

No. 06-CV-1452

DISTRICT OF COLUMBIA COURT OF APPEALS

1420 CHAPIN STREET TENANTS ASSOCIATION, INC., et al.,

Appellants,

v.

CHARLES RUSSELL PROPERTIES, et al.,

Appellees

**On Appeal from the Superior Court of the District of Columbia,
Civil Division, Landlord and Tenant Branch**

**BRIEF AMICI CURIAE OF
THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA
LEGAL COUNSEL FOR THE ELDERLY AND
BREAD FOR THE CITY
SUPPORTING APPELLANTS**

Jan May (# 955732)
Rawle Andrews (# 436283)
Jennifer Berger (# 490809)
Legal Counsel for the Elderly
601 E Street, N.W.
Washington, DC 20049
Tel. (202) 434-2155

Vytas V. Vergeer (# 447121)
Rebecca Lindhurst (# 478623)
Bread for the City
1525 Seventh Street, N.W.
Washington, DC 20001
Tel. (202) 265-2400

Beth Mellen Harrison (# 497363)
Barbara McDowell (# 414570)
Legal Aid Society of the District of Columbia
666 Eleventh Street, N.W., Suite 800
Washington, DC 20001
Tel. (202) 628-1161

Counsel for Amici Curiae

INTEREST OF THE AMICI CURIAE

The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs.” Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal-services program in the District of Columbia. Housing law is among Legal Aid’s principal practice areas.

Legal Counsel for the Elderly (LCE) is a non-profit provider of legal services to D.C. residents aged 60 or older and an affiliate of AARP. More than 20% of LCE’s clients experience a legal problem involving their housing. Included among LCE’s services is the Alternatives to Landlord/Tenant Court for the Elderly Project, which integrates social work and legal strategies to prevent eviction of lower-income elderly tenants.

Bread for the City is a private, non-profit organization that offers free food, clothing, medical care, social services, and legal assistance to impoverished residents of the District of Columbia. On a monthly basis, Bread for the City’s programs serve more than 8,000 people, many of whom are homeless or at risk of losing their homes.

The Legal Aid Society, Legal Counsel for the Elderly, and Bread for the City have participated as counsel for a party or as *amici curiae* in other cases in this Court involving significant issues of housing law. *See, e.g., Giles v. Crawford Edgewood Trenton Terrace*, 911 A.2d 1223 (D.C. 2006); *Scarborough v. Winn Residential, L.L.P.*, 890 A.2d 249 (D.C. 2006); *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109 (D.C. 2005) (en banc). The *amici* have represented many low-income tenants who, like the tenants in this case, find their housing threatened by a proposed condominium conversion. Appellants have consented to the filing of this brief *amici curiae*; Appellees have not consented.

INTRODUCTION

In the District of Columbia, a party pursuing litigation involving an interest in real property is required by statute to file a *lis pendens* providing notice to any potential purchasers about the claims raised in the pending litigation. The filing of a *lis pendens* preserves the priority rights of the litigant's interest in the property over any subsequent purchasers. In the context of condominium conversion, tenants or a tenant association challenging a condominium conversion as wrongful assert two legally-protected interests in the property: the right to require an election on the owner's plans for conversion after receiving notice of those plans, and the right to vote in any such election, with the majority will of the tenants governing whether a conversion may proceed. Both of these rights are protected by the Rental Housing Conversion and Sale Act of 1980 and both are encompassed in the scope of the *lis pendens* statute, which broadly applies to any "interest in real property."

To ensure that the tenants' interests in the property are not sold or transferred out from under them, tenants and tenant associations challenging conversions must be allowed to file a *lis pendens* against an entire property. The filing of such a *lis pendens* ensures that any future purchasers of condominiums on the property will be bound to the results of the tenants' litigation. The need to bind any subsequent purchasers is heightened in the context of condominium conversion, because sales and transfers can occur rapidly while litigation remains pending. For this reason, tenants challenging a condominium conversion must be able to bind subsequent purchasers to ensure that the tenants can receive complete and meaningful relief, which may include the unwinding of condominium sales that have occurred, the restoration of all units in a building to rental housing, and the restarting of the conversion process. Without a *lis pendens* against the entire building, tenants will not be able to effectuate their statutory rights: to

request and vote in an election to determine whether *any* unit in the property may be converted. Filing a *lis pendens* against the entire building also is necessary in order to satisfy a critical goal of the *lis pendens* doctrine: to provide full information to potential purchasers about the property.

The conversion of rental housing to condominiums remains one of the greatest threats facing low- and moderate-income tenants in the District, resulting in the loss of thousands of affordable rental housing units during the past few decades. The rights provided to tenants and tenant associations under the Conversion and Sale Act ensure that tenants threatened by conversion in their building will have a voice in the decision-making process, enabling them to block or influence the structure of the conversion before it occurs. These statutory rights, when effectuated, empower tenants to preserve the shrinking stock of affordable rental housing in the District. In order to effectuate the rights guaranteed by the Conversion and Sale Act, however, tenants challenging a wrongful condominium conversion through litigation must be able to file a *lis pendens* covering the entire building at issue. In the instant case, the trial court erred by quashing the *lis pendens* as overbroad as applied to the entire building. Because the tenant association is challenging the conversion status of the entire building, not just the individual units still occupied by tenants, the tenants and tenant association must be allowed to file a *lis pendens* against the entire building in order to effectuate their rights under the Conversion and Sale Act.

ARGUMENT

I. Enforcement of Statutory Limits on Condominium Conversions Preserves Affordable Housing.

A. The District of Columbia Continues to Face an Affordable Housing Crisis.

Low- and moderate-income residents in the District of Columbia are confronting a dire and ever-growing shortage of affordable housing options. Rents have skyrocketed, resulting in a

loss of tens of thousands of affordable apartments across the city in the past two decades. The conversion of affordable apartments into condominiums has been a singular factor in fueling this affordability crisis. The District's Conversion and Sale Act allows tenants and tenant associations to play a critical role in stemming the tide of condominium conversion, by empowering tenants to block or control the contours of a conversion. In order to exercise these statutory rights fully and effectively, however, tenants and tenant associations challenging a wrongful condominium conversion through litigation must be empowered to file a *lis pendens* against an entire building. The filing of a *lis pendens* thus is critical to realizing the Conversion and Sale Act's goal of preserving affordable rental housing and tempering the ongoing affordability crisis in the District.

Rental units currently on the market in the District of Columbia are out of reach for the majority of the city's residents. As of 2003, the average gross monthly rent for an apartment in the District was \$840. Angie Rodgers, D.C. Fiscal Policy Institute, *Squeezed Out: The Worsening Shortage of Affordable Housing for Low Income DC Households* 14 (2005). At this price level, the average apartment is affordable to only 43% of the District's residents. *Id.* By comparison, in 1990, the average gross monthly rent was only \$440, a level that was affordable to 72% of District residents. *Id.*¹ Even these figures do not convey the state of the rental market today, because they include many units that are not available for rent, but that remain occupied by existing tenants. A telephone survey in December 2004 found that among advertised rental units on the market, the average monthly rent was \$1,241. Fannie Mae Foundation & The Urban Institute, *Housing in the Nation's Capital 2005*, at 35. The spiraling costs of rental housing mark the District of Columbia as one of the most expensive places to live in the nation. One recent

¹ These figures are adjusted for inflation to constant 2003 dollars. *Squeezed Out* 14.

study, focusing on fair market rents for two-bedroom apartments, ranked the District of Columbia as the most expensive jurisdiction among the 50 states, the District, and Puerto Rico. National Low Income Housing Coalition, *Out of Reach 2006*, available at http://www.nlihc.org/oor/oor_current/.

Increasing rents over the past two decades have resulted in a stark loss of affordable units from the available housing stock. In 1990, the District had 43,146 affordable apartments renting at below \$500 per month. *Squeezed Out* 3. By 2004, the number of affordable rental units had fallen to 26,900, a loss of 38% of the available stock. See Angie Rodgers, D.C. Fiscal Policy Institute, *New Census Data Show DC's Affordable Housing Crisis Worsening* 1 (2005). During this same period, the number of high-cost apartments—those renting at \$1,000 or more per month—increased by 64%. See *id.*; *Squeezed Out* 3. As a result of these changes in the rental market, there exists a growing gap between the number of families in need of affordable housing in the District and the number of units available to meet their needs. As of 2003, there were 23,900 fewer affordable rentals available than the number of low-income families in the District that needed these apartments. *Squeezed Out* 15-16. This affordability shortage has increased nearly eightfold since 1990. See *id.*

At the same time that rental housing prices have skyrocketed, the cost of purchasing a home in the District of Columbia also has increased dramatically. Between 1994 and 2005, the median sales price for a single family home in the District increased from \$121,000 to \$415,000, more than tripling. See Fannie Mae Foundation & The Urban Institute, *Housing in the Nation's Capital 2006*, at 35; *Housing in the Nation's Capital 2005*, at 20-21. The available housing stock in the District is changing, resulting in a loss of opportunities for affordable homeownership. The number of available homes in the District worth \$150,000 or less fell by

more than two-thirds between 1990 and 2003. *See Squeezed Out* 18. During the same time period, the number of high-cost homes worth \$500,000 or more nearly tripled. *See id.* 18-19.²

The effects of this affordable housing crisis are borne out in an increasing number of District residents struggling with high rent burdens. As of 2004, more than 37% of District of Columbia residents were “rent burdened,” meaning they were paying more than 30% of their income for rent. *New Census Data* 2.³ More than 17% were “severely rent burdened,” paying more than 50% of their income for rent. *Id.* Figures also show that these rent burdens fall disproportionately on low-income households, many of which are headed by elderly individuals or individuals with disabilities. *Squeezed Out* 2; *see* AARP Public Policy Institute, *Across the State: Profiles of Long-Term Care and Independent Living* (7th ed. 2006) (finding that 58% of District residents 65 or older are renters who pay 30% or more of their income for housing).

B. Rising Numbers of Condominium Conversions Have Fueled the Affordable Housing Crisis.

Chief among the many factors driving the affordable housing crisis in the District has been the explosive growth in the condominium market. Condominium conversion removes affordable apartments from the market and replacing them with unaffordable homeownership units, resulting in displacement of low- and moderate-income families. A sustained increase in the number of condominium conversions in recent years has heightened the critical role played by tenants and tenant associations in preserving affordable housing in the District, through the exercise of their statutory rights to block or control conversions. Protecting the tenants’ role in the conversion process, through litigation under the Conversion and Sale Act accompanied by

² These figures are adjusted for inflation to constant 2003 dollars. *Squeezed Out* 18.

³ Paying 30% or less of income for rent is widely used by federal housing programs as an index of affordability. *See, e.g.*, 42 U.S.C. 1437f(o)(2)(A).

the filing of *lis pendens*, is critical to stemming the tide of the affordable housing crisis in the District

In recent years, thousands of apartment units, many previously rented at affordable rates, have been converted to condominiums. Between 1990 and 2000, there were several thousand new condominiums added to the market in the District as a result of conversions or similar changes in stock. See Fannie Mae Foundation & The Urban Institute, *Housing in the Nation's Capital 2003*, at 27. The rate of conversion has increased markedly in recent years. There were 600 units converted from apartments to condominiums in the District in 2004. *Housing in the Nation's Capital 2005*, at 36. One year later, in 2005, the number of condominium conversions had nearly quadrupled to 2,300. *Housing in the Nation's Capital 2006*, at 33. By the end of 2005, with the increasing rate of conversion, condominiums accounted for more than 25% of all homeownership units in the District. Fannie Mae Foundation & NeighborhoodInfo D.C., D.C. *Housing Monitor* 8 (Summer 2006).

There is a clear link between the loss of affordable housing units on the market in recent decades and the rise in the number of available condominiums. Experts agree that a substantial number of affordable housing units in the District of Columbia have been lost because of condominium conversion. See Comprehensive Housing Strategy Task Force, *Homes for an Inclusive City: A Comprehensive Housing Strategy for Washington, DC* 16 (2006); *Housing in the Nation's Capital 2005*, at 6; Washington Area Housing Partnership, *Toolkit for Affordable Housing Development* 14, 34 (2005). During the same period that the city lost approximately 16,000 affordable housing units, between 1990 and 2005, it gained more than 5,000 condominium units through conversion. Condominium conversion has played a significant role

in this loss of affordable housing options, and it remains “perhaps the greatest threat to the existing stock of affordable rental units.” *Homes for an Inclusive City* 39.

The new condominium units being added to the market also do not offer affordable options for homeownership. Between the end of 1995 and the end of 2005, the median sales price for a condominium unit in the District rose from \$159,000 to \$390,000. *D.C. Housing Monitor* 5.⁴ In recent years, these prices have risen at a level and rate close to single family home sales prices. *See Housing in the Nation’s Capital 2005*, at 29-30. Indeed, condominiums now account for an increasing share of the luxury housing market in the District. In 2000, condominiums were only one-tenth of new home sales above \$400,000; by 2004, condominiums were three-tenths of such sales. *Id.* at 29-30. This market rush surrounding condominium conversions has fueled the affordable housing crisis, by draining the District of affordable rental units without providing any suitable replacement housing.

C. Enforcement of the Rental Housing Conversion and Sale Act Preserves Affordable Rental Housing by Limiting and Controlling Condominium Conversions.

The Rental Housing Conversion and Sale Act of 1980 guarantees tenants the right to participate in and, in some cases, block an owner’s decision to convert a rental property to condominiums. Before converting any building containing one or more rental units into condominiums, the building owner is required to provide notice and an opportunity to call for an election by the current tenants to approve or disapprove of the planned conversion. *See* D.C. Code § 42-3402.03(a) (2001). If a tenant organization or an individual tenant requests an election, then the election must be conducted, *see id.* § 3402.03(b)-(h), and the building cannot be converted unless more than 50% of the tenants approve. *See id.* § 42-3402.03(i). Once the

⁴ These figures are adjusted for inflation to constant 2005 dollars. *D.C. Housing Monitor* 5.

owner has requested conversion and provided appropriate notice, each tenant holds two legally-protected interests affecting the entire building: the right to require that an election be held in the first place and the right to vote in any such election. The Conversion and Sale Act reflects a legislative judgment that tenants should have a voice—both individually and as a group—in deciding the fate of the entire building, not just their own individual units.⁵

Even after a unit has been converted to a condominium, the tenants' rights in the conversion process are preserved. If a unit has been converted but continues to be used as rental housing, then any new tenant has the right to receive notice of the unit's condominium status before moving in. *Id.* § 42-3402.02. Failure to provide this notice can result in the owner being required to start the conversion process anew. *See id.* The only way for a tenant to lose the right to request and vote in a conversion election is to move into a converted unit with full and fair notice of its status. Without this knowing waiver, the tenants' statutory rights are preserved.

The District of Columbia Council enacted the Conversion and Sale Act, with these strict limits on the conversion of condominiums, in order to preserve affordable housing. The Council recognized that the conversion of apartments into condominiums results in a loss of affordable rental housing stock. *See id.* § 42-3401.01(a)(3)-(a)(4); *see also* Comm. on Hous. & Econ. Dev., 3rd Sess., *Report on Bill 3-222, "Rental Housing Conversion & Sale Act of 1980"* 2 (1980). Low-income tenants, who cannot afford to pay the costs to remain in their units after conversion, suffer disproportionately from the resulting displacements. *See* D.C. Code § 42-3401.01(a)(3)-

⁵ Once a building is converted, the Act grants tenants another interest which inheres in the tenant's individual unit: a right of first refusal to purchase the unit on terms as least as favorable as those offered to the general public. *See* D.C. Code § 42-3402.06. In addition, an elderly or disabled tenant with a qualifying income has the right to remain in his or her unit as a tenant. *See id.* § 42-3402.08.

(a)(4); *Report on Bill 3-222*, at 2-3.⁶ The Act’s provisions surrounding condominium conversion attempt to restrict the conversion of rental property, in order to prevent the displacement of tenants and preserve affordable rental housing. *See* D.C. Code §§ 42-3401.01, -3401.02. The primary mechanism for accomplishing this goal is the election process itself, which places the final decision on whether to convert a building in the hands of a majority of the current tenants. *See Report on Bill 3-222*, at 3. The election process ensures that tenants “have a voice in the decision whether or not their rental housing should be converted” and “strengthen[s] the bargaining position of tenants” in this decisionmaking process, by granting them an absolute veto over any conversion plan. D.C. Code §§ 42-3401.01(a)(7), 42-3401.02(1). To ensure strong enforcement of these statutory protections, the Council broadly authorized any aggrieved tenant to file a civil action or to petition the Mayor to enforce any right under the statute. *Id.* §§ 42-3405.03, 42-3405.03a.

The Conversion and Sale Act also is intended “to encourage the formation of tenant organizations.” *Id.* § 42-3401.02(6). The statute accomplishes this goal by vesting rights not only in individual tenants, but also in tenants acting as a group through a tenant organization. Tenants requesting an election on conversion may do so by forming a single tenant organization to make the request. *See id.* § 42-3402.03(b). The tenant organization then is authorized to conduct the election and notify the owner and Mayor of the results. *See id.* § 42-3402.03(c), (f). Finally, an aggrieved tenant organization is authorized to file suit or to petition the Mayor to enforce any right guaranteed under the statute. *See id.* § 42-3405.03, -3405.03a.

⁶ The Council recognized a two-fold risk of displacement: low-income tenants will be displaced from their existing units, and then may be displaced from the District entirely if they fail to find suitable replacement housing. *See Report on Bill 3-222*, at 2-3.

In the context of condominium conversions, the rights granted to tenants under the Conversion and Sale Act operate to preserve affordable housing in at least two respects. First and foremost, if a conversion proposal will result in affordable rental units being converted to market-rent condominiums, tenants may vote to block the plan from being implemented. As this Court has recognized, the Act effectively operates as a ban on all conversions to condominiums, with an exception only where a majority of tenants vote to approve a conversion plan. *See Hornstein v. Barry*, 560 A.2d 530, 535 (D.C. 1989). By preventing conversions from occurring, tenants often are able to preserve affordable rental housing.

Second, and perhaps not as obvious, tenants, particularly those able to obtain counsel, can use their bargaining power to ensure that any conversion proposal will include elements that preserve affordable housing. Tenants can influence the structure of a conversion by trading their votes of approval for concessions by the owner. A common arrangement calls for the tenants to approve conversion in exchange for the owner offering the condominiums for sale to existing tenants at below-market rates. Alternatively, the tenants might negotiate for a certain number of apartments to be set aside and preserved as affordable rental housing, while the rest of the building is converted to market-rate condominiums. An owner also could opt to convert to a nonprofit cooperative, with the units reserved for low- and moderate-income families.⁷ In some cases, an owner considering conversion instead might opt to sell the entire building to the tenants, who in turn can partner with developers to preserve the building as affordable rental or homeownership units. Under any of these scenarios, enforcement of the Act results in the preservation of affordable housing.

⁷ Under such a conversion plan, the owner would be eligible to apply to the Mayor for an exemption from the provisions of the Conversion and Sale Act. *See* D.C. Code § 42-3402.02(b).

II. *Lis Pendens* Must Be Available to Tenants Challenging Condominium Conversions to Ensure Meaningful Enforcement of the Tenants' Statutory Rights.

A. Under District Law, the Filing of a *Lis Pendens* Is Required to Protect a Party's Interest in Real Property While Litigation Is Pending.

A party to litigation that asserts any interest in real property in the District of Columbia must record a notice of the pendency of the action, in the form of a *lis pendens* with the Recorder of Deeds, to ensure that any subsequent purchaser will be bound by the outcome of the litigation. This requirement to record a *lis pendens* is statutory. *See* D.C. Code § 42-1207. It supersedes and is somewhat contrary to the common law doctrine of *lis pendens*, which bound all subsequent purchasers to the outcome of any pending litigation on a theory that the mere filing of the lawsuit provided constructive notice. Under the common law, a party who purchases real property involved in pending litigation takes the property “subject to the parties' rights as finally determined [in the litigation] and [i]s conclusively bound by the results of the litigation.” *Lewis v. Jordan Investment, Inc.*, 725 A.2d 495, 500-01 (D.C. 1999). The rights and interests of a plaintiff asserting a claim in pending litigation take priority over the rights and interests of the subsequent purchaser. The common law doctrine thus prevents a subsequent purchaser from claiming status as a bona fide or good faith purchaser, even when the purchaser has no actual or record notice of any pending litigation. *See id.*

The common law doctrine led to unjust results, in which parties with no actual notice, no record notice, and no reasonable means for obtaining actual or record notice of a pending lawsuit were held to its results. It was in apparent reaction to such a decision from this Court, *Lewis v. Jordan Investment, Inc.*, that the District of Columbia Council enacted the new statutory filing requirement in 2000. *See Trustee 1245 13th St., NW #608 v. Anderson*, 905 A.2d 181, 185 (D.C. 2006). The *lis pendens* statute preserves the common law, but eliminates the potentially unfair

rule of constructive notice. By requiring a filing with the Recorder of Deeds, the statute provides a transparent and accessible mechanism for a prospective purchaser to review any pending claims against the property. The primary purpose of this change in the law was to ensure proper notice to good faith, bona fide purchasers of real property, while preserving the priority rights of plaintiffs with pending claims involving the property. *See id.*

For the party engaged in litigation who claims an interest in real property, *lis pendens* now is the only means available for ensuring that the party's rights and interests in the property are not lost before the litigation can be resolved. Real property always remains vulnerable to subsequent sales, transfers, or encumbrances while litigation is pending. This Court recognized this risk in holding that a denial or revocation of *lis pendens* is an immediately appealable order. *See McAteer v. Lauterbach*, 908 A.2d 1168, 1170 (D.C. 2006). If a *lis pendens* has not been recorded or has been revoked, a subsequent purchaser will take the property as a good faith, bona fide purchaser with priority rights to the property.⁸ The filing of a *lis pendens* preserves the priority rights of the party engaged in litigation over any subsequent purchaser and is essential to protecting that party's rights while litigation remains pending.

B. The Filing of a *Lis Pendens* Is Necessary to Ensure That Tenants Challenging a Wrongful Conversion Can Enforce Their Statutory Rights and Obtain Meaningful Relief.

Like all other plaintiffs asserting an interest in real property in the District, tenants challenging a condominium conversion are required to file a *lis pendens* to ensure that any subsequent purchasers will be bound by the results of the litigation. In the context of condominium conversion, the *lis pendens* may be based on two legally-protected "interests in

⁸ Indeed, in the wake of the statutory reform, it is unsettled whether even actual notice of pending litigation will bind a subsequent purchaser without the filing of a *lis pendens*. *See 1st Atlantic Guaranty Corp. v. Tillerson*, 916 A.2d 153, 157-58 (D.C. 2007) (declining to reach this issue).

real property” held by the tenants. D.C. Code § 42-1207. First, the tenant, acting individually or through a tenant organization, has the right to require an election on the owner’s plans for conversion after receiving the statutorily-required notice of those plans. *Id.* § 42-3402.03(a)-(c). Second, once an election is called, each tenant has the right to vote in that election, with a majority of the tenants determining whether conversion will proceed. *Id.* § 42-3402.03(c)-(d), (i)-(j). Unless all subsequent purchasers of condominium units on the property at issue are bound by the results of tenants’ litigation challenging a conversion, the tenants risk losing these interests in the property before the litigation is resolved.

The *lis pendens* statute covers claims such as those asserted by the tenant association in the instant case. The scope of interests protected by the *lis pendens* statute is broad, encompassing not only title and security claims, but also any “other interest in real property.” *Id.* § 42-1207(a). The legal term “interest” is “the most general term that can be used to denote [] property,” encompassing not only title or estate, but also “any right in the nature of property.” *Black’s Law Dictionary* 950 (4th ed. 1957). Proponents of statutory reform of *lis pendens* in the District of Columbia suggested using this type of broad language to ensure that a broad range of property interests, including leasehold interests, would be protected, as they were under the common law. *See, e.g.,* William Douglas White, *Lis Pendens in the District of Columbia: A Need for Codification*, 36 Cath. U. L. Rev. 703, 707-08, 713 (1987) (proposing a *lis pendens* statute to apply to litigation “concerning real property or affecting the title or the right of possession of real property”). The statutory term “interest in real property” is expansive enough to encompass statutory rights provided to tenants and tenant associations under the Conversion and Sale Act, including those asserted in the instant case.

In many respects, the importance of filing a *lis pendens* while litigation remains pending is an issue of timing. The greater the risk that real property may be sold or transferred before litigation can be resolved, the greater the need for a *lis pendens* to protect the rights of the party claiming an interest in the property through that litigation, to preserve that party's priority rights over any subsequent purchaser. In the context of condominium conversion, the need for the protection of *lis pendens* is heightened precisely because transfers of rights and interests can occur rapidly.

The Conversion and Sale Act contains deadlines contemplating that condominium conversions will proceed quickly to conclusion. Once an owner has given notice of the intent to convert a building, any election must be requested and conducted within 60 days. *See* D.C. Code § 42-3402.03(c). If the conversion is approved by election, it can be certified immediately. *See id.* § 42-3402.03(i). Within a period of two months of the tenants' receiving initial notice of the owner's plans to convert, the conversion may be final. At that point, the owner can proceed immediately with offering any vacant units for sale to the general public as condominiums. Certification of conversion also immediately triggers the owner's right and duty to offer currently occupied units for sale to the tenants living in them. *See* D.C. Code § 42-3402.06; 14 D.C.M.R. § 14-4705.5 (1991). Following another 60-day period, the owner can proceed with offering these condominiums to the general public as well. *See id.*

For tenants seeking to challenge any aspect of a condominium conversion, the time between when the tenants may become aware of their rights and interests and when those same rights and interests can be lost to a subsequent sale or transfer is very short. Tenants seeking to challenge the notice of conversion or the steps leading up to the election have a maximum of 60 days before conversion may be finalized and sales of units can begin. Tenants seeking to

challenge the election itself cannot do so until the election has been held, at which point certification of conversion and the sale of units may begin at any time. Finally, tenants claiming that they moved into a converted unit without proper notice of the units' status, or that their landlord initiated conversion without providing proper notice, may find their units put up for sale at any time and without any notice prior to the tenants receiving a 120-day notice to vacate their units. Events on the ground easily can overtake tenants' efforts to enforce their statutory rights through litigation. Because litigation challenging a conversion seldom will not be resolved before an owner begins efforts to sell units as condominiums, tenants need the protection of a *lis pendens* against subsequent purchasers.

The need for tenants to act quickly to protect their rights from subsequent purchasers is exacerbated further by the quick turnaround of housing properties for sale in the current market in the District. During the past few years, condominiums and homes for sale in the District of Columbia have spent an average of just over 30 days on the market before being sold. *See* Washington Area Housing Partnership, *Metropolitan Washington Annual Regional Housing Report* 9 (2006). Tenants attempting to use the legal system to prevent the conversion and sale of apartments in their building must act quickly in this dynamic market.

Responding quickly to a proposed or attempted conversion may be particularly difficult for low- and moderate-income tenants in the District, who face a number of other obstacles to enforcement of their statutory rights. First and foremost, legal counsel is not readily available, particularly for low-income individuals who cannot afford to pay an attorney. It is estimated that less than 10% of the civil legal services needs of the District's residents currently are being met. *See* D.C. Bar Foundation, *Civil Legal Services Delivery in the District of Columbia* 1-2 (2003). Tenants may have trouble proceeding on their own, without the assistance of counsel, because of

barriers that include low literacy skills, limited English proficiency, and elderly or disabled status. In the District, 37% of residents have “Level I” literacy skills, meaning they cannot read well enough to fill out an application form or read a simple story. *See D.C. Learns, Adult Literacy Skills in Washington D.C.* 1 (2006). In addition, 7% of residents are considered limited English proficient, because they report speaking English less than “very well.” Brookings Institution, *Polyglot Washington: Language Needs & Abilities in the Nation’s Capital* 1, 3 (2004). Approximately one-third of low-income households in the District are headed by an individual who is elderly or who has a physical or mental disability, presenting additional challenges. *Squeezed Out* 10, 12. All of these obstacles may prevent low- and moderate-income tenants from being able to mobilize quickly enough to preserve their rights in the face of an imminent conversion.⁹

The attempted conversion of the Embassy Apartments, a scenario in some respects parallel to the facts in the instant case, illustrates how quickly tenants’ rights under the Conversion and Sale Act can be threatened by subsequent purchasers.¹⁰ Within the first four months of the owner’s initial notice to tenants, the owner already had sold seven or eight units as condominiums to existing tenants. *See District of Columbia v. 1613 Harvard Ltd. P’ship*, Civil

⁹ When the Conversion and Sale Act was under consideration in 1980, the Department of Housing and Community Development noted its concern that developers seeking to convert units would target buildings occupied by low- and moderate-income tenants, because of the perception that “these tenants are less sophisticated regarding their rights.” District of Columbia Dep’t of Hous. & Cmty. Dev., 3rd Sess., *Memorandum: Bill-322, “Rental Housing Conversion & Sale Act of 1979”* 1 (1980). This perception may be based on the reality of the many barriers that low- and moderate-income tenants face to realizing their statutory rights.

¹⁰ In Embassy Apartments, the tenants alleged that the owner had failed to perfect its conversion in a timely manner and failed to provide statutorily-mandated notices to new tenants who subsequently moved into the property. *See District of Columbia v. 1613 Harvard Ltd. P’ship*, Civil Action No. 05-2739, Order & Memorandum of Points and Authorities, slip op. at 5-6 (D.C. Super. Ct., Oct. 28, 2005). The trial court ultimately ruled in the tenants’ favor and the owner appealed, but this Court dismissed the appeal after argument for lack of jurisdiction. *See 1613 Harvard Ltd. P’ship v. District of Columbia*, No. 05-CV-1338 (D.C. March 22, 2007).

Action No. 05-2739, Order & Mem. 5 (D.C. Super. Ct., Oct. 28, 2005). Although the tenants acted quickly to enforce their rights and were fortunate enough to convince the District of Columbia government to intervene on their behalf four months later, they still were not able to prevent these subsequent sales and transfers. *See id.* at 4-5.¹¹ As a result, the rights of subsequent purchasers became entwined in the litigation. Because the risk is great in condominium conversions that the property may be sold or transferred before litigation can be resolved, a *lis pendens* is vital to preserving the tenants' statutory rights and interests.

In another case in which tenants challenged an attempted condominium conversion, *1388/1390 Tewkesbury Pl, NW Tenants' Association v. Nuyen*, Civil Action No. 05-2739 (D.C. Super. Ct.), the tenants were successful in obtaining a *lis pendens*, which became necessary to protect their rights as the owner proceeded with selling most of the units on the property.¹² Despite the tenants' promptness in finding counsel, filing suit, and securing a *lis pendens* within months of their initial notice of the owner's attempt to convert, 37 of the 46 units in the two buildings at issue were sold to third-party purchasers, placing the tenants at risk of eviction. *See* Mem. of Law for Def.'s Mot. for Discharge of *Lis Pendens* and for Summ. J. at 2-3, *1388/1390 Tewkesbury Pl, NW Tenants' Ass'n* (No. 05-2739). The owner then filed a motion with the trial court to quash the *lis pendens*, in order to proceed with sales unimpeded, but the trial court denied this request. *See id.* Ultimately, the court found that the notice provided to the tenants was not sufficient, rendering the attempted conversion of the buildings defective. The filing of a *lis pendens* in the *Tewkesbury Place* case will allow the trial court to bind subsequent purchasers

¹¹ Condominium sales finally stopped when the District government issued a cease and desist order to the owner, a remedy that appears to be invoked only on rare occasions. *See 1613 Harvard Ltd. P'ship*, slip op. at 5; *see also* D.C. Code § 42-3405.06(b).

¹² The tenants in *Tewkesbury Place* challenged the notice provided to them indicating the owner's intent to convert to condominiums.

to its decision, as the court proceeds with determining the rights of third-party purchasers of condominium units at the property.

As both the *Tewkesbury Place* and Embassy Apartments conversion illustrate, sale of condominium units quickly can threaten to overtake tenants' rights. To understand the significance of this timing for tenants opposing conversion, it is important to remember that the tenants' legally-protected interests in the conversion process run not only to their own individual units, but to the building as a whole. The Conversion and Sale Act guarantees that tenants can have a voice in whether *any* unit in their building is converted to a condominium. For tenants to be able to realize the statute's goal of preserving affordable housing, they must be able either to block the conversion process altogether or to influence the structure of the conversion before it occurs. Once a single condominium in the building is sold, the tenants' rights and their concomitant power to preserve affordable housing will be lost or significantly eroded.

For this reason, it also is critical that tenants challenging a wrongful condominium conversion be permitted to file a *lis pendens* against the entire property. Because tenants challenging a condominium conversion have a legally-protected interest in whether any unit in the building is allowed to convert, a *lis pendens* against the entire property is appropriate. *Cf. Interlaken Serv. Corp. v. Interlaken Condo. Ass'n*, 222 Wis. 2d 299, 306-10 (1998) (upholding the filing of a *lis pendens* against an entire building in breach of contract action against condominium association, where state law provided that any judgment would run against all individual units in the building). While the final order in any litigation will bind the owner and ensure that further sales of condominium units are halted, only a *lis pendens* can bind non-parties, including any purchasers of condominium units during the pendency of the suit.

The need for tenants to bind any subsequent purchasers to the results of litigation challenging a conversion is illustrated further by considering the relief potentially available to prevailing tenants. Tenants may be entitled to declaratory relief invalidating a conversion and injunctive relief requiring that any steps towards conversion be reversed. *See* D.C. Code § 42-3405.03. This would include the unwinding of any sales that have occurred and an order requiring the owner to begin the conversion process anew. The tenants in the instant case seek precisely this type of relief. App. 25. It is only by reversing the entire conversion process and restoring all units to rental apartments that tenants challenging a wrongful conversion will be able to realize their statutory rights: to request and vote in an election to determine whether *any* unit in the property may be converted. Thus binding any subsequent purchasers to the results of the litigation through a *lis pendens* filed against the entire building is critical to ensuring complete and meaningful relief for the tenants.

Denying tenants the ability to file a *lis pendens* against an entire building also creates perverse incentives for owners considering or attempting to convert their buildings. If tenants can file a *lis pendens* only as to the units they currently occupy, then owners will have incentives to empty as many units as possible prior to starting the conversion process. Although the remaining tenants may seek to challenge a wrongful conversion, those tenants will not be able to bind purchasers of any vacant units in the course of any litigation. Leaving this gap in the *lis pendens* would allow an owner to proceed with a wrongful conversion with some impunity, even while litigation is pending, knowing that any court decision will be unable to unwind sales that already have occurred. In the instant case, the tenants allege that the owner has engaged in precisely this type of conduct, using illegal and harassing means to force tenants to vacate their units, so that the owner can proceed with the sale of those units. App. 11, 21-22.

The Embassy Apartments and Tewkesbury Place cases also illustrate the need for a *lis pendens* as to an entire building to ensure that a court invalidating a wrongful conversion can provide meaningful relief to prevailing tenants. Ultimately, the trial courts in those cases determined that conversion of the buildings to condominiums had been improper. *See 1613 Harvard Ltd. P'ship*, slip op. at 19; Transcript of Proceedings, *1388/1390 Tewkesbury Pl., NW Tenants' Ass'n* (Jan. 24, 2007). The import of such rulings is that the conversion of the building at issue to condominiums and all subsequent sales of condominiums would be invalid. Unless a *lis pendens* was filed, however, any subsequent purchasers would be expected to claim that they were bona fide purchasers, not bound by the trial court decision. If the subsequent purchasers prevailed on this point and were not bound to the trial court's order, then the ability of the remaining tenants to unwind sales and revert the entire building to rental housing would be seriously impaired. Without a *lis pendens* as to the entire building, tenants challenging a wrongful conversion under these circumstances could be denied comprehensive relief.

Allowing tenants challenging a wrongful condominium conversion to file a *lis pendens* against the entire property thus is consistent with the principal purpose of the *lis pendens* doctrine itself: to ensure that a prevailing plaintiff in pending litigation will receive a meaningful remedy. *See McAteer*, 908 A.2d at 1170 (recognizing the "risk that property will be transferred before litigation affecting an interest in it is concluded" as the principal rationale for the doctrine). Tenants have the right to require an election prior to conversion and to block a conversion of any units in the building if a majority of the tenants do not approve. Because their rights and legal remedies concern the status of the entire building, the trial court must be able to order relief as to the entire building and to bind any subsequent purchasers. Only the filing of a *lis pendens* against the entire property makes this kind of comprehensive relief possible.

Permitting a *lis pendens* to be filed against the entire building is also necessary in order to satisfy another critical goal of the *lis pendens* doctrine: to provide full information to potential purchasers about the status of the property. A legal challenge to a condominium conversion filed by a single tenant, if successful, has the power to block the conversion and sale of any units in the building and to unwind any sales that already have occurred. Purchasers of any condominium unit in the building—not just those currently occupied by tenants—should be advised of this potential liability. Only if a *lis pendens* is filed as to the entire building will the statute satisfy its purpose of providing potential purchasers with fair notice of all pending claims.

CONCLUSION

For the foregoing reasons, the order of the trial court quashing the *lis pendens* should be reversed and the case should be remanded to the trial court for further proceedings.

Respectfully submitted,

Beth Mellen Harrison (# 497363)
Barbara McDowell (# 414570)
Legal Aid Society of the District of Columbia
666 Eleventh Street, N.W., Suite 800
Washington, DC 20001
Tel. (202) 628-1161

Jan May (# 955732)
Rawle Andrews (# 436283)
Jennifer Berger (# 490809)
Legal Counsel for the Elderly
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2155

Vytas V. Vergeer (# 447121)
Rebecca Lindhurst (# 478623)
Bread for the City
1525 Seventh Street, N.W.
Washington, D.C. 20001
Tel. (202) 265-2400

Dated: June 8, 2007

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief Amici Curiae of The Legal Aid Society of the District of Columbia, Legal Counsel for the Elderly, and Bread for the City to be delivered by first-class mail, postage prepaid, the 8th day of June, 2007, to:

Antonia K. Fasanelli
Anne M. Smetak
Washington Legal Clinic for the Homeless
1200 U Street, NW, Third Floor
Washington, DC 20009

Counsel for Appellant

David H. Cox
Robert C. Cooper
Catherine H. Finn
Jackson & Campbell, P.C.
1120 20th Street, N.W.
South Tower
Washington, DC 20036

Counsel for Appellee

Beth Mellen Harrison