

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 04-CV-1534 and 04-CV-1575

TWIN TOWERS PLAZA TENANTS ASSOCIATION, INC.,

Appellant/Cross-Appellee,

v.

CAPITOL PARK ASSOCIATES, L.P., *et al.*,

Appellees/Cross-Appellants.

BRIEF *AMICI CURIAE* OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, BREAD FOR THE CITY, CENTER FOR COMMUNITY CHANGE, CENTRAL AMERICAN RESOURCE CENTER, D.C. LAW STUDENTS IN COURT PROGRAM, D.C. TENANTS ADVOCACY COALITION, LEGAL COUNSEL FOR THE ELDERLY, WASHINGTON INTERFAITH NETWORK, AND WASHINGTON LEGAL CLINIC FOR THE HOMELESS IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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The *amici curiae*, all of which serve low-income residents of the District of Columbia who are threatened with the loss of affordable housing, urge that the petition for rehearing *en banc* be granted.¹ Relying on the general definition of “sale” adopted in *West End Tenants Ass’n v. George Washington University*, 640 A.2d 718 (D.C. 1994), the Division ruled that a transfer that was deliberately structured so as to avoid tenants’ statutory opportunity to purchase was not a “sale” for purposes of the Rental Housing Conversion and Sale Act, D.C. Code §§ 42-3404.02 *et seq.* That ruling will encourage developers to continue to invoke *West End Tenants* to nullify an important tenant protection -- one that is even more important today, as the contraction of District’s supply of affordable housing accelerates, than it was when the Act was adopted. The time has come for the *en banc* Court to re-examine *West End Tenants* and its unduly restrictive notion of what constitutes a “sale” under the Act.

1. The Rental Housing Conversion and Sale Act was enacted in 1980 to combat a “continuing housing crisis in the District of Columbia.” D.C. Code § 42-3401.01(a)(1). At that time, the D.C. Council found that there was “a severe shortage of rental housing” available to lower-income tenants; that the conversion of rental units to condominiums “depletes the rental housing stock”; that lower-income tenants, particularly the elderly, are most adversely affected by condominium conversions; that few rental units were being built; and that controls were needed to preserve rental housing and to prevent displacement of tenants. D.C. Code § 42-3401.01(a)(2)-(8).

The D.C. Council intended that one of the most significant of those controls would be the Act’s prohibition against a property owner’s “sell[ing]” any housing accommodation without first “giv[ing] tenant an opportunity to purchase the accommodation at a price and terms which

¹ The *amici* joining in this brief and their interests are more fully identified in the accompanying motion for leave to file this brief in support of the petition for rehearing *en banc*.

represent a *bona fide* offer of sale.” D.C. Code § 42-3404.02(a). The tenant opportunity to purchase, by strengthening tenants’ bargaining position with property owners, was designed to preserve affordable rental housing and enable tenants to remain in their existing homes as owners or renters. *See* D.C. Code § 42-3401.02(1) and (2). In some instances, the statute would enable non-profit organizations, acting on behalf of the existing tenants, to acquire a building for the purpose of maintaining rental housing that those tenants could afford. In other instances, the statute would enable the tenants themselves to become owners, so that they could reap the tangible and intangible advantages of homeownership.

The tenants’ statutory opportunity to purchase has not achieved the potential intended by the Council, however. That is largely because developers, relying on the definition of “sale” adopted in *West End Tenants*, have been able to circumvent the statute by transferring a building through transactions that, while not prototypical sales in form, are sales in substance. By withholding fractional interests in a building that have no economic or other practical value -- as in the so-called “95-5” transfer at issue here -- developers have denied tenants the opportunity to purchase their building although both its ownership and its control have changed hands.

2. As explained more fully in the petition for rehearing and the briefs of the other *amici*, the definition of “sale” adopted in *West End Tenants*, and followed by the Division in this case, is unduly narrow. The Rental Housing Conversion and Sale Act does not purport to limit the scope of the comprehensive terms “sell” and “sale.” Although the Act describes certain transactions that are to be considered sales, *see* D.C. Code § 42-3404.02(b) and (c), the Council intended from the outset that those descriptions be illustrative, not exhaustive. *See* Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Report on Bill 16-50, at 3 (March 11, 2005); Council of the District of Columbia, Committee on Consumer and Regula-

tory Affairs, Report on Bill 11-53, at 10 (March 14, 1995) (expressing the intent to treat “all changes in fundamental control or ownership” as sales triggering the opportunity to purchase); *Columbia Plaza Tenants Ass’n v. Columbia Plaza Ltd. P’ship*, 869 A.2d 329, 334 (D.C. 2005). It would be inconsistent with the Council’s intention to prevent displacement of vulnerable tenants if the Act were construed to exempt transfers of control and ownership that would empower the new owners to take precisely the kinds of actions that would lead to tenant displacement.

That the Council intended a more comprehensive definition of “sale” than the one applied by the Division here is confirmed by the text of the relevant provisions, which states that a sale under the Act “include[s]” transactions such as those described. D.C. Code § 42-3404.02(b) and (c). As the Supreme Court and other courts have recognized, “the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.” *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); accord, e.g., *Dong v. Smithsonian Institution*, 326 U.S. App. D.C. 350, 125 F.3d 877, 880 (D. C. Cir. 1997) “the word ‘includes’ normally does not introduce an exhaustive list but merely sets out examples of some ‘general principle’” (quoting *Federal Land Bank*, 314 U.S. at 100).

The formalistic approach suggested by *West End Tenants* is inconsistent with the plain terms of the statute, which includes, as examples of “sales,” transactions that are not included within the definition articulated in that case. The Division, following *West End Tenants*, treated those examples as exceptions to the general definition of “sale” rather than as illustrations of its scope. Even if there were more than one way to read the statutory text, the Act requires courts to resolve “ambiguity * * * toward the end of strengthening the legal rights of tenants and tenant organizations to the maximum extent permissible under laws.” D.C. Code § 42-3405.11 (quoted in Slip op. 12-13 n.12).

Moreover, the *West End Tenants* approach, to the extent that it exempts transactions like the one here from tenants' statutory opportunity to purchase, is inconsistent with the judiciary's usual unwillingness to allow parties to avoid through artifice the obligations that arise from a "sale." See, e.g., *Commissioner of Internal Revenue v. Court Holding Co.*, 324 U.S. 331, 334 (1945) (to determine whether a transaction is a "sale" under the Internal Revenue Code, "the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant."); Brief *Amici Curiae* of Bread for the City, *et al.*, 6-7 (brief at the Division stage identifying cases applying the economic substance approach to hold that a transfer of a less than 100% interest constituted a "sale"). Here, however, the Division, viewing *West End Tenants* as controlling, held that no "sale" occurred to trigger the tenants' rights under the statute simply because the owner, while transferring ownership and control of the buildings at issue, retained a nominal 5% interest for the stated purpose of denying the tenants those rights.²

Experience under the Act has shown that, every time the Council closes off one loophole, developers create a new one. Consequently, even the most recent amendment of the Act, which expressly requires consideration of a transaction's economic substance, may be insufficient in

² There is no reason to think the interest retained on paper had any economic or practical value whatsoever. Under the Division's application of *West End Tenants*, any nominal retained interest, no matter how small or worthless, would preclude the tenants from enforcing the right to purchase. The decision in *West End Tenants* did not foreclose the courts from disregarding the form of a transaction entered into solely to defeat the tenants' rights. See 640 A.2d at 730 (discussing *Kings Antiques Corp. v. Varsity Properties*, 503 N.Y.S.2d 575, 576-77 (N.Y. App. Div. 1986)). The record in this case would support a finding that the "95/5" form of the transaction was solely intended to defeat the statutory opportunity to purchase, which should therefore be disregarded. The Division, however, concluded that the form of the transaction was in all cases dispositive.

itself to avoid circumvention.³ Developers' future efforts may be more subtle than they were in this case, and their future testimony about the reasons for structuring a transaction to avoid tenants' opportunity to purchase may be less forthright. But developers' evasion will undoubtedly continue unless this Court grants rehearing *en banc* and clarifies that the *West End Tenants* definition is not dispositive as to whether the Act applies to transfers of ownership and control that are "sales" in substance, such as the one here.

3. Tenants' statutory right to a *bona fide* offer to purchase their homes in the event of a sale by the owner is vital to the preservation of the District's shrinking stock of affordable housing. 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: A Comprehensive Housing Strategy for Washington, D.C., 1 (April 5, 2006).⁴

³ See Slip op. 2, n. 1 (discussing the 2005 amendment to D.C. Code § 42-3405.03b).

⁴ The report is available at <http://www.dc-chstaskforce.org/docs/CHSTFfinalreport4606.pdf>. The Mayor's Task Force reported an increase in the median price single family home from \$159,000 in 2000 to \$485,000 in 2005. *Homes for an Inclusive City* 11. The report described the gap between the District's median income and median home prices as "impossible to bridge." *Id.*

A report published by the Fannie Mae Foundation similarly found that the recent surge in housing prices has placed “more than 80 percent of the District’s home sales market * * * out of reach for a family supported by the salary of a school teacher.” *Housing in the Nation’s Capital 6* (2005).⁵ For lower-income tenants, the picture is even bleaker. Rents in multi-family units “in the city increased nearly twice as fast as in the region as a whole.” *Id.* And, “[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.” *Id.* According to the Mayor’s Task Force, four times as many housing units were converted to condominiums in the first half of 2005 as in all of 2004, and “[t]here is no sign this trend will abate soon.” *Homes for an Inclusive City* 13.

Many low-income individuals and families are being priced out of the District housing market altogether. *Homes for an Inclusive City* 32-33. In recent testimony before the Council, the D.C. Fiscal Policy Institute reported the loss of 7500 affordable 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.* at 36. Higher rents also make it more diffi-

⁵ The report is available at <http://www.knowledgeplex.org/kp2/cache/documents/127805.pdf>.

cult 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%).⁶

The situation is exacerbated by the expiration of federal subsidy contracts for more than half of the District's project-based Section 8 housing units between May 2005 and November 2006. Some owners may renew those contracts. But others may sell in the hopes of cashing in on rising prices and rents, posing a further risk of displacement of low-income tenants assisted by those programs, many of whom are elderly or have disabilities. The Mayor's Task Force reported that owners did not renew contracts for 60% of the 3900 units scheduled for contract renewals in May 2005. *Homes for an Inclusive City* 15. Moreover, some landlords have tried to escape their subsidized housing obligations early by causing their buildings to deteriorate to the point that they are in violation of the federal Department of Housing and Urban Development's health and safety requirements. The potential consequence is that the Department may cancel the contract and the subsidized mortgage, allowing the owner to pay off the loan and charge market rents. *Homes for an Inclusive City* 16; see Lori Montgomery, *Mayor Vows to Block Ouster of 211 Families*, Washington Post B1 (April 28, 2006) (describing response to termination of project-based Section 8 contract for Temple Courts).⁷

⁶ See National Low Income Housing Coalition, *Who's Bearing the Burden? Severely Unaffordable Housing* (<http://www.nlihc.org/research/bearingburden.pdf>). According to that analysis, more than 80% of extremely low income households (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 analysis by the National Low Income Housing Coalition, *Out of Reach* (2005) (<http://www.nlihc.org/oor2005/>), 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.

⁷ Federal law protects against the displacement of tenants due to the termination of project-based (i.e., building-wide) Section 8 contracts and ensuing rent increases by authorizing the issuance of

As these reports make clear, the affordable housing crisis, which prompted the enactment of the Rental Housing Conversion and Sale Act a quarter-century ago, has become increasingly severe in recent years. This crisis has “hit the elderly especially hard.” *Homes for an Inclusive City* 12. Many elderly persons live on fixed incomes and cannot readily meet escalating rents. The emotional costs of displacement are also particularly high for the elderly; moving can mean giving up a familiar and supportive environment and, for some, the independence that comes from being able to shop in one’s neighborhood without having to drive long distances. The shortage of affordable housing also causes distinct harm for individuals with serious illnesses and disabilities. *Id.* at 17-19.

Another adverse effect of the loss of affordable housing in gentrifying neighborhoods is the cleavage of the city along socioeconomic lines. Poverty is most debilitating when it is concentrated because, among other things, young people grow up in communities with few adults who provide an example of professional success. See William Julius Wilson, *The Truly Disadvantaged* 46-62 (1987). “[R]ising housing prices have shrunk the areas with moderate housing costs, not only making it more difficult for low and moderate-income households to find affordable homes, but also promoting further geographical concentration of the lowest income groups.” *Homes for an Inclusive City* 17.

Nothing less than the District’s future as a diverse but unified community, rather than one sharply stratified by income, depends on preserving affordable rental housing and homeownership in neighborhoods in which housing prices have increased dramatically. *Preserving*

individual enhanced Section 8 vouchers, which allow the tenants to pay reasonable market rate rents and remain in their homes. Pub. L. 106-74, § 531, 113 Stat. 1047, 1113 (1999). Tenants have the right to remain in their unit, using enhanced vouchers pay the rent, so long as the property remains rental housing and the rent is “reasonable.” 42 U.S.C. § 1437f(t)(1). See Dept. of Housing & Urban Development, PIH Notice, 01-41 (explaining the right to remain).

affordable housing is a cheaper and, in this era of declining federal investment in housing, a more effective strategy for meeting the needs of low-income families than *constructing* new housing.

In sum, the *West End Tenants* definition of “sale,” as applied by the Division in this case, undermines one of the Council’s principal initiatives for preserving affordable housing: the tenant opportunity to purchase provisions of the Rental Housing Conversion and Sale Act. In adopting a restrictive notion of what sorts of transactions trigger that opportunity, those decisions elevate form over substance and cannot be reconciled with the Act’s text and purposes. Unless the full Court charts a new course, developers will continue their efforts to evade tenants’ statutory opportunity to purchase, thereby further eroding protection for affordable housing.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2006, I caused a true and correct copy of the foregoing Brief *Amici Curiae* Of The Legal Aid Society of the District of Columbia, *et al.*, in Support of the Petition for Rehearing *En Banc* to be sent by first-class mail, postage prepaid, to:

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