a proposed order consistent with the relief requested.

Pursuant to SCR-Civil 12-I, counsel for Defendants was contacted and declined to consent to the relief requested.

WHEREFORE Plaintiffs respectfully request that this Honorable Court grant the relief requested.

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, by and through undersigned counsel and pursuant to SCR-Civil 56(a) and 12-I(k), respectfully submit these points and authorities in support of their Motion for Summary Judgment.

**I. Question presented and standard of review**

This case challenges the authority of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) to issue determinations that the Rental Housing Conversion and Sale Act ("Sale Act"), D.C. Code § 42-3401.01 *et seq.*, is not applicable to a particular transaction. Plaintiffs assert that such determinations were without lawful authority because, *inter alia*, DCRA failed to follow procedures required by the Sale Act and the D.C. Administrative Procedures Act.

This Court has broad authority to "entertain claims for equitable relief from allegedly unlawful action by public officials." District of Columbia v. Sierra Club, 670 A.2d 354, 358 (D.C. 1996). 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) (citations and internal quotation marks omitted in original)).

Summary judgment may be entered for the plaintiff on the same standard as for a defendant, SCR-Civil 56(a); where the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,” SCR-Civil 56(c).

## **II. Introduction and factual background**

This case challenges actions at DCRA that undermine the rights of tenants to purchase their buildings. The Sale Act is remedial legislation designed to address the lack of affordable rental housing and to protect tenants in the event of a sale of their rented homes. D.C. Code § 42-3401.02. In particular, Title IV of the Sale Act creates rights for tenants in rental property that the owner seeks to sell or demolish. See D.C. Code § 42-3404 *et seq.* The law requires the owner to first negotiate with the tenants and offer them the opportunity to purchase the property on terms that are at least as favorable as those offered to other parties desiring to purchase the property. Id.

In an effort to circumvent tenant rights to purchase, some owners of rental properties have adopted a practice of transferring all but a small percentage of the ownership interest (often 5%), and asserting that such does not constitute a “sale” triggering tenant rights. This is commonly referred to as a “95/5” sale, although the ownership interest transferred can be as high as 99%.

DCRA followed a practice of issuing letters purporting to certify that such 95/5 sales were exempt from the tenant right to purchase provisions of the Sale Act. The letters were issued without any set of rules governing how requests for such letters would be submitted, what criteria would apply in considering such requests, or whether any interested parties would have an opportunity to submit information and argument. Accordingly, the issuance of such letters was in violation of specific requirements of the Sale Act as well as basic principles of administrative law under the DCAPA.

Such 95/5 sales, with DCRA imprimatur, had become common and were employed for each of the buildings at which Plaintiffs lived. See Compl. ¶¶ 34-37; Defendants' Answer ¶¶ 35-38 (admitting to the allegations in ¶¶ 34-37 of the Complaint). These letters were routinely signed by DCRA employee Linda Harried, and thus became commonly referred to as "Linda Harried letters."

On its face, a Linda Harried letter is determinative of substantive rights, including the tenants' rights under Title IV of 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]." (Exhibit 3.<sup>1</sup>) The letter regarding 1816 Kalorama Road (one of the buildings at issue in this case), for example, concludes that "[t]herefore, this transaction is exempt from the statutory requirements of Title IV of the Act." (Exhibit 3 at 2.)

As described next, the Sale Act expressly requires that any determination of the Act's applicability to a particular transaction occur under procedures established through formal rulemaking providing for a considered and deliberative process.

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<sup>1</sup> Exhibits are provided as attachments to Plaintiffs' Statement of Genuine Issues.

Because DCRA's issuance of Linda Harried letters occurred in an *ad hoc* manner and essentially upon request of the property owners, they were issued without lawful authority and are invalid. Moreover, the practice of issuing these letters developed in an improper and anti-democratic manner, in violation of the most basic principles of administrative law. When the practice was finally brought into the open for public comment, the Agency responded to the pressure and public criticism by ceasing the practice, which was followed by legislative correction of the practice as well. Each of these issues are taken in turn.

**III. DCRA's issuance of Linda Harried letters are invalid because the Agency did not follow the procedures required by the Sale Act.**

At the most basic level, the Linda Harried letters purport to determine the applicability of the Sale Act to a particular real estate transaction. The Sale Act itself specifies the conditions under which there may be an administrative determination of this question. Because those conditions were not satisfied, DCRA was without authority to make such a determination.

The Sale Act provides that owners that are "uncertain as to the applicability" of the law are considered "aggrieved" for purposes of seeking review from the Courts or the Mayor. D.C. Code § 42-3404.02. Such an owner may seek declaratory relief from the Courts, *id.* at § 42-3405.03, or, more to the point in this case, such an owner "may petition the Mayor for declaratory relief." *Id.* at § 42-3405.03a.

The Sale Act does not provide this authority to DCRA, but the Agency asserts that it may exercise this power based on a delegation of the Mayor's authority. *See* Def's Motion to Dismiss at 17 (*citing* Mayor's Order No. 84-8, 31 D.C. Reg. 494 (Feb. 3, 1984)).

- A. *The Sale Act requires a deliberative process in compliance with a formalized system established through rulemaking.*

The provision of the Sale Act that refers to administrative determination of the Act's applicability to a particular transaction expressly requires a formal, deliberative process. D.C. Code § 42-3405.03a. It specifies that “[u]pon 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.” Id.

To carry out the administrative functions and implementation of authorities under the Sale Act, the Agency was required to engage in formal rulemaking. See D.C. Code § 42-3405.01(a) (“The Mayor shall issue rules for the implementation of this chapter.”).

Accordingly, for there to be an administrative determination of the Sale Act's applicability to a specific transaction, there must be, at minimum, a showing of reasonable grounds and a hearing. The specifics of how reasonable grounds would be shown and the relevant procedures and criteria for the hearing should have been established through formal rulemaking.

- B. *DCRA's actions in issuing Linda Harried letters was anything but deliberative and according to rule.*

It is undisputed that the Linda Harried letters purport to certify that a specific transaction does not trigger tenant rights under the Sale Act. (Exhibit 3.)

It is undisputed that these letters were issued upon request of land owners. See Deposition of District of Columbia at 13 (“At the behest of certain owners, requests were made as to clarification regarding whether or not a particular transaction constituted a sale under the Rental Housing Conversion Act of 1980. And pursuant thereto those requests, letters were issued.”) (Exhibit 4).

It is undisputed that DCRA has never engaged in any formal rulemaking in relationship to determinations of whether or not the Sale Act is applicable to a particular transaction; nor does it even have written policies in this regard. See Interrogatory No. 3 and Response (“DCRA does not have any established policies and procedures in reference to the submission, consideration, and disposition of requests relative to the Sale Act.”) (Exhibit 1); Deposition of D.C. at 31, ln. 18-21, and 50-51 (Exhibit 4).

It is undisputed that DCRA, as an established practice, does not grant a hearing prior to making a determination of whether or not the Sale Act is applicable to a particular transaction. See Response to Request for Admission No. 6 (Exhibit 2).

It is undisputed that DCRA did not hold hearings prior to issuing any of the letters concerning the apartment homes of Plaintiffs. See Responses to Requests for Admission Nos. 7-9 (Exhibit 2).

It is undisputed that DCRA does not require documentation, statements under oath, or assurances of authenticity of any documents that are voluntarily submitted. See Deposition of D.C. at 17 (Exhibit 4).

It is undisputed that requests for issuance of Linda Harried letters were not discussed within DCRA, were not discussed outside of DCRA (except for communications with the requesting party), and were not subjected to fact-finding or any form of investigation. See id. at 19. Consistent with this general practice, it is undisputed that DCRA conducted no hearing, investigation, meeting, notification or other communication prior to issuing the letters concerning the 95/5 sale of Plaintiffs’ rental apartment homes. See Interrogatory Nos. 7, 9 and 11 and responses (Exhibit 1).

Accordingly, the steps required in order for the Agency to reach an administrative determination regarding the applicability of the Sale Act to a specific transaction – notably, a hearing and findings of fact based on procedures established by rulemaking, D.C. Code § 42-3405.03a, 42-3405.01(a) – were not met. The issuance of any letters that assert to determine that a particular transaction is exempt from the Sale Act was, therefore, unauthorized and invalid.

**IV. In addition and in the alternative, the issuance of Linda Harried letters was arbitrary and capricious and in violation of the DCAPA.**

In addition to the specific provision above from the Sale Act, the D.C. Administrative Procedures Act likewise requires that any determination of a law's applicability be pursuant to rule creating an appropriate, deliberative process. The DCAPA provides that:

On petition of any interested person, the Mayor or an agency, within their discretion, may issue a declaratory order with respect to the applicability of any rule, regulation, Council act or resolution, or statute enforceable by them or by it, to terminate a controversy (other than a contested case) or to remove uncertainty.

D.C. Code § 2-508.

However, this DCAPA provision also requires that “[t]he Mayor and each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.” Id.

As noted, Defendants have been clear that “DCRA does not have any established policies and procedures in reference to the submission, consideration, and disposition of requests relative to the Sale Act.” Response to Interrogatory No. 3 (Exhibit 1).

Accordingly, DCRA did not have the authority to respond to requests for determination of the applicability of the Sale Act to any particular transaction.

**V. This obligation to engage in formal rulemaking is good public policy, as well as clearly required by law.**

In response to this litigation and other public opposition to DCRA's practice of issuing Linda Harried letters, the D.C. City Council held hearings and passed legislation to clarify the law. This process resulted in bringing to light the details of DCRA's practices, explored serious concerns and opposition to those practices, and ultimately resulted in the cessation of the practice of issuing these letters.

The City Council held hearings on the Linda Harried letters and heard testimony from many concerned residents. Committee Report at 5-13 (Exhibit 5). The District's designee at its 30(b)(6) deposition discussed this process. He explained that, because the Agency never engaged in notice and comment rulemaking, the council hearings constituted the first opportunity for formal public comment by both citizens giving testimony and members of the Council. "And in light of all those concerns, the director took the action to agree to suspend the process [of issuing Linda Harried letters.]" Deposition of D.C. at 29-31 (Exhibit 5).

The Council concluded "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 (Exhibit 5). It passed legislation, among other purposes, "to clarify that declaratory orders are the sole means to determine rights and reliance upon any other form of determination shall not be afforded any weight." 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).

Had DCRA followed the law from the beginning, much anxiety, violations of tenant rights, and embarrassment D.C. residents suffer from seeing this thoughtless

“misinterpret[ation] by the very government officials charged with protecting tenant rights,” as the Council put it, could have been avoided. There would have been proposed rules establishing what processes and criteria would apply in a request for a determination of the applicability of the Sale Act to particular transactions. Public comment could have been offered, and in the end such requests would be subjected to a clear process that would at minimum include a hearing and application of defined criteria. The Linda Harried letters that were issued without following that required process are invalid.

## **VI. Conclusion**

The Sale Act is quite clear that determinations as to the applicability of that Act to a specific transaction are subject to administrative determination only by “petition,” at which point “[u]pon 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. The DCAPA likewise specifies that determinations of a law’s applicability to a transaction may occur only after the Agency has “prescribe[d] by rule the form for such petitions and the procedure for their submission, consideration, and disposition.” *Id.* at § 2-508. The letters at issue here constitute a determination that a particular transaction is exempt from the Sale Act, although no rules had ever been promulgated establishing how such a determination should be made. Accordingly, they are without authority and invalid.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter the relief requested in their Motion 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 6th day of October, 2005, upon:

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Zachary Wolfe