DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1338

1613 HARVARD LIMITED PARTNERSHIP,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

On Appeal from the Superior Court of the District of Columbia

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BRIEF OF AMICI CURIAE THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, THE WASHINGTON LEGAL CLINIC FOR THE HOMELESS, AND TENAC IN SUPPORT OF APPELLEE

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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 protect and 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. Each year, Legal Aid lawyers handle some 10,000 requests for assistance, represent some 500 clients in judicial and administrative proceedings, and provide in-person counseling to more than 2,000 individuals in the areas of landlord-tenant law, family law, and public benefits.

The Washington Legal Clinic for the Homeless seeks to use law and advocacy to meet the needs of individuals who struggle with homelessness and poverty. It provides legal services to clients who are homeless or at risk of becoming homeless. It also engages in systemic advocacy, litigation, and law reform to improve the programs, benefits, resources, and opportunities available to such individuals. An integral part of its work is assisting clients in securing and retaining appropriate, stable housing opportunities.

TENAC is a public service organization dedicated to tenant interests, tenant rights, and support for rent control in the District of Columbia. TENAC, now in its fifteenth year, is the District's only city-wide tenants' organization. Its mission is to assist tenants through education, information, and legislative advocacy. TENAC has helped to establish scores of tenant associations, and seeks to have a tenant association in every rental building in the District, as there is in the building at issue in this case.

The *amici curiae* often assist low-income tenants who are threatened with displacement as property owners attempt to convert their rental buildings to condominiums or otherwise capitalize on the increasing demand for high-end housing. In *amici*'s view, the tenant

protections established by the Condominium Act of 1976, and strengthened by the Rental Housing Conversion and Sale Act of 1980, are even more important to tenants today than when they were enacted. As a recent report prepared for the Fannie Mae Foundation observed with respect to the local housing market, "[a] substantial number of rental properties that have long provided affordable shelter for low- and moderate-income residents are being sold to new investors, renovated as luxury housing, or converted to condominiums." *Housing in the Nation's Capital* 6 (2005).[1] Earlier this year, the Mayor's Comprehensive Housing Strategy Task Force found that four times as many housing units were converted to condominiums in the first half of 2005 than in all of 2004, and "[t]here is no sign this trend will abate soon." *Homes for an Inclusive City: A Comprehensive Housing Strategy for Washington, D.C.* 13 (2006).[2]

STATEMENT

The District of Columbia Council enacted the Rental Housing Conversion and Sale Act of 1980 (1980 Act), D.C. Law 3-86, to stem a crisis in affordable housing caused, in significant part, by the conversion of rental buildings into condominiums. *See id.*, § 101 (D.C. App. 82-86). Among the 1980 Act's purposes were "[t]o discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of laws." *Id.*, § 102(a) (D.C. App. 86). To effectuate that purpose, the Council strengthened the tenant protections against displacement that existed under the Condominium Act of 1976 (1976 Act), D.C. Law 1-89. One of the Council's accommodations to the interests of property owners

[1] The report is available at http://www.knowledgeplex.org/kp2/cache/documents/127805.pdf.

[2] The report is available at http://www.dcchstaskforce.org/docs/CHSTFfinalreport4606.pdf.

was a limited exemption (1980 Act, § 210) for condominium conversion applications filed before the effective date of the 1980 Act, leaving the 1976 Act in place for those applications.

This case concerns a property owner's attempt -- a quarter-century after the enactment of the 1980 Act -- to deny its tenants the protections of either the 1980 Act or the 1976 Act. The trial court correctly concluded that the property owner could not do so.

1. Shortly before the 1980 Act became effective on September 10, 1980, the Jaffee Group (Jaffee), which was then the owner of 1613 Harvard Street, N.W., submitted to the D.C. Department of Housing and Community Development (DHCD) an incomplete application to convert the building to a condominium. On August 7, 1980, Jaffee received DHCD's notice of filing of the application. As a consequence of Jaffee's receiving that notice before the 1980 Act's effective date, its application was eligible for treatment under the 1976 Act, as provided by the "grandfather" provision of the 1980 Act. *See* 1980 Act, § 210 (D.C. App. 103-104) (declaring that the 1980 Act applies "to conversion of housing accommodations into condominium or cooperative status for which no notice of filing is issued pursuant to section 405 of the [1976] Act * * * prior to the effective date of this title"). Jaffee submitted additional documents necessary to flesh out its application to DHCD after the effective date of the 1980 Act.

On December 2, 1981, DHCD approved Jaffee's application and granted a certificate of registration under the 1976 Act. But Jaffee never recorded the condominium instruments and, consequently, never established a condominium based on its 1980 application. [3]

[3] Jaffee's application was expressly contingent on obtaining the approval of the building's tenants association, which did not occur until 1985.

In 1985, Jaffee sold the building to its current owner, 1631 Harvard Limited Partnership (Harvard). Harvard agreed to pay the existing tenants $12,000 each in order to obtain their consent to condominium conversion and to satisfy its obligations under the tenant opportunity to purchase provisions of the 1980 Act. For reasons that are not explained on the record, Harvard never established a condominium either.

2. For nearly two decades, Harvard continued to treat the building as rental housing for tax purposes. In addition, Harvard continued to rent units in the building to new tenants without advising them of earlier tenant consent to condominium conversion, as it was required to do by Section 501 of the 1976 Act.

Many of the tenants first learned that Harvard claimed to have converted the building to a condominium in October 2003, when they received a seemingly innocuous letter from the building's management company notifying them that "a recent audit of our lease files has found the attached document missing from your file." D.C. App. 139. The letter appears to have been calculated to induce the tenants to sign and return the attached document without examining it closely, on the assumption that the tenants should have executed earlier and were obliged to sign in order to satisfy the landlord's "audit" of tenant files. In reality, the document, if signed, would have extinguished valuable tenant rights by obtaining for Harvard a false acknowledgment that "prior to entering into any lease, and prior to any occupancy, of the Premises leased to Tenant under this lease, Tenant *was advised* that the building in which the Premises is located is registered with the District of Columbia as a condominium." D.C. App. 140 (emphasis added).

3. In November 2004, Harvard submitted an "amended and restated" conversion application that completely supplanted Jaffee's 1980 application. Simultaneously, and before the D.C. Department of Consumer and Regulatory Affairs (DCRA) had reviewed the new

application, Harvard issued eviction notices to the tenants based on the unrecorded 1980 application.

After initially issuing a letter "registering" the 2004 application, DCRA concluded, upon investigation, that Harvard could not proceed on the basis of the 1976 Act, under the "grandfather" provision for applications receiving notices of filing before September 10, 1980. Instead, DCRA concluded, Harvard had to satisfy the conversion requirements of the 1980 Act.

The District of Columbia filed suit to block Harvard's attempt to evict the tenants. The Superior Court (Fisher, J.) granted the District's motion for partial summary judgment and denied Harvard's summary judgment motion.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that Harvard could not proceed with conversion of 1613 Harvard Street, N.W., to condominium status under the 1981 certificate of registration. That is so for several reasons.

First, Harvard failed to comply with the requirement of Title V of the 1976 Act that it notify prospective tenants that a majority of tenants had previously consented to conversion. Because of that failure, Harvard cannot rely on the 1976 Act as authority for its 2004 conversion application. There is no merit to Harvard's argument that it was exempt from the notification requirement of the 1976 Act. As the District explains, applications that were exempt from the new requirements of the 1980 Act, by virtue of its "grandfather" clause, were also exempt from its repeal of the notification requirements in Title V of the 1976 Act.

Second, Harvard cannot rely on any exemption from the tenant notice requirement for applications filed before the effective date of the 1980 Act, because the "amended and restated" application that Harvard filed in 2004 cannot be treated as relating back to the entirely different

application that Jaffee filed in 1980. The same equitable principles that the lower court invoked as a basis for laches -- including prejudice to the tenants -- preclude relating the 2004 application back to the 1980 application. Moreover, because the 1980 application was a mere placeholder that was never recorded by Jaffee and was abandoned by Harvard after it bought the building, there was no viable application to which the 2004 application could relate back.

Third, Harvard cannot invoke equitable estoppel against the District of Columbia in order to proceed under the 1981 certificate of registration. Harvard cannot show that it reasonably relied to its detriment on any representations made by District agencies. And, even if it could make such a showing, the reasons for denying equitable estoppel against the government carry full weight here. Otherwise, past errors and omissions by DCRA employees would have the effect of nullifying tenant protections enacted by the Council.

ARGUMENT

I. HARVARD VIOLATED THE 1976 ACT BY RENTING UNITS WITHOUT NOTIFYING PROSPECTIVE TENANTS OF THE CONVERSION STATUS OF THE BUILDING

The 1976 Act entitled prospective tenants of a building to notice that the existing tenants had previously consented to its conversion to a condominium.[4] Section 501(b)(2) of the 1976 Act provides that:

> If a majority of the heads of household in such housing accommodation have signed such written agreements [consenting to condominium conversion], but the conversion has not taken place, then the landlord of that housing accommodation shall notify each prospective tenant of that housing accommodation that a majority of the heads of household in that housing accommodation have signed such agreements. (D.C. App. 78).

[4] The 1980 Act eliminates the problem of new tenants moving into a building without notice that many years earlier a majority of tenants had consented to conversion. The 1980 Act requires a tenant election and conversion within 180 days after certification by the District. D.C. Code § 42-3402.02. Harvard does not, and could not, contend that its conversion application would be valid under the 1980 Act.

Such provisions serve an important purpose: They ensure that new tenants, who did not have the opportunity to grant or refuse consent to conversion, are aware of the conversion status of the building, so that they can make an informed decision whether to rent in that building, with the attendant risks of displacement. While such information is useful to all prospective tenants, it is particularly useful to tenants for whom stable housing is a priority, including elderly individuals, individuals with disabilities, and families with children. We are informed by the building's tenants association that, during the pendency of this suit, the tenants have included elderly individuals, an individual with a disability (who was forced to move out when the elevator was inoperable for some months), a low-income family with a housing choice voucher, and families with minor children.[5]

Although Harvard attempted to paper over its failure to give the required notice with its 2003 "audit" letters to the tenants, there is no factual dispute that Harvard did not comply with Section 501(b)(2) of the 1976 Act. *See* Harvard Reply Br. 3. Instead, Harvard maintains that it had no legal obligation to give such notice. *See* Harvard Br. 12 n.5, 15-17; Harvard Reply Br. 11. The District's brief cogently explains the flaws in Harvard's selective repeal argument (*see* D.C. Br. 21-23), and we will not repeat that statutory analysis.[6] Suffice it to say that, if the

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[5] The tenant association informs us that 16 units in the building are currently occupied, a decrease from 30 units at the time that the District's suit was filed.

[6] The Council's subsequent enactment of the Rental Housing Conversion and Sale Amendment Act of 1981, D.C. Law 4-27 (Aug. 1, 1981), D.C. Code § 42-3402.11, responded to the refusal of condominium developers to make relocation payments required under Title V of the 1976 Act with respect to grandfathered conversion projects, and disputes over what relocation payment standards should apply. In providing that certain obligations to pay for relocation "shall apply" to grandfathered condominium applications, D.C. Code § 42-3402.11, the Council did not repeal by implication the other requirements of Title V of the 1976 Act, particularly Section 501, which remained in force as to projects that were exempted from the 1980 Act *in toto* (including the Title V repealer in § 211) by Section 210 of the 1980 Act. The lower court described that

application is exempt from 1980 Act under the "grandfather" provision, the application is also exempt from that Act's repeal of Title V of the 1976 Act. Indeed, the purpose of the "grandfather" provision was to preserve the more lenient provisions of the 1976 Act for conversion applications filed before the 1980 Act's effective date, not to eliminate regulation of those applications entirely.[7] The Council that enacted the 1980 Act to diminish the involuntary displacement of tenants by condominium conversions could not have intended to free developers retroactively of the tenant protections that already existed in the 1976 Act. *See Hornstein v. Barry*, 560 A.2d 530 (D.C. 1989) (en banc) (discussing background of the 1980 Act); *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988)(same).[8]

II. HARVARD'S 2004 APPLICATION DOES NOT RELATE BACK TO JAFFEE'S APPLICATION FOR PURPOSES OF THE "GRANDFATHER" EXEMPTION FROM THE 1980 ACT

Harvard's principal argument is that its 2004 condominium conversion application qualifies for the "grandfather" exemption from the 1980 Act as an amendment to Jaffee's 1980 application. Harvard does not seek to proceed with condominium conversion on the basis of the

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statutory scheme as "convoluted," Order, p.12 n.6, but it is a perfectly straightforward way to preserve the existing law for condominium applications exempted from the new law.

[7] The trial court concluded that a DHCD regulation supported Harvard's position. *See* Order, p.12, n.6. 14 D.C.M.R. § 4708.1 ("If a notice of filing has been issued to the declarant and the certificate of eligibility for conversion of the housing accommodation to a condominium issued pursuant to [the 1976 Act] was valid on the effective date of the [1980] Act, that housing accommodation is exempt from the provisions of Title II of the [1980] Act, provided that the certificate of eligibility remains valid upon registration."). But if 1613 Harvard Street, N.W. is "exempt from the provisions of Title II," of the 1980 Act, then it is exempt from section 211 of that Act, which repeals Title V of the 1976 Act. Thus, the regulation, like the plain text of the statute, preserves Title V for Harvard's property.

[8] Harvard's contention that the notice requirement of Section 501(b) of the 1976 Act does not apply because the building was *already* converted by the 1980 notice of filing (Harvard Br. 11), cannot be squared with the plain meaning of Section 201 of the 1976 Act, which hinges conversion to a condominium on recordation of condominium instruments. *See* p. 17, *infra* (discussing recordation requirement as a prerequisite to condominium conversion).

1980 application, which is obsolete and materially different from its 2004 application. Obviously, since the exemption is available only to applications for which DHCD issued a notice of filing before September 10, 1980 (*see* p. 3, *supra*), Harvard's 2004 application could not qualify for the exemption independently.[9] The question thus becomes whether the 2004 application -- which describes a different plan of development for the building by a different owner -- should be allowed to take advantage of the exemption available to the 1980 application. The trial court correctly answered that question in the negative.

Although the trial court analyzed that question as a matter of laches, the question may more appropriately be analyzed under the relation-back doctrine.[10] Both analyses turn on similar equitable considerations, including the extent to which Harvard sat on its rights and the extent to which the tenants would be prejudiced.

A. Relation Back Is Permitted When the Second Filing Is Similar in Content to the First and There Is Otherwise No Prejudice to the Opposing Party

Courts employ the "relation-back" doctrine in a variety of contexts to decide whether to treat as timely a filing that was made after a deadline. If the new filing is deemed to be an amendment to a previous filing, the new filing may be treated as "relating back" to the previous

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[9] Harvard also necessarily relies on relation-back principles to argue that its notices to vacate were not premature. *See* Harvard Br. 17-18. Harvard effectively concedes that the notices were improper if predicated on the 2004 application.

[10] The federal courts have recently applied a relation-back analysis to decide the flip-side of the question posed here, which is whether Harvard's application should be treated as having been filed before September 10, 1980 in order to get the benefit of the old law. The Class Action Fairness Act, Pub. L. 109-2, 199 Stat. 4 2005, which permits certain large state diversity class actions to be heard in federal court applies only to cases "commenced" after the effective date. To decide whether a party can invoke the procedural benefits of the new law, the circuit courts of appeals have looked to whether an amended complaint after the effective date relates back to the earlier complaint (under state relation back law because these are diversity cases). *See e.g.*, *Prime Care of NE Kansas v. Human Ins. Co.*, 447 F.3d 1284 (10th Cir. 2006); *Brand v. Transit Serv. Co.*, 445 F.3d 801 (5th Cir. 2006).

filing for purposes of timeliness, depending on all of the circumstances. As a general matter, courts do so only when the two filings are so closely related that the opposing party is not unfairly surprised by the second filing and is not otherwise prejudiced.

For example, when the new filing cures a purely technical defect in the earlier filing, courts have treated the new filing as timely under the relation-back doctrine. In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), the Supreme Court upheld an EEOC regulation allowing a claimant to perfect a timely charge by filing an omitted verification under oath after the deadline. In *Becker v. Montgomery*, 532 U.S. 757 (2001), the Court allowed a *pro se* litigant to cure a missing signature on his notice of appeal after the time for filing an appeal had expired. And in *Scarborough v. Principi*, 541 U.S. 401 (2004), the Court held that a party could cure an application for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, by submitting an omitted allegation that the government's position was "not substantially justified."

Scarborough is particularly noteworthy because it is rooted not in the language of the Federal Rules of Civil Procedure, but in pre-existing equity practice. 541 U.S. at 418. For that reason, the principles applied in *Scarborough* to decide whether the corrected attorneys' fees application related back to the original application for purposes of the EAJA's time limits can appropriately be applied to determine whether Harvard's 2004 condominium conversion application can relate back to the Jaffee's 1980 application. *Scarborough* made clear that an important component of the relation-back analysis is prejudice to the other party, observing that, although the government was not claiming that it would be prejudiced by the belated correction

of the attorneys' fees application, "a showing of prejudice should preclude operation of the relation-back doctrine in the first instance." *Id.* at 422.[11]

This Court's decisions also recognize that an important consideration in the application of the relation-back doctrine is prejudice to the opposing party. In *Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 556 (D.C. 2001), the Court discussed the relation-back doctrine in the context of Rule 15(c) of the Rules of Civil Procedure. The Court noted that allowing an otherwise untimely new claim to relate back to an earlier-filed complaint is permissible if, but only if, the opposing party had fair notice from the original complaint of a controversy that included the new claim. Allowing the amendment does not cause any prejudice in such circumstances. *See id.* at 558 (defendant acknowledged the absence of prejudice). Other decisions of this Court also note the relevance of prejudice to the relation-back analysis. *See, e.g., Zuurbier v. MedStar Health, Inc.*, 895 A.2d 905, 909 (D.C. 2006) (relation back is permissible when the new party has "received such notice that it will not be prejudiced in maintaining its defense"); *Strother v. District of Columbia*, 372 A.2d 1291, 1297 (D.C. 1977) ("The rationale behind the rule is that if, within the statute of limitations, the defendant was put on notice that the plaintiff was attempting to enforce a claim against him because of a certain occurrence or event, then there is no cognizable prejudice to the defendant, when, after the running of the limitations period, the plaintiff is allowed to amend the complaint to reassert the

[11] In applying the equitable relation back doctrine here, the Court should take into consideration the difference between the time limit for the grandfather clause under the 1980 and a statute of limitations. *Cf.* Super. Ct. Civ. Rule 15(c)(1) (in considering relation back, court must consider whether it is permitted by the applicable statute of limitations). The purpose of a statute of limitations is repose. A pleading giving fair notice of a controversy allows the opposing party to preserve evidence and otherwise to take steps that may be appropriate when its rights are contested. Here, the purpose of allowing applications filed before the effective date of the 1980 Act to proceed under the old law was to avoid unfairness to condominium developers who had already launched conversion plans that might be adversely affected by the new law. That purpose is not applicable to Harvard's 2004 conversion plan.

claim that was deficiently asserted at the time."); *id.* at 1298 ("The major concern in this test is that of adequate notice to the defendant.").

B. Relation Back Should Not Apply Here Because of the Dissimilarity of the Applications and the Prejudice to the Tenants

There are two related reasons why Harvard's 2004 application should not be held to relate back to Jaffee's 1980 application: First, allowing Harvard to take advantage of the less rigorous legal regime that applied to the 1980 application would be prejudicial to the building's existing tenants who were not given actual notice by Harvard of the prior tenant consent to conversion and registration, and thus cannot be deemed to have been on constructive notice of the 1980 application when they moved in. Second, the applications are too dissimilar for the second to be viewed as simply an amended version of the first, in the manner of the amended attorneys' fees application in *Scarborough* or the amended complaint in *Wagner*.

1. The tenants who rented units between 1985 and Harvard's issuance of eviction notices in 2004 were prejudiced by Harvard's failure to give the required notice of the earlier consent to conversion. The notice requirement of the 1976 Act protected tenants from unwittingly renting a unit that was about to be converted to condominium, so they could choose to rent in another building another apartment, rather than be faced with involuntary displacement in an unforgiving rental market. Since the time of Jaffee's original application, a quarter-century of condominium conversion and other development has further eroded the District's supply of affordable rental housing, making the harm from involuntary displacement even worse.

The Mayor's Comprehensive Housing Strategy Task Force recently documented the accelerating pace at which such housing is being lost:

> The housing boom has triggered a crisis of affordability. As demand outruns supply, house prices and apartment rents are rising above what many Washingtonians can afford. The prices of homes are soaring even further out of the reach of the city's low income

> residents, making it even more difficult for them to move up to the middle class. Meanwhile, the federal government has been reducing its support for low-income housing here and around the country. The rising expense of Washington homes, moreover, is hitting working families who are forced to leave the city and move further from their jobs to find more affordable housing options. In previous decades the District of Columbia lost many middle-income residents and now it is in danger of losing the rest. At the same time, the affordability crisis is widening the gap between income and racial groups and worsening the tensions among them.

Homes for an Inclusive City 1.

In recent testimony before the D.C. Council, the D.C. Fiscal Policy Institute reported the loss of 7,500 affordable housing units (those renting at less than $500 a month) between 2000 and 2004, leading to a shortage of more than 20,000 affordable units. Testimony of Angie Rodgers, Policy Analyst, D.C. Fiscal Policy Institute, Public Hearing on Bill 16-661, the D.C. Housing Authority Rent Supplement Act of 2006 (March 22, 2006). Although new rental housing is under construction, it is more expensive than the older rental housing undergoing condominium conversion. *Housing in the Nation's Capital* 36. The result has been an increase, from 39% in 2000 to 46% in 2004, in the share of renters who must pay more than 30% of their income for housing. *Id.* Higher rents also make it more difficult to save to buy a home, widening the long-term income gap between owners and renters. *Id.* (between 2000 and 2003, renters' income fell by 5%, while homeowners' income rose by 9%).[12]

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[12] *See* National Low Income Housing Coalition, *Who's Bearing the Burden? Severely Unaffordable Housing* (2005). (http://www.nlihc.org/research/bearingburden.pdf). According to that survey, more than 80% of extremely low income households (those earning less than 30% of area median income) in the District are severely burdened by housing costs, meaning that they spend more than 50% of their income on housing. The survey reported that 33,149 District households were severely burdened by housing costs in 2003. Comparing housing costs to income levels, the survey found a shortage of more than 22,000 units. A subsequent report, ranked the District last among the states in two-bedroom housing affordability, with more than three full-time minimum wage jobs required to afford the federal fair market rent for a two-bedroom apartment. National Low Income Housing Coalition, *Out of Reach* (2005)) (http://nlich.org/oor2005/).

The trial court recognized that the District's affordable housing "crisis" exacerbated the harm to the tenants from Harvard's denial of their statutory right to advance notice of the condominium status of the building before they signed their leases. As the trial court found, "[t]here is clear prejudice to the tenants of the building who are either unable or unwilling to purchase their units, because they have missed the opportunity to lease elsewhere while living in the Embassy and will now be thrust into the ever-dwindling market of affordable rental housing if conversion goes forward." Order 14-15. In light of that prejudice, Harvard's 2004 application cannot be treated as relating back to Jaffee's 1980 application.

2. The relation-back doctrine allows a party to correct technical mistakes, not to substitute an untimely submission for a timely placeholder, which would make the time limits meaningless. *See generally* 6 Wright, Miller & Kane, Federal Practice & Procedure § 1471, pp. 502-07 (1990) (describing history of equitable relation back doctrine and its expansion in Rule 15(c)). Harvard's 2004 application describes a new plan of development, not a technical correction to the 1980 plan.

The differences between the 1980 and 2004 applications are such that even if Harvard had given notice of the 1980 application, tenants would be prejudiced by a conversion under the 2004 application. A prospective tenant considering whether to move into a unit subject to conversion has to weigh the desirability of purchasing a unit at an insider price upon conversion. That depends on the terms of the purchase as described in the application (*see* 1976 Act, § 408(b)(2)) such as the price of the condominium, the condition of the building, future condominium fees and financing, the financial stability of the condominium, and the plans (if any) to renovate it. Some prospective tenants, given notice, might choose to rent an apartment with the option to purchase at an insider price, while others would move on.

The 1980 application, even if disclosed to the tenants, would not have given them fair notice of the plan of development for 1613 Harvard Street, N.W., proposed in the 2004 application. *See generally Wagner*, 768 A.2d at 556 (explaining that the inquiry under Rule 15(c) is whether "the initial complaint put the defendant on notice that a certain range of matters was in controversy and the amended complaint falls within that range").

A side-by-side comparison of the two applications shows that the 1980 application bears little resemblance to the 2004 application, apart from the shared physical structure and condominium declaration boilerplate.[13] The changes in the 2004 application are substantive, not technical. For example, the 1980 application is for 80 units, while the 2004 application is for 79, a basic change in the configuration of the real property rights that would be created by conversion. Unlike the 1980 application, the 2004 application includes a list of the percentage shares of the common elements owned by each unit, and the corresponding monthly fees. The 1980 application breaks the ownership rights down differently, based simply on the size of the unit. There are differences in the descriptions of the common elements, which affect the value of the units. The unit prices, fees, and financial terms of purchase are different.

The plans of renovation differ significantly between the two applications. The declarant, construction manger, construction firm, and subcontractors identified in the 2004 application are all different from those identified in the 1980 application. The architect, structural engineer, and mechanical engineer are different. Obviously, there are differences in the condition of the

[13] We obtained and reviewed both the "hard copy" and computer files relating to the 1980 application maintained by DCRA. Although those documents are not in the record (except for Jaffee's 1980 application form, without exhibits), the Court may take judicial notice of the differences between the 1980 application and the 2004 application that is included in Harvard's appendix for purposes of weighing the proper disposition of this appeal for application of the relation-back doctrine. *See In re Barfield,* 736 A.2d 991, 996 n.7 (D.C. 1999). If the Court so requests, *amici* will submit these documents to the Court in a special appendix.

building as described in the 1980 application and its condition now (or in 2004). There also appear to be some differences between the plat and plans filed in support of the 1980 application and the "preliminary" plat and plans filed in support of the 2004 application. The warranty provisions are also different. So are the encumbrances on the building, which affect the financial viability of the condominium, and the proposed budget for operations. In sum, the condominium described in the 1980 application differs in numerous ways from the condominium described in the 2004 application.

DCRA appears to have recognized as much. The January 14, 2005, letter from Linda Harried, then DCRA's Housing Regulations Officer, states that, "[i]n accordance with the Condominium Act of 1976 Technical and Clarifying Amendment Act of 1992, D.C. Law 9-82, it has been determined that the Application and POS [Public Offering Statement] of the Embassy Condominium located at 1613 Harvard Street, N.W., is hereby registered." That letter seems to treat Harvard's 2004 "amended and restated" application as distinct from, and as completely supplanting, the incomplete application that Jaffee filed in 1980.

C. Relation Back Also Should Not Apply Because There Is No Longer Any Earlier Application to Which the 2004 Application Could Relate Back

In any event, the relation-back doctrine could not apply unless there was a still-viable earlier filing to which the later filing could relate. *See Stewart-Veal v. District of Columbia*, 896 A.2d 232, 237 (D.C. 2006) (complaint filed after previous complaint was dismissed could not relate back). Jaffee's 1980 application was abandoned years before Harvard's 2004 application was submitted.

Under Section 501 of the 1976 Act, if "conversion has not taken place," the owner has an obligation to notify prospective tenants. Harvard chose not to fulfill that obligation, thereby electing to abandon the 1980 application and to retain ownership of the building as rental

housing. Harvard's 2004 application is properly regarded as a new application made after the September 10, 1980, effective date of the 1980 Act.

Harvard is incorrect to say that "the property was * * * converted on August 7, 1980, when the Notice of Filing was issued." Harvard Br. 11. It is undisputed that neither Harvard nor Jaffe ever recorded the condominium instruments required to perfect condominium status. Under the 1976 Act, a condominium could come into existence only "by the recordation of condominium instruments pursuant to the provisions of [the 1976 Act]." 1976 Act, § 101(d); *see id.*, § 201 ("No condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this act."). The "condominium instruments" consist of "the declaration, bylaws, and plats and plans, recorded pursuant to the provisions of [the 1976 Act]." *Id.*, § 101(e) *see id.*, § 214 (recordation of plat and plans "promptly upon recordation of the declaration"); *id.*, § 301 (recordation of bylaws).

All DHCD did in August 1980 was to determine that the property was eligible for registration under the Act, subject to further DHCD review of the condominium instruments. Even after DHCD registered the condominium application in December 1981, condominium status depended on recordation of condominium instruments, which would have definitively altered the real property interests in the building.[14]

If Harvard had recorded the condominium instruments, each condominium unit would have constituted "a separate parcel of real property," 1976 Act, § 103, and, once any unit was sold, each condominium unit would have been separately taxable, *id.*, § 104. Even before selling a unit, Harvard would have been required to pay real property taxes as the owner/declarant of a

[14] Even at the time the condominium was registered, Jaffee's original application was incomplete and could not have served as the basis for creating a condominium. Jaffee had not yet obtained the tenants' association consent to conversion, as stipulated in its application.

condominium building, rather than enjoying the comparative tax advantages of owning rental property. Recordation would have prevented Harvard from gaining tax benefits while simultaneously preserving the advantages of a pre-1980 condominium application.[15] Rather than pursue the 1980 application, Harvard opted to retain ownership of a rental building. Having made its choice not to proceed with the 1980 application, Harvard cannot reverse that decision 19 years later by relating a new application back to the one it abandoned.

The 1980 application has long since been defunct. It cannot serve as a basis to extend the "grandfather" exemption of the 1980 Act to the application that Harvard did not file until 2004.

III. HARVARD CANNOT INVOKE EQUITABLE ESTOPPEL AGAINST THE DISTRICT

Harvard contends that the District of Columbia is equitably estopped from challenging the 1981 certificate of registration as a result of the issuance of two letters issued by DCRA officials: (i) a letter issued in 1985 by Byron Hallsted, chief of Condominium and Cooperative Conversion and Sales Branch, stating that the property had received authorization for conversion in 1980, and (ii) a letter issued in January 2005 by Linda Harried as Housing Regulations Officer that purported to register Harvard's November 2004 application. Harvard's argument fails for several reasons: Harvard cannot establish that it relied on either letter to its detriment; Harvard cannot satisfy the standard for equitable estoppel against the District, because any misconduct by District officials favored Harvard; and Harvard has unclean hands.

A. Harvard Cannot Demonstrate Detrimental Reliance on the DCRA Letters

A precondition for equitable estoppel is detrimental reliance. *See, e.g., Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 241 (D.C. 2006). Harvard cannot establish that

[15] As reflected in the 1985 Hallsted letter, one of the chief benefits of the "grandfather" clause is an exemption from the fee assessed for a conversion under the 1980 Act.

it detrimentally relied on the 1985 Hallsted letter, because Harvard did nothing in reliance on the letter. Perhaps this would be a different case if, upon acquiring the building in 1985, Harvard had promptly recorded the dormant condominium instruments, including the newly acquired evidence of tenant consent. But that is not what occurred.

Instead, Harvard chose to operate the building as a rental property for many years, without even notifying prospective tenants of the prior consent to conversion. Harvard did not attempt to record the condominium instruments or to sell any units. Given that choice, any claim that Harvard would not have purchased the building if not for the Hallsted letter rings hollow. As for Harvard's payments to the tenants, those appear to have been consideration for waiving the tenants' collective right to an opportunity to purchase the building rights under the 1980 Act, regardless of the building's rental or condominium status after purchase, rather than for consent to conversion that had been given in 1980. As the trial court recognized, therefore, Harvard cannot show that it would have done anything differently as owner with respect to conversion without the Hallsted letter. *See* Order 16 (concluding that, "[o]n this record Harvard's decision to treat the property as an apartment building for tax advantage and other financial benefit is at least as likely an explanation for its lengthy quiescence as is detrimental reliance" on the Hallsted letter).

Nor can Harvard demonstrate detrimental reliance on the Harried letter. Although Harvard maintains that it took out a $17 million loan in reliance on the letter, Harvard was notified of DCRA's investigation of the matter a month before it closed on the loan. Moreover, the record does not suggest that Harvard suffered any loss as a result of its receipt of the loan. Most of the money apparently went to refinancing existing loans, presumably enabling Harvard to take advantage of low interest rates. And, while Harvard's condominium application asserts

that $6 million of the loan was to be spent on conversion, Harvard cannot be prejudiced if it has not spent the money.

B. Harvard Cannot Demonstrate "Affirmative Misconduct" by the District

"It is 'well established * * * that equitable estoppel will not lie against the Government as against private litigants unless there is some finding of affirmative misconduct.'" *Artis-Bey v. District of Columbia*, 884 A.2d 626, 638 n.20 (D.C. 2005) (quoting *District of Columbia v. Greene*, 806 A.2d 216, 222 n.8 (D.C. 2002)). The reason is that otherwise subordinate executive branch officials could effectively nullify laws enacted by the legislature. In this context, that would mean that errors in favor of developers by DCRA or DHCD officials could strip tenants of important statutory protections. The trial court made no finding of affirmative misconduct, and Harvard identifies none in its briefs to this Court.

Although Harvard complains of unfairness, there is none. Harvard did not reasonably rely on the District's representations to its detriment, so it is not in the position of the contractor in *Williams v. District of Columbia*, 902 A.2d 91 (D.C. 2006). *See* Harvard Reply Br. 16. Harvard and Jaffee may have benefited in the past from derelictions in favor of the owners by DCRA or DHCD employees, but those derelictions do not prevent the District, or the courts, from enforcing the law. [16]

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[16] Ms. Harried's performance in issuing "opinion letters" exempting transactions from compliance with the 1980 Act's tenant opportunity to purchase came under harsh scrutiny last year. According to a report prepared by Councilmember Jim Graham, Ms. Harried, who was not a lawyer or supervised by a lawyer, never refused a landlord's request to issue a letter permitting a transaction to bypass that important tenant protection. *See* Councilmember Jim Graham, Chairperson, Committee on Regulatory Affairs, *Committee Report on Bill 16-50 "Rental Housing Conversion and Sale Act of 2005,"* Mar. 11, 2005, at 3. Moreover, Councilmember Graham's investigation of 63 letters that Ms. Harried issued revealed that she did not change a single word in the letters submitted by the landlords' lawyers. *Id.* Plainly referring to Ms. Harried, Councilmember Graham criticized the subversion of the tenant opportunity to purchase "through a routine system that was developed by select attorneys representing landlord interest in

C. Harvard Has Unclean Hands

To invoke equitable estoppel, like any other equitable remedy, Harvard would have to have come to the courts with clean hands. *See, e.g., Rising Micro, L.L.C. v. Exxon Mobil Oil Corp.*, 2006 U.S. Dist. LEXIS 25728, at *29-*30 (D.D.C. May 3, 2006). But it did not.

As described above, Harvard tried to trick its tenants into a false acknowledgment that they had rented apartments with notice of consent to condominium conversion. Had that scheme succeeded, Harvard would have proffered those notices as proof of its compliance with the 1976 Act. Signing a document acknowledging such notice would have put the tenants at risk of eviction from their homes. They would then have had to seek new housing in an increasingly formidable rental market without the benefit of statutory protection against involuntary displacement. Harvard also sought to evict the tenants on the basis of the 2004 condominium conversion plan that DCRA had not yet reviewed or approved.

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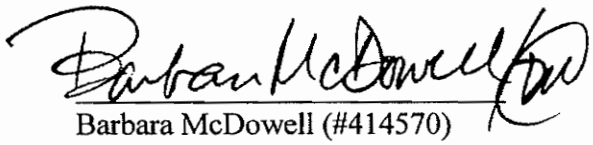
conjunction with officials at the Department of Consumer and Regulatory Affairs who were misguided as to the actual law, complicit in effectuating a routine system of issuing regulatory opinion letters, and wholly unqualified to interpret the legal rights of tenants." *Id.*

CONCLUSION

The trial court's decision that Harvard cannot proceed with conversion of the property to condominiums based on the 1981 certificate of registration should be affirmed.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amici Curiae, The Legal Aid Society of the District of Columbia, The Washington Legal Clinic for the Homeless, and TENAC in Support of Appellee was served this 7th day of November, 2006, by first class mail, postage prepaid, to:

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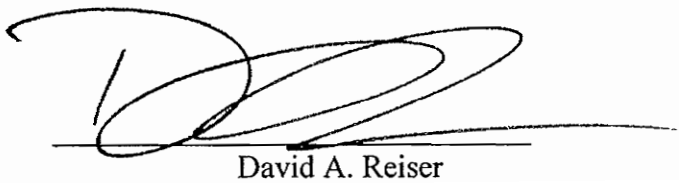

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