ORAL ARGUMENT SCHEDULED FOR OCTOBER 16, 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7035

ROSE RUMBER, *et al.*,

Appellants,

v.

DISTICT OF COLUMBIA, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

FINAL BRIEF FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties appearing before the district court and in this Court are listed in the Brief for the Appellants.

B. Rulings Under Review. References to the ruling at issue appear in the Brief for the Appellants.

C. Related Cases. This case was previously before this Court in Rose Rumber, et al. v. District of Columbia, et al., No. 06-7004. Related cases pending in the Superior Court of the District of Columbia are District of Columbia v. 0.03 Acres of Land in the District of Columbia, et al., C.A. No. 05-5323 (involving party Duk Hea Oh), and District of Columbia v. 0.40 Acres of Land in the District of Columbia, et al., C.A. No. 05-5336 (involving parties Peter DeSilva, Rose Rumber and Joseph Rumber[1]). Defendants in the latter case filed a notice of appeal on July 20, 2009.

As noted in the Brief for the Appellants, the District of Columbia is a party to other pending cases (not in this Court) that involve the same or similar issues, but those other pending cases do not involve any appellant in this case. One such case,

[1] Duk Hea Oh is also listed on the docket as a defendant but has apparently not entered an appearance in the case.

Franco v. District of Columbia, No. 09-CV-204, is on appeal in the D.C. Court of Appeals, and oral argument is scheduled for September 30, 2009.

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GLOSSARY

ANC..... Advisory Neighborhood Commission

NCRC..... National Capital Revitalization Corporation

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ISSUES PRESENTED

Plaintiffs brought this suit to prevent the District of Columbia's use of eminent domain to redevelop the Skyland Shopping Center. The issues are:

1. Whether the district court properly found that legislation authorizing such use of eminent domain serves a valid public purpose, and thus satisfies the Fifth Amendment, when the Council of the District of Columbia could rationally conclude that the legislation would eliminate blight, reduce crime, and create needed economic development?

2. Alternatively, whether the district court properly abstained from considering the public use claims of four of the plaintiffs who are parties to ongoing condemnation proceedings, in which they have been afforded the opportunity to raise those claims?

3. Alternatively, whether the district court properly dismissed as moot the claims of three of the plaintiffs who voluntarily sold their properties to the government prior to condemnation?

4. Whether the district court properly denied leave to file a fourth amended complaint because it proposed two new claims that were baseless, namely a claim alleging a repeal of eminent domain authority that was disproved by the statutory language and a claim to enforce a purported settlement agreement that was barred by the statute of frauds?

STATEMENT OF THE CASE

This case arises from the proposed redevelopment of the Skyland Shopping Center, located at the junction of Alabama Avenue, Good Hope Road, and Naylor Road in Southeast Washington. Beginning in 2004, the Council of the District of Columbia enacted a series of laws authorizing the National Capital Revitalization Corporation ("NCRC") to exercise eminent domain

to acquire the Skyland site. Permanent legislation took effect April 5, 2005. See National Capital Revitalization Corporation Eminent Domain Clarification and Skyland Eminent Domain Approval Amendment Act of 2004, D.C. Law 15-286, 52 D.C. Reg. 4567 (2005).

Seventeen property owners, tenants, and employees at the center brought suit on July 13, 2004, against the District of Columbia and the NCRC in an attempt to prevent the proposed redevelopment. In their third amended complaint, plaintiffs alleged that the exercise of eminent domain would violate the takings, due process, and equal protection provisions of the Fifth Amendment. (3d Am. Compl. at 30-37).

The district court dismissed the complaint. Rumber v. District of Columbia, 427 F. Supp. 2d 1 (D.D.C. 2005). It held that plaintiffs' claims were premature unless a taking occurred and defendants failed to provide just compensation. Id. at 5. On appeal, this Court reversed in part. Rumber v. District of Columbia, 487 F.3d 941 (D.C. Cir. 2007). It ruled that plaintiffs' takings claim not only raised a just compensation challenge but also alleged that the taking would not serve a public purpose. Id. at 943. Holding that the public use claim was ripe, the Court "remand[ed] only [the] public use claim to the district court." Id. at 945. It further directed: "Upon remand, the district court should address . . . other grounds

for dismissal of the complaint, including the standing of individual appellants, res judicata as may arise from the condemnation proceedings in the District of Columbia courts, and, in its discretion, abstention." Id.

Following remand, the District renewed its motion to dismiss the third amended complaint.[2] (Dkt. No. 55). Plaintiffs opposed and also sought leave to file a fourth amended complaint. (Dkt. No. 57, 62). The proposed fourth amended complaint would have added two new claims. The first, Count III, alleged that the District acted without statutory authority to exercise eminent domain following the dissolution of the NCRC. (J.A. 103, 4th Am. Compl. ¶ 136-39). The second, Count V, sought enforcement of an alleged settlement agreement between the NCRC and Rose and Joseph Rumber ("Rumber plaintiffs"). (J.A. 105, 4th Am. Compl. ¶ 145-47). The Rumber plaintiffs also moved to enforce the alleged settlement agreement. (Dkt. No. 63).

By memorandum opinion and order of February 26, 2009, the district court denied as futile the motion to file a fourth amended complaint. (J.A. 113-15). On Count III, the court found no basis to question the District's statutory authority to exercise eminent domain. (J.A. 113). On Count V, the district

[2] By this time, the Council had dissolved the NCRC and transferred its authority to the Mayor. See D.C. Code § 2-1225.01 et seq. (2008 Supp.).

court found that the alleged, unsigned agreement violated the statute of frauds. (J.A. 114-15). Accordingly, the district court also denied the motion to enforce the alleged settlement agreement. (J.A. 115).

In the same memorandum opinion and order, the district court granted the District's motion to dismiss. The court did not reach the issue of standing because "it is undisputed that at least one of the plaintiffs has standing." (J.A. 117). Applying Younger abstention, the district court dismissed the claims of plaintiffs Duk Hea Oh, Peter DeSilva, and Rose and Joseph Rumber, who are parties to condemnation proceedings in the Superior Court of the District of Columbia. (J.A. 119-20). It found that the claims of three of the plaintiffs (Ingak Lee and Graham and Verna Fields) were moot because they had sold their properties. (J.A. 121). Lastly, the court granted the District summary judgment on the public use claim because the legislative record revealed a "wealth of evidence" indicating "a well-informed vote by the Council to redevelop the . . . Center for the public interest." (J.A. 123).

This appeal followed.

STATEMENT OF FACTS

A. Community Petition

Residents concerned about their community's welfare were the impetus for the redevelopment of the Skyland Shopping Center. (J.A. 399-400, 455). During the 1990's, community leaders attempted to engage the owners at Skyland to improve or redevelop the center so that it could become an asset to the community, but their requests were ignored. (J.A. 455). The community then turned to its elected city officials for assistance. (J.A. 84-86, 4th Am. Compl. ¶ 62-63, 66).

The Mayor directed the residents' petition to the National Capital Revitalization Corporation (NCRC). (J.A. 320). The NCRC was an independent instrumentality of the District of Columbia charged with several public purposes. D.C. Code § 2-1219.02(a) (2001). These public purposes included "attract[ing] new businesses to the District," "induc[ing] economic development and job creation," and "removing slum and blight." D.C. Code § 2-1219.02(b) (2001).

In 2002, the NCRC solicited proposals for the redevelopment of the Skyland site. (J.A. 328). The site included the 11.5 acres comprising the center plus five adjacent acres of undeveloped land. (J.A. 308, 313). In response, nine development teams submitted proposals. (J.A. 272, 328). The

NCRC selected from among these a proposal by a development team (the "Developer") headed by the Rappaport Companies. (J.A. 306). The team also included Harrison Malone Development, LLC; the Washington East Foundation, a non-profit foundation established in 1995 for East of the River communities; and Marshall Heights Community Development Organization, Inc., a non-profit community-based organization operating in Ward 7 since 1979. (J.A. 393).

The NCRC entered into a Joint Development Agreement with the Developer to redevelop the Skyland site. (J.A. 317). The NCRC agreed to acquire the properties within the site through purchase agreements or the use of eminent domain, if such use were approved by the Council. (J.A. 345-46). After acquiring the land, relocating tenants, and removing existing buildings, the NCRC would then sell the site to the Developer. (Id.; J.A. 77, 4th Am. Compl. ¶ 31). In turn, the Developer agreed to build, lease, and operate a retail center containing a non-grocery store anchor tenant in excess of 50,000 square feet. (J.A. 346; J.A. 77, 4th Am. Compl. ¶ 31). The Developer had to obtain the approval of the NCRC for the anchor tenant as well as for the final site plans. (J.A. 346-47).

B. Legislative Action

In March 2004, Councilmembers Harold Brazil and Kevin Chavous introduced Bill 15-752 to approve the NCRC's use of eminent domain to acquire the Skyland site. (J.A. 207). Following notice, the Council's Committee on Economic Development held a public hearing on the proposed legislation on April 28, 2004. (Id.)

At the hearing, the Committee received oral and written testimony. Testifying in support of the legislation were the Office of the Deputy Mayor for Planning and Economic Development (J.A. 239-45); the NCRC (J.A. 246-54); the Developer (J.A. 409-13, 419-21); Economics Research Associates, an economic consultant (J.A. 394-96); and Washington Square Partners, a development consultant that had assisted the NCRC during the developer selection process (J.A. 414-18). The Council also received extensive testimony from dozens of residents, police officers, and community organizations in favor of the legislation. (J.A. 397-408, 422-24, 453-81, 510-21). Many owners and tenants of the shopping center testified in opposition. (J.A. 425-31, 440-52, 482-509, 523-600).

The Committee also received considerable documentary information. The NCRC provided a presentation detailing the proposed redevelopment. (J.A. 255-301). It also submitted a

Project Area Designation Plan ("Plan"), which provided a preliminary site plan and compared the existing conditions of the site with the projected benefits of redevelopment. (J.A. 302-93). The Plan appended the economic consultant's analysis of the retail market potential of the site (J.A. 360-82), as well as photographs of the existing site (J.A. 373-75, 384-91). Owners and tenants of the center likewise submitted documents and photographs. (See, e.g., J.A. 542-66).

The testimony and information presented to the Committee addressed the following issues:

(1) Existing physical conditions. The NCRC's Plan reported that the center was "obsolete" and did not meet standards of contemporary retailing. (J.A. 316). According to the Plan, Skyland was not a true shopping center, but an irregular collection of commercial properties without a unifying design theme. (J.A. 338-39). "Because it was never designed as a shopping center, Skyland shows a number of design deficiencies." (J.A. 339). Among these deficiencies, the buildings along Alabama Avenue "restrict visibility of the center, contrary to accepted industry design norms." (J.A. 336). The design of a contemporary center would capitalize upon the exposure afforded by its location at a busy intersection. (J.A. 335).

The Committee also heard that the poor site layout was unsafe for traffic and pedestrians. According to the Plan, traffic circulation within the center was "vague" and "confusing." (J.A. 336, 339). The pedestrian environment was "virtually non-existent, creating safety issues for those on foot and limiting the number of multi-stop shopping visits to Skyland." (J.A. 339).

Residents elaborated on the dangers to pedestrians. One Advisory Neighborhood Commission (ANC) Commissioner explained that store groupings within the center were not connected by sidewalks. (J.A. 518). Thus, shoppers who wish to walk between two sets of stores on the same visit "must take their li[ves] in their own hands" in trying to traverse the center. (Id.) A retired member of the police department expressed concern for the safety of senior citizens who frequented the center, since there were no sidewalks leading from the street to the stores and "the traffic in and out of the area is very dangerous." (J.A. 479).

The Plan also reported that the center was poorly maintained and unattractive. (J.A. 338). This was attributed to the center's fragmented ownership and lack of central management. (Id.) Since no one had overall responsibility for the center, the center suffered from "trash dumping and graffiti, inappropriate uses of parking areas, uncoordinated

physical improvements, and wildly varying standards of maintenance." (Id.) In addition, there was "inadequate landscaping throughout the site" and "inadequate screening of trash and other storage areas." (J.A. 335). The result was a site that "clearly detracts from the visual amenity of the area." (J.A. 336). Residents called the center more simply an "eyesore." (J.A. 461, 474).

One long-time community resident summarized: "Over the past 22 years, I have seen a steady decline of the Skyland Shopping Center to the point where it is little more than a collection of deteriorating buildings, set in a chaotic and potholed parking lot, plagued by confusing and unsafe traffic patterns, and maintained in a state of permanent filth." (J.A. 520). Even though the center was just five blocks from his home, this resident testified, "I no longer shop there." (Id.)

Property owners and tenants disputed the claim that the center was "blighted." (J.A. 440, 491). Some, including the Rumber plaintiffs, acknowledged "the fact that the Skyland shopping community could use some refurbishment" or "upgrading." (J.A. 451, 487). But they generally denied that the center was "dilapidated, deteriorated or obsolete." (J.A. 482). One major property owner described residents' complaints about the center – specifically "lack of sidewalks, unattractive landscaping, that the property was generally rundown, trash, potholes, and

burnt out vehicles" – as merely "cosmetic concerns." (J.A. 539). While some business owners stated that they worked hard to maintain their properties in good condition, they also explained their recent reluctance to make physical improvements given the prospect of redevelopment. (J.A. 427, 487, 570-71).

(2) Crime. Several police officials testified regarding criminal activity that plagued the center. These officials – Commander Daindridge of the Sixth District, Captain Brito of the Sixth District substation, and Lieutenant Sims of Patrol Service Area 610 – were responsible for the area that includes the Skyland Shopping Center. (J.A. 401-03, 407-08). They attended community meetings at which citizens regularly complained about the center. (J.A. 401, 403, 407). These citizens requested additional police presence at the center to combat a variety of problems including public drinking and urination, loitering, littering, dumping, and illegal vending. (Id.)

Captain Brito also testified that the shopping center's poor design contributed to crime. (J.A. 401). He based his testimony on not only his experience as a police officer but also his education, including a series of courses on crime prevention through environmental design. (Id.) Captain Brito described how the haphazard "layout of the center, with darkened areas in the back that are hidden from street view, was an excellent example of poor design that encourages criminal

activity." (Id.) In fact, he had used photographs of the Skyland Shopping Center for one community presentation he gave on the contribution of environmental factors to crime. (Id.)

Even with the center's poor design, Captain Brito explained that crime "could have been reduced if the business owners had joined with the citizens of the community to address the problems." (Id.) But "[t]hey did not." (Id.) Business owners were "unwilling to call police when they observe[d] suspicious activity outside their stores." (J.A. 408). When police responded to crime in the center, business owners would often "take no responsibility for what [had just] happened outside their doors" and would merely "finger-point to another business owner." (J.A. 402). The owner of the center's parking lot was never available to police, nor did the owner attempt to address the crime problems by posting signs, fixing the lighting conditions, or taking other measures. (J.A. 403).

Community members also testified about the crime at the center. One 40-year resident and former ANC Commissioner described the "constantly increasing" problems at the center, including "public drinking, public urination, illegal dumping, pan handling . . . drugs, loud music, prostitution, . . . [improper] trash and garbage disposal, abandoned cars and illegal vending." (J.A. 464). Many other residents testified

to a similarly long list of illicit activities at the center. (See, e.g., J.A. 215, 423, 513).

Police officials also explained how a properly designed and managed shopping center would abate crime. Across the street from the Skyland Shopping Center is the Good Hope Marketplace. It is a contemporary shopping center (anchored by a major grocery store) with a central contact person, security guards, and "very few of the quality of life problems of the Skyland Shopping Center." (J.A. 408). The Marketplace's management "reached out to the police early" and met regularly with community representatives to discuss any problems. (J.A. 403, 408).

The NCRC also analyzed crime statistics. It found that the number of reported crimes at the Skyland Shopping Center was nearly double the number at the Good Hope Marketplace. (J.A. 337). During the period analyzed, 40 property crimes – thefts, thefts from automobiles, or burglaries – were reported at Skyland. (Id.) In contrast, only 14 thefts or thefts from automobiles, and no burglaries, were reported at the Good Hope Marketplace. (Id.)

In opposition to the legislation, one major property owner claimed there was "no factual evidence" that "Skyland is responsible for the prevalence of crime in the area" or that "a new center will lead to reduced crime." (J.A. 540). The Rumber

plaintiffs stated that their liquor store "never caused a loitering problem or anything of that nature" and does not "serve minors or intoxicated people." (J.A. 486).

(3) Economic benefits of redevelopment. The NCRC reported that East of the River residents do not have sufficient retail opportunities to satisfy consumer demand. "[H]igh-quality consumer goods[,] such as apparel and hardware goods[,] and food and restaurant establishments . . . are currently missing from East of the River." (J.A. 311). As a result, residents were forced to shop elsewhere, pushing retail expenditures and associated jobs to suburban locations. (J.A. 341-42). A market analysis of Wards 7 and 8 found that 70% of the area's $575 million retail buying power, or $404 million, was being spent in other jurisdictions, primarily Maryland. (Id.)

The NCRC determined that a redeveloped Skyland would capture a significant portion of this sales leakage. (J.A. 342-43). Due to its location at a major crossroads, Skyland also had the potential to attract shoppers from outside the area. (J.A. 343). The retail market analysis concluded that a redeveloped Skyland "can realistically achieve total annual sales in the range of $45.5 to $91.1 million." (J.A. 370). This compared to an estimate of Skyland's current annual sales of about $25 million. (J.A. 343).

The NCRC identified the employment and tax benefits of this increased economic activity. According to the NCRC's development consultant, a redeveloped Skyland would produce a net gain of 233 jobs (full-time equivalent). (J.A. 416; see also J.A. 344). It was also expected to generate an additional $2.5 to $3.5 million in sales and property taxes annually. (J.A. 343).

Residents corroborated that their community lacked basic retail amenities. (J.A. 471). One resident stated, "We have no way to get the supplies for our homes and offices." (Id.) Another wished that residents were able to shop for basic home improvement products – like "gardening tools, paint, or a water hose." (J.A. 477). A former ANC Commissioner described the lack of retail options bluntly: "No sit-down/tablecloth restaurant. No hardware store. No cinema. No department store. No coffee shop. No bookstore." (J.A. 456).

One mother of six children testified that she feared to let her teenage boys go to the Skyland Shopping Center because of security concerns. (J.A. 478). The center was also sometimes "out of things that [her children] require." (Id.) Even though she and her children live within walking distance of Skyland, they have to take the bus to do their shopping elsewhere, which is a hardship for them. (Id.) She believed her community deserved "the convenience of shopping where we live." (Id.)

In response, one property owner stated: "Increased retail and quality of life do not constitute a public purpose for eminent domain." (J.A. 425). Another testified that "the businesses currently located in Skyland provide the right mix of products and services needed and desired by our community." (J.A. 571). This owner explained his store's community involvement and how his years of local business experience "uniquely positioned" his store to meet the needs of local consumers. (J.A. 569-71). Like other business owners, he testified that his store hires area residents and contributes to the District's tax revenue. (J.A. 450, 569).

One major property owner emphasized that "[t]here is no guarantee that the planned commercial space will be able to [obtain] tenants." (J.A. 533). This owner believed that attracting major retailers would be difficult since the Skyland area had a large percentage of low-income households and a declining population. (Id.) Many property owners, including plaintiff DeSilva, also believed that NCRC was greatly underestimating the costs of land assembly and construction. (J.A. 425, 538, 577). One "wonder[ed] if there is not a more cost effective project" with "more public benefit yield per dollar invested." (J.A. 425).

(4) Catalytic effects of redevelopment. The Committee also heard about the catalytic effects of redevelopment. The

NCRC reported that the proposed Skyland redevelopment "will have strong synergy" with the adjacent Good Hope Marketplace and that together they will create the largest retail destination in the East of the River area. (J.A. 321). The new center would also energize other local economic development. (J.A. 343-44). It would do so by not only increasing overall consumer traffic to the area, but also assuring the private sector that "investments in communities that have experienced persistent disinvestment can succeed." (J.A. 321). Redevelopment would thus "pave the way for private investment in the area that has been way overdue." (J.A. 344).

As the NCRC reported, increased retail opportunities would attract residents to these communities. (J.A. 333-34). Vincent Gray, then-Chairperson of the Ward 7 Democrats and now Chairman of the Council, testified that the population of Ward 7 had fallen since 1980, even as the geographical boundaries of the ward expanded. (J.A. 461). Chairman Gray noted: "Inaccessibility to basic amenities is a huge factor in why people choose to relocate." (Id.) A strengthened retail environment would thus stem the loss of population and attract additional residents to the area. (J.A. 333). Residential growth would in turn spur a positive cycle of even more economic development. (J.A. 321).

The Office of the Deputy Mayor for Planning and Economic Development explained how the redevelopment of Skyland would complement other ongoing or planned investments in the area. These investments included new housing, the proposed Anacostia light rail line, streetscape improvements, and new commercial and office space. (J.A. 242-43). In conjunction with the Skyland redevelopment, these investments should "spark the comprehensive resurgence that East Washington residents have worked so hard to promote." (J.A. 243).

(5) Necessity of eminent domain. As the NCRC's development consultant testified, redevelopment could not occur without the use of eminent domain. One reason was the risk of holdouts. The Skyland site encompassed at least 40 properties with 15 different owners. (J.A. 417). The development consultant opined that "there is absolutely no possibility . . . of assembling this many parcels from this many different owners." (Id.) The NCRC similarly explained that it "cannot risk purchasing some parcels only to learn that we will not be able to complete land assembly months down the road." (J.A. 253). Without the ability to "gain site control" and negate the holdout risk, the NCRC stated that the project also cannot secure firm commitments from retailers. (Id.)[3]

[3] One major property owner contended that the fragmentation of ownership was not as significant because just four entities

The NCRC's development consultant, in turn, explained that government intervention is often needed to build quality retail developments in urban areas. (J.A. 417). "[P]rivate developers seeking urban locations encounter various obstacles to investment, including high land costs, limited available sites, time-consuming site assemblage processes, and security costs tied to perceived crime concerns." (J.A. 322). In this instance, for example, "the underlying land values at Skyland are so high as to make private assemblage for a new shopping center completely infeasible." (J.A. 417).

Without land assembly assistance in urban areas, private developers will instead chose suburban areas for their development projects. (J.A. 328). Suburban areas offer many large tracts of undeveloped (or less developed) land to accommodate retail development. In contrast, as the NCRC explained, "[t]here is no other comparable site East of the River that can accommodate the type and scale of retail development envisioned for Skyland." (J.A. 321).

* * *

On November 3, 2004, the Committee reported favorably on the bill. The Committee Report noted: "The residents of the communities near the shopping center have been working for years

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owned 93% of the site. (J.A. 538). This owner nevertheless made clear that it "has no interest in selling its property." (J.A. 532).

to have the shopping center developed so that [it] is an asset to their community." (J.A. 204). It continued: "Unfortunately, this redevelopment effort has not been successful, largely because the shopping center's ownership is scattered among at least a dozen owners and because the owners have not engaged themselves with the community." (J.A. 205). While the "NCRC has contacted some property owners to begin negotiations on the purchase of the properties," the Report found that failure of "even one or two property owners" to agree to sell may "stop altogether this much needed project and the achievement of several public purposes." (Id.)

Based on the hearing testimony and other information provided, the Committee added the following detailed findings to the bill:

> (1) The communities east of the Anacostia River, including the areas near the Skyland Shopping Center, have lagged behind other communities in the District in economic development and have the highest unemployment rates in the District.
>
> (2) Wards 7 and 8, including the neighborhoods surrounding the Skyland Shopping Center, remain economically depressed and underserved by the amenities enjoyed by the rest of the District and nearby Maryland.
>
> (3) One of the key reasons why these areas lag behind is because certain critical commercial locations are run down or blighted.
>
> (4) The Skyland Shopping Center is a blighting factor in the Hillcrest and nearby communities.

(5) The Skyland Shopping Center is characterized by underused, neglected, and poorly maintained properties.

(6) These poor conditions of the Skyland Shopping Center have fueled crime and attracted criminal elements to the site and [are] likely to have increased the incidence of crime in the surrounding neighborhoods.

(7) The Skyland Shopping Center has been the site of a significant amount of stray and illegally dumped garbage, which the current owners have not removed in a timely manner and which has created an eyesore and nuisance in the community.

(8) The layout of the current shopping is unsafe for both motorists and pedestrians.

(9) The fragmented and often absentee ownership of the properties has exacerbated these problems by allowing individual owners to avoid responsibility for safety and the reduction of crime, trash, and other blighting factors.

(10) Neither the police nor the community ha[s] been able to secure the cooperation of current owners to deal with the numerous problems at the site, despite years of efforts.

(11) For over 15 years, residents near the shopping center have petitioned the District to become involved in the redevelopment of the area and the correction of conditions at the site.

(12) The National Capital Revitalization Corporation has advised the Council that the Skyland Shopping Center is blighted and that current conditions are an impediment to the economic revitalization of this area of the District.

(13) The National Capital Revitalization Corporation has proposed a redevelopment of the Skyland Shopping Center that will create hundreds of new jobs, attract businesses that are desired by the community, and stimulate economic activity east of the Anacostia River.

> (14) The assemblage of properties comprising the Skyland Shopping Center is necessary to allow for the proposed redevelopment and it is highly unlikely that the properties could be assembled without the involvement of the District government and without the authority to exercise eminent domain by the National Capital Revitalization Corporation.
>
> (15) The assemblage of the properties comprising the Skyland Shopping Center and the construction of the new shopping center on the site (guided by the policies and requirements of the District government, including the National Capital Revitalization Corporation), will further many important public purposes, including: (1) removal of unsafe and unsanitary conditions; (2) reduction of the incidence of crime; (3) removal of garbage and other eyesores; (4) reorganization and reorientation of the site to make it safer and more attractive; (5) expansion of economic opportunities for residents of Wards 7 and 8; (6) provision of needed job opportunities for residents of Wards 7 and 8; (7) provision of needed retail options and other amenities for residents of Wards 7 and 8; (8) revitalization of an economically distressed community; and (9) increasing and diversifying the tax base of the District.

(J.A. 605-07; accord J.A. 205-06).

The Council passed the bill approving the NCRC's use of eminent domain to acquire the Skyland site on December 7, 2004. The bill became law when the Congressional review period ended on April 5, 2005. See 52 D.C. Reg. 4567 (2005).

C. Condemnation Proceedings

In July 2005, the NCRC filed condemnation actions in the Superior Court of the District of Columbia against several Skyland properties. Three of those actions involved some of the

plaintiffs in this case. Two of those three are still pending. See District of Columbia v. 0.03 Acres of Land in the District of Columbia, et al., C.A. No. 05-5323 (involving Oh), and District of Columbia v. 0.40 Acres of Land in the District of Columbia, et al., C.A. No. 05-5336 (involving DeSilva and the Rumbers). The third resulted in a consent order and judgment in 2007. See National Capital Revitalization Corp. v. In Suk Baik, et al., C.A. No. 05-5327.

In the condemnation action involving DeSilva and the Rumbers (C.A. No. 05-5336), the Superior Court entered summary judgment against them on their public use challenge. (J.A. 169-81, Omnibus Order dated June 4, 2008). In declaring the taking valid, the Superior Court held that the Council acted "rationally and with reasonable foundation, rather than pretextually, when it decided that the Skyland redevelopment would serve numerous public purposes." (J.A. 180). On July 20, 2009, DeSilva and the Rumbers appealed to the D.C. Court of Appeals from an order granting the District immediate possession of the property. (See Order dated June 18, 2009).[4]

[4] A public use challenge to the taking of another Skyland property is currently before the D.C. Court of Appeals in Franco v. District of Columbia, No. 09-CV-204, with oral argument to be held on September 30, 2009.

SUMMARY OF ARGUMENT

As the district court determined, the Skyland legislation is constitutional because it serves several valid public purposes. In authorizing the use of eminent domain, the Council had a rational basis to find that the redevelopment of the Skyland Shopping Center would eliminate blight and reduce crime. The center's design was obsolete, and its design deficiencies threatened traffic and pedestrian safety. The center was poorly maintained and the site of trash dumping. Crime plagued the center because of its design defects and the failure of its property owners to cooperate with police. In addition, the Council rationally concluded that redevelopment would bring hundreds of jobs and new retail amenities to an economically distressed area of the District. The redeveloped center was expected to complement other public investments and catalyze further economic development and residential growth in surrounding neighborhoods.

Because these public purposes were substantial, the plaintiffs' pretext claim fails. If necessary, surrounding circumstances also show that the public purposes were not pretextual. Since the project was community-initiated, it was for the benefit the community at large rather than any particular private persons. The NCRC picked the Developer

through a competitive selection process, and the participating retailers were not even known at the time of the legislation. Independent consultants comprehensively evaluated the proposed project. Moreover, the Council thoroughly deliberated by holding a public hearing to receive information from both sides and by producing a voluminous Committee Report.

In alleging pretext, the plaintiffs have not specifically proffered any circumstance that would overcome the deference given to legislative judgments. They do not claim, for example, illegal or improper dealings between the Developer and government officials. Plaintiffs virtually concede the substantial evidence of blight and crime. While they despair that the projected economic benefits of the project will ever materialize, such second-guessing cannot invalidate the legislation. Even assuming that the plaintiffs could prove their non-conclusory factual allegations regarding the project, a rational legislator could still have believed that the taking would promote its declared public purposes.

Alternatively, the district court properly dismissed several of the plaintiffs on two other grounds. The court soundly exercised its discretion in abstaining from considering the claims of four plaintiffs who are parties to ongoing condemnation proceedings in the Superior Court. Those proceedings afford those plaintiffs an adequate forum to resolve

their constitutional challenges. The court also correctly dismissed as moot the claims of three other plaintiffs who sold their properties to the NCRC before condemnation. By selling their properties, they no longer have a legally cognizable interest in the outcome of this case.

Finally, the district court properly denied as futile a proposed fourth amended complaint with two new claims. The first claim – alleging that the Council had repealed the eminent domain authority for the Skyland project when it dissolved the NCRC – was baseless. The legislation expressly provided that such eminent domain authority simply transferred to the Mayor. The second claim, seeking enforcement of a purported settlement agreement between two plaintiffs and the NCRC, likewise failed as a matter of law. Because the alleged agreement was unsigned and involved the sale of an interest in land, the statute of frauds barred its enforcement.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED THE DISTRICT SUMMARY JUDGMENT BECAUSE THE LEGISLATIVE APPROVAL OF EMINENT DOMAIN TO REDEVELOP THE SKYLAND SHOPPING CENTER SERVES A VALID PUBLIC PURPOSE.

The district court's rejection of plaintiffs' public use challenge may be sustained as either a dismissal under Fed. R.

Civ. P. 12(b)(6) or an award of summary judgment. This Court reviews de novo an order dismissing a complaint for failure to state a claim under Rule 12(b)(6). Atherton v. District of Columbia Office of the Mayor, 567 F.3d 672, 681 (D.C. Cir. 2009). While a court must accept the complaint's well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiff, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

As the Supreme Court recently explained, two working principles underlie its decision in Twombly. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). First, a complaint's conclusory allegations "are not entitled to the assumption of truth." Id. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 1949. Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 1950. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

This Court also reviews de novo an order granting summary judgment. Hussain v. Nicholson, 435 F.3d 359, 364-65 (D.C. Cir.

2006). To obtain summary judgment, the moving party must show "that there is no genuine issue of material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). While the Court examines the evidence in the light most favorable to the party opposing the motion, "conclusory allegations lacking any factual basis in the record" are insufficient to create a genuine issue of material fact and defeat summary judgment. Hussain, 435 F.3d at 365.

A. A Taking Satisfies the Fifth Amendment If It Is Rationally Related to a Legitimate Public Purpose.

The Fifth Amendment provides, inter alia, that "private property [shall not] be taken for public use, without just compensation." Applying this provision, the Supreme Court has "embraced the broader and more natural interpretation of public use as 'public purpose.'" Kelo v. City of New London, 545 U.S. 469, 479 (2005). "The Court long ago rejected any literal requirement that condemned property be put into use for the general public." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

Without exception, the Supreme Court has defined the concept of public purpose "broadly," reflecting its "longstanding policy of deference to legislative judgments in this field." Kelo, 545 U.S. at 480. This deference arises in

part from the recognition that "the needs of society have varied between different parts of the Nation." Id. at 482. "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intensive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of takings power." Id. at 483.

For example, in Berman v. Parker, 348 U.S. 26 (1954), the owner of a store challenged a redevelopment plan condemning a blighted area of the District of Columbia. The owner argued that his store was not itself blighted and that a "better balanced, more attractive community" was not a valid public use. Id. at 31. The Supreme Court, however, unanimously affirmed the public purpose underlying the taking. The Court noted that the concept of the public welfare is "broad and inclusive," representing a wide variety of values that are "spiritual as well as physical, aesthetic as well as monetary." Id. at 33. Thus, "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Id.

Kelo affirmed that economic development falls within "our traditionally broad understanding of public purpose." 544 U.S. at 485. In Kelo, the Supreme Court rejected the argument that using eminent domain for economic development "impermissibly

blurs the boundary between public and private takings." Id. The Court explained: "Quite simply, the government's pursuit of a public purpose will often benefit private parties." Id. The fact that private benefits will arise from a taking is not a basis, however, to invalidate it. Id.; accord Midkiff, 467 U.S. at 243-44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."); Berman, 348 U.S. at 34 ("The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the [legislature] might conclude.").

The role of the judiciary in determining whether the eminent domain power has been exercised for a public purpose is "an extremely narrow one." Berman, 348 U.S. at 32. Of course, the government may not take one person's property for the sole purpose of transferring it to another private person. Kelo, 545 U.S. at 477. Such a taking is invalid whether its actual purpose is openly declared or hidden "under the mere pretext of a public purpose." Id. at 477-78. Nevertheless, "if a legislature determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." Midkiff, 467 U.S. at 244. And "when the legislature has spoken,

the public interest has been declared in terms well-nigh conclusive." Berman, 348 U.S. at 32.

Applying such deference, courts accept the legislature's stated public purpose if it has a rational basis. The Supreme Court "has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" Midkiff, 467 U.S. at 241, quoting United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 680 (1896). In other words, a compensated taking is not proscribed by the Fifth Amendment "where the exercise of eminent domain is rationally related to a conceivable public purpose." Midkiff, 467 U.S. at 241.

Moreover, "[w]hether in fact the legislature will accomplish its objectives is not the question." Id. at 242 (internal quotes omitted) (emphasis in original). The constitutional requirement is satisfied if the legislature "rationally could have believed the [use of eminent domain] would promote its objective." Id. (internal quotes omitted) (emphasis in original). "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than the debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the [] courts." Id., quoted in Kelo, 545 U.S. at 488 (refusing to

require "reasonable certainty" that the expected public benefits of an economic development taking will actually accrue).

B. The Redevelopment of the Skyland Shopping Center Serves Several Valid Public Purposes.

Based on the record before the Council, a rational legislator could find that redevelopment would promote important public purposes, including the elimination of blight, reduction of crime, and needed economic development.

(1) Remediation of blight and crime. Given the information the Council had at the time it enacted the Skyland legislation, the Council could reasonably conclude that the center was a blight on the community. Because it was never planned as a shopping center, the haphazard configuration of buildings suffered many design deficiencies. (J.A. 339). For example, buildings fronting Alabama Avenue "restrict visibility of the center, contrary to accepted industry design norms." (J.A. 336). The poor site layout was also unsafe for traffic and pedestrians. Traffic circulation within the center was "vague" and "confusing." (J.A. 336, 339). Without sidewalks leading from the street or connecting different building groups, the pedestrian environment was "virtually non-existent, creating safety issues for those on foot." (J.A. 339).

The center was also poorly maintained and unattractive. (J.A. 338). Given its fragmented ownership and lack of central management, the center suffered from trash dumping and graffiti, uncoordinated physical improvements, and wildly varying standards of maintenance. (Id.; see also J.A. 375 (photos)). The center also lacked any meaningful landscaping, and it failed to screen properly trash and other storage areas. (J.A. 335). Area residents described the center as an "eyesore." (J.A. 461, 474).

Police officials also testified that the current center fostered crime. (J.A. 401-03, 407-08). As one official explained, "the layout of the center, with darkened areas in the back that are hidden from street view, is an excellent example of poor design that encourages criminal activity." (J.A. 401). In addition to the center's poor design, the failure of business owners to cooperate with police also contributed to the high crime levels. (Id.) Owners were unwilling to call police or take action regarding criminal or suspicious activity outside their doors. (J.A. 402, 408). No proprietor took responsibility for the general safety of the center.

As a result, crime proliferated. Statistics revealed an exceptionally high rate of crime, particularly property crimes, at this site. (J.A. 337). At community meetings, residents regularly complained to police officials about a variety of

illicit activities at the center, including public drinking and urination, drugs, prostitution, loitering, littering, trash dumping, and illegal vending. (J.A. 401, 403, 407). These problems led to continual community demands for a greater police presence at the center. (Id.)

Plaintiffs do not challenge these facts. Instead, they merely note that the Council described the center as a "blighting factor" without "using the statutorily defined term 'Blighted area.'" (Br. at 45). The Council was not required, however, to apply any particular standard of blight. Instead, the Council could rationally use the term "blight" to collectively describe the existing conditions as reported by the NCRC and others. It is irrelevant whether the Council compared the conditions against specific criteria defining the term "blight." The pertinent question is whether the remediation of these conditions, including crime, garbage, and unsafe traffic patterns, constitutes a valid public purpose under the Fifth Amendment. It unquestionably does. See Berman, 348 U.S. at 32-33.

(2) Economic development. Based on the information it received, the Council reasonably found that redevelopment would bring significant economic benefits. It recognized that "communities east of the Anacostia River, including the areas near the Skyland Shopping Center, have lagged behind other

communities in the District in economic development" and remain "economically depressed." (J.A. 605). Plaintiffs miss the point entirely when they note that "the Skyland project was not designed to address a serious city-wide depression." (Br. at 35). Indeed, the Council was targeting one particular area of the city for economic revitalization. And it is indisputable that the need for economic development in this area was serious.[5] See also Kelo, 545 U.S. at 483 (holding that the city's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference").

The Council reasonably found that redevelopment would help revitalize these neighborhoods. One statistic highlighted the potential economic benefits. A market analysis of Wards 7 and 8 found that an astounding 70% of the area's $575 million retail buying power is spent in other jurisdictions. (J.A. 341-42). Further analysis determined that a redeveloped Skyland could capture some of this sales leakage by doubling or tripling Skyland's current annual sales of about $25 million. (J.A.

[5] In 2007, for example, Wards 7 and 8 had the highest unemployment rates in the District at 9.9% and 15.5% respectively, well above the District average of 5.7%. See District of Columbia Annual Economic Report 2007, prepared by the Office of Labor Market Information and Research, District of Columbia Department of Employment Services (Dec. 2008) (accessible at http://www.does.dc.gov/does/lib/does/2007_District_of_Columbia_Annual_Economic_Report_II.pdf).

370). Among its economic benefits, redevelopment would provide basic retail amenities currently unavailable to East of the River residents. (J.A. 311). It would also create a net gain of about 233 jobs and approximately $3 million in annual sales and property taxes. (J.A. 343-44, 416).

Moreover, redevelopment was expected to be a catalyst for even further economic growth. By increasing consumer traffic to the area and setting an example that investments in these communities can succeed, a redeveloped Skyland would pave the way for even more private investment. (J.A. 321, 343-44). As greater retail options retain and attract residents, residential growth should encourage even more economic development. (J.A. 321, 333-34). The District also envisioned a redeveloped Skyland as complementing other ongoing or planned public investments in housing, transportation, and infrastructure in the area. (J.A. 242-43).

Plaintiffs' skepticism about the likelihood of realizing these economic benefits is misplaced. They contend that the projected economic benefits are "wholly speculative" and that the Council cannot "guarantee that a successful redevelopment project will be achieved." (Br. at 37). The NCRC's Plan and the accompanying retail market analysis, however, refuted such concerns about the project's economic viability. (J.A. 360-82). In any event, Kelo forbids second-guessing a legislature's

predictive judgments about whether a redevelopment plan will actually succeed. 545 U.S. at 487-88. It is sufficient that the Council rationally could have believed that the taking would promote its objectives. Midkiff, 467 U.S. at 242; see also Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (holding that "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data").

C. Based on the Substantial Public Purposes of the Skyland Legislation and Given the Surrounding Circumstances, Plaintiffs' Pretext Claim Fails.

The record demonstrates several public purposes for the taking. Because these public purposes are substantial – indeed overwhelming – the taking should survive a pretext challenge on this basis alone. Midkiff, 467 U.S. at 244 ("[I]f a legislature . . . determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public purpose."). This is not a case where the public benefits are merely "incidental" or "de minimis." Kelo, 545 U.S. at 490, 493 (Kennedy, J., concurring).

Beyond the substantiality of these public purposes, surrounding circumstances are also incompatible with a claim of pretext. Further proof that the legislature's declared public

purposes were its actual purposes arises from several other factors, including that this was a community-driven project, the NCRC selected the developer through a competitive process, the retailer beneficiaries were unknown, and thorough deliberation preceded the Council's enactment.

(1) Community-driven project. Community residents were the genesis for this redevelopment project. (J.A. 399-400). Since the early 1990's, residents had been organizing to improve or redevelop the center so that it could become a community asset, rather than a liability. (See, e.g., J.A. 455). The community's hopes finally began to take form once Mayor Williams directed their petition to the NCRC. (J.A. 320). Although plaintiffs contend that many residents liked the existing center, they also acknowledge that elected officials supported redevelopment because their constituents advocated for it. (J.A. 84-86, 4th Am. Compl. ¶ 62-63, 66). It is therefore clear that, from the outset, this effort was not intended to benefit "a particular class of identifiable individuals." Kelo, 545 U.S. at 478. Rather it was designed to help the community at large.

(2) Competitive selection process. Acting on the community's request, the NCRC solicited proposals for redevelopment of the center. (J.A. 328). The NCRC selected the winning proposal from among nine proposals submitted. (J.A.

272, 328). This competitive selection process likewise shows that the project was not intended to benefit a particular private party. See Kelo, 545 U.S. at 492 (Kennedy, J., concurring) (noting evidence that the city "reviewed a variety of development plans and chose a developer from a group of applicants rather than picking out a particular transferee beforehand").

(3) Unknown retailer beneficiaries. While the developer had been selected prior to the Council's approval of eminent domain authority, the retailers had not been identified. Plaintiffs allege, for example, that the NCRC never obtained a commitment from an anchor retailer. (J.A. 94, 4th Am. Compl. ¶ 93). This is yet additional evidence refuting a private purpose. See id. (noting that "the fact that other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented" favored the conclusion that the project had a public purpose).

(4) Thorough deliberation. In upholding the taking in Kelo, the Supreme Court noted the redevelopment "plan's comprehensive character" and "the thorough deliberation that preceded its adoption." 545 U.S. at 484. Likewise here, the NCRC's Plan set forth a comprehensive analysis of the site's existing conditions and the projected benefits of redevelopment. (J.A. 302-93). The NCRC also used a development consultant, who

assisted in the developer selection process, (J.A. 414-18), and an economic consultant, who conducted a retail market analysis (J.A. 360-91). Although the proposed site plan was preliminary and major retailers had yet to be identified, the NCRC retained the right to approve the final site plan and other project details. (J.A. 346-47).

The Skyland legislation was also the product of thorough deliberation. As the district court found, the Council was "well-informed" when it passed the legislation. (J.A. 123). At a hearing, the Council Committee "took extensive public testimony" and documentary information from a full array of persons on both sides of the debate. (Id.) The hearing also specifically addressed whether redevelopment could occur without the use of eminent domain. (See supra at 19-20). The Committee then produced its Report, summarizing all the testimony and attaching the entire hearing record. (J.A. 204-612). It also added detailed findings to the bill based on the testimony and information provided. (J.A. 605-07).[6]

Plaintiffs have not alleged countervailing circumstances that would sufficiently raise an inference of an impermissible private purpose. This case does not present circumstances that

[6] While plaintiffs imply that the Committee's addition of these findings following the public hearing somehow suggests pretext, the detailed findings are simply evidence of the Council's careful review of the legislative record and its appropriate attention to the public use requirement.

"so greatly undermine the basic legitimacy" of the redevelopment project as to require "a closer objective scrutiny" of the declared public purposes. Goldstein v. Pataki, 516 F.3d 50, 64 (2d Cir.), cert. denied, 128 S. Ct. 2964 (2008) (emphasis omitted). Plaintiffs do not allege, for example, any facts that would show corruption or "illegalities in the elaborate process by which the [p]roject was approved." Id. at 64. They also make no claim of "improper dealings between [the Developer] and the pertinent government officials." Id. In short, plaintiffs cannot show "any specific defect in the [p]roject that would be so egregious as to render [the project] . . . 'palpably without reasonable foundation.'" Id., quoting Midkiff, 467 U.S. at 241.

Accordingly, the district court properly rejected the plaintiffs' public use challenge. The court determined that the Council's findings "provide a solid basis for this court to determine that the takings were legitimate and the means were not irrational." (J.A. 123 (internal quotes omitted)). Analyzing the legislative record, it found that "the wealth of evidence in this case points to a well-informed vote by the Council to redevelop the Skyland Center for the public interest." (Id.) The district court agreed with the Superior Court's analysis upholding the legislation: "Given the voluminous record before the Council as to the conditions at the Skyland site, the comprehensive redevelopment plan put forth by

NCRC, and the likely economic and blight-reducing benefits, the Court concludes . . . that the Council had a rational basis for its passage of the Skyland Act." (Id., quoting Omnibus Order at 13).

D. The District Court Properly Treated the District's Motion to Dismiss as a Motion for Summary Judgment.

Plaintiffs vainly attempt to evade summary judgment on a procedural ground. They argue that they did not receive notice that the district court would treat the District's motion as one for summary judgment. Plaintiffs' argument fails for two reasons. First, plaintiffs had constructive notice because both sides submitted evidence outside the pleadings. Second, plaintiffs were not prejudiced because they could not have produced evidence sufficient to create a substantial question of fact material to the issue of public use.

Plaintiffs had constructive notice because they invited the court to consider evidence outside the pleadings in deciding the motion to dismiss. Plaintiffs submitted an email (Dkt. No. 45, Attach. 1), a statement (Dkt. No. 45, Attach. 2), and a newspaper article (Dkt. No. 47)[7] in response to the original motion to dismiss the third amended complaint. In opposing the

[7] Although the notice of filing of the newspaper article did not expressly reference the motion to dismiss, the motion was the only matter pending before the court at the time.

renewed motion to dismiss, they also attached six letters. (Dkt. No. 62, Attach. 1). As a result, the district court was not required to give formal notice of conversion of the motion. See Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (by inviting the court to consider extra-pleading materials on a motion to dismiss, a plaintiff "certainly cannot be heard to claim that he was surprised when the district court accepted his invitation"); San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998) ("A represented party who submits matters outside the pleadings to the judge and invites consideration of them has notice that the judge may use them to decide a motion originally noted as a motion to dismiss, requiring its transformation to a motion for summary judgment."); Angel v. Williams, 12 F.3d 786, 789 (8th Cir. 1993) (where plaintiffs submitted materials in response to defendant's motion to dismiss, plaintiffs had constructive notice that motion would be converted).

Even assuming lack of constructive notice, plaintiffs were not prejudiced. Plaintiffs could have suffered prejudice only if the court's failure to give notice of the motion's conversion "prevented [plaintiffs] from coming forward with evidence sufficient to create a substantial question of fact material to the governing issues of the case." Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003). In

support of its motion, the District filed the Committee report (Dkt. No. 55, Exh. A) with all its attachments (Dkt. No. 67, Exh. A). Faced with this legislative record, plaintiffs failed to offer any non-conclusory allegations that, even if proven, would establish that the legislation's public purposes were mere pretext. Id. at 165-66. As explained more below, providing plaintiffs further opportunity to present evidence in opposition to summary judgment would have made no difference.

E. The Plaintiffs' Public Use Claim Would Also Have Been Properly Dismissed Under Fed. R. Civ. P. 12(b)(6).

As an alternative to summary judgment, dismissal of the public use claim under Rule 12(b)(6) would also have been proper. The district court could consider the same materials on a motion to dismiss as it did for summary judgment. It could do so because the Committee Report with all its attachments was a public record, and "public records [are] subject to judicial notice on a motion to dismiss." Abhe & Svoboda, Inc. v. Chao, 508 F.3d 1052, 1059 (D.C. Cir. 2007), quoting Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004).

In light of the legislative record, the complaint's allegations were insufficient to survive a motion to dismiss. First, the allegations relevant to the public use claim are mere conclusory statements. For example, the complaint alleges that

the project's public purposes are "wholly speculative" and that the Council's findings are "arbitrary and capricious" and "lack proper factual and statistical support." (J.A. 89, 100-01, 4th Am. Compl. ¶ 74, 122, 124). There are no well-pleaded facts that bolster these conclusory allegations. In fact, these allegations are contradicted by the legislative record, which provides considerable factual and statistical support for the Council's findings. Such conclusory allegations therefore "are not entitled to the assumption of truth" on a motion to dismiss. Iqbal, 129 S. Ct. at 1950. In substance, the complaint is nothing but the "threadbare recital[]" of the elements of a public use claim, which does not suffice. Id. at 1949.

Moreover, the complaint also fails to state "a plausible claim for relief." Id. at 1950. Determining whether a complaint states a plausible claim is a "context-specific task." Id. The legislative record here provides the decisive context. As discussed above, the Committee Report establishes that the Skyland legislation is at least rationally related to legitimate public purposes. Midkiff, 467 U.S. at 242. Based on the entirety of the testimony and record before the Council, these public purposes are "substantial." Id. at 244. Plaintiffs do not meaningfully dispute that the legislation in fact serves several public purposes, including the remediation of crime, garbage, and unsafe traffic patterns. Even considering all

their non-conclusory allegations regarding the project's economic benefits, plaintiffs can only, at best, second-guess the economic wisdom of the Skyland legislation. See Kelo, 545 U.S. at 488. They cannot establish that it was irrational for a legislator to believe that the legislation would promote its objectives. Midkiff, 467 U.S. at 242. Thus, given the legislative record, the complaint cannot plausibly give rise to a claim for relief.

Under these circumstances, plaintiffs were not entitled to discovery. "Allowing such a [pretext] claim to go forward, founded on only mere suspicion, would add an unprecedented level of intrusion into the [legislative] process." Goldstein, 516 F.3d at 62. In Goldstein, the Second Circuit affirmed the dismissal of a pretext claim under Rule 12(b)(6) without permitting discovery. It rejected the notion that Kelo requires "courts in all cases to give close scrutiny to the mechanics of a taking rationally related" to a public purpose in order to "gauge the purity of the motives of various government officials who approved it." Id. Instead, the task of a court reviewing the constitutionality of such a taking "should be one of 'patrolling the borders' of this decision, viewed objectively, not second-guessing every detail in search of some improper illicit motivation." Id. at 63, quoting Brody v. Village of Port Chester, 434 F.3d 121, 135 (2d Cir. 2005).

As Kelo recognized, heightened review would impose significant costs. The "disadvantages from a heightened form of review are especially pronounced in this type of case" because "[o]rderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced." 545 U.S. at 488. The present case proves this point all too well. Even without taking discovery, plaintiffs' public use challenge still has not been conclusively resolved after more than five years of litigation. Such protracted litigation complicates negotiations to acquire remaining property interests in the area as well as to obtain commitments from retailers to join the project. Until the validity of the taking is finally resolved, construction cannot commence, and the will of the Council and the District residents it represents remains thwarted.

While courts have a role in reviewing a legislature's judgment of what constitutes a public use, the Supreme Court has made clear that role is "an extremely narrow" one. Midkiff, 467 U.S. at 240, quoting Berman, 348 U.S. at 32. "[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." Berman, 348 U.S. at 32. "This principle admits of no exception merely because the power of eminent domain is involved." Id.

"Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by the exercise of the taking power." Midkiff, 467 U.S. at 244. Thus, "both in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the [] courts." Goldstein, 516 F.3d at 57.

Applying this deferential review, this Court should declare the Skyland legislation constitutional and allow its important public purposes to finally be realized.

II. IN THE ALTERNATIVE, THE DISTRICT COURT PROPERLY DISMISSED THE CLAIMS OF PLAINTIFFS OH, DESILVA, AND THE RUMBERS UNDER THE YOUNGER ABSTENTION DOCTRINE.

This Court previously remanded this case to the district court to address other grounds for the dismissal of the complaint, including "in its discretion, abstention." Rumber, 487 F.3d at 945. Following this remand instruction, the district court properly exercised its discretion and dismissed the claims of four plaintiffs (Oh, DeSilva, and the Rumbers) who are parties to ongoing condemnation proceedings in the Superior Court of the District of Columbia. Thus, as an alternative to affirming the rejection of the public use claim on its merits,

this Court may affirm the dismissal of these four plaintiffs on abstention grounds.

The district court properly abstained from exercising jurisdiction based on Younger v. Harris, 401 U.S. 37 (1971). The Younger doctrine provides that, "except in extraordinary circumstances," federal courts should not intervene in an ongoing state proceeding "that is judicial in nature and involves important state interests." JMM Corp. v. District of Columbia, 378 F.3d 1117, 1120 (D.C. Cir. 2004). This doctrine rests principally on the notion of comity, recognizing that "interference with District proceedings may prevent the District from effectuating its substantive policies and disrupt its efforts to protect interests it regards as important." Id. at 1122-23. Such interference is unwarranted since "there is no reason to presume that the courts of the District cannot be trusted to adequately protect federal constitutional rights." Id. at 1123.

Younger abstention applies to the ongoing condemnation proceedings. "Eminent domain proceedings have long been recognized as an important state interest." Aaron v. Target Corp., 357 F.3d 768, 777 (8th Cir. 2004) (holding that the district court should have abstained from a challenge to a state eminent domain proceeding). While plaintiffs argue "the mere possibility of inconsistent results is insufficient to justify

Younger abstention" (Br. at 18), this action would in fact interfere with the ongoing condemnation proceedings. Plaintiffs' complaint seeks injunctive relief prohibiting the District from exercising the power of eminent domain or "undertaking any additional steps toward taking possession of plaintiffs' property." (J.A. 66-67, 3d Am. Compl. at 38-39). Such relief would effectively enjoin the condemnation proceedings. It would also invalidate orders issued in the condemnation case involving DeSilva and the Rumbers (C.A. No. 05-5336) that have already transferred legal title and granted possession of the property to the District. (See Orders dated May 8, 2006 and June 18, 2009).

The condemnation proceedings afford plaintiffs an adequate opportunity to raise their public use challenge. While plaintiffs Oh and DeSilva argue that the Superior Court initially struck their pretext defenses in their condemnation cases, they acknowledge that the D.C. Court of Appeals subsequently allowed such pretext defenses to go forward. Franco v. District of Columbia, 930 A.2d 160 (D.C. 2007). Moreover, in the DeSilva condemnation case (C.A. No. 05-5336), DeSilva and the Rumbers then had the opportunity to litigate their pretext defense in opposing the District's motion for partial summary judgment on the validity of the taking. The

Superior Court rejected their defense on the merits after a full analysis of the issue. (J.A. 173-81, Omnibus Order at 5-13).

The Rumber plaintiffs erroneously argue that an extraordinary circumstance – namely, bad faith – required the district court to intervene. The Rumbers complain that the District improperly joined them as defendants in the DeSilva condemnation case (C.A. No. 05-5336). The Superior Court, however, rejected the Rumbers' motion to dismiss in that case. It found that the Rumbers have a leasehold interest and that, under the terms of the lease, they potentially have the right to share a condemnation award. (J.A. 172-73, Omnibus Order at 4-5). Even if, as the Rumbers argue, they could have been joined in the condemnation proceeding earlier than they were, they are properly joined now. As the district court explained, the Superior Court's order "defeats the Rumber plaintiffs' allegation that the District acted in bad faith when it added them to the Superior Court action." (J.A. 119-20).[8]

The Rumbers incorrectly contend that the district court erred in relying on the Superior Court Omnibus Order. They challenge the order on various procedural grounds that they

[8] The District did not oppose the Rumbers' motion to dismiss provided that the dismissal was "with prejudice to the Rumbers' right to (1) challenge the District's right to take the property by eminent domain, and (2) make a claim for just compensation." (Opp. to Mot. to Dismiss at 5).

either raised, or could have raised, in the Superior Court action. For example, the Rumbers contend that it was unfair for them to have to oppose summary judgment on the validity of the taking while their motion to dismiss was pending. (Br. at 26). Guided by collateral estoppel principles, however, the district court appropriately declined to relitigate such issues. (J.A. 120, citing Allen v. McCurry, 449 U.S. 90, 94 (1980)).[9] Moreover, regardless of whether the Omnibus Order had preclusive effect, it illustrates that the ongoing proceedings in the District's local courts provide plaintiffs Oh, DeSilva, and the Rumbers an adequate opportunity to raise the same claims that they raise here. The district court could therefore properly consider the Superior Court order in applying Younger abstention.

[9] While the Omnibus Order was not a final judgment, it conclusively resolved the issues it addressed and therefore was sufficiently firm for persuasive, if not preclusive, effect. See Martin v. Department of Justice, 488 F.3d 446, 455 (D.C. Cir. 2007), citing Restatement (Second) of Judgments § 13 (1982) ("[F]or purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in a prior action that is determined to be sufficiently firm to be accorded conclusive effect.").

III. IN THE ALTERNATIVE, THE DISTRICT COURT PROPERLY DISMISSED THE CLAIMS OF PLAINTIFFS LEE AND GRAHAM AND VERNA FIELDS AS MOOT.

The district court properly held that the claims of plaintiffs Lee and Graham and Verna Fields were moot because they sold their properties to the NCRC. Thus, assuming arguendo that plaintiffs' public use challenge could survive on its merits, this Court should affirm the dismissal of these three plaintiffs on mootness grounds.

"A matter is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Munsell v. Department of Agric., 509 F.3d 572, 583 (D.C. Cir. 2007) (internal quotes omitted). Because they sold their properties before condemnation, these three plaintiffs "lack a legally cognizable interest in the outcome" of this case. Munsell, 509 F.3d at 581, quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Even if the use of eminent domain would have been unconstitutional, these plaintiffs allege no basis in law or fact to rescind the sales. Their claims are therefore moot.

In contesting mootness, plaintiffs Graham and Verna Fields allege that they were not just property owners. While alleging that they also "have had businesses at Skyland," they

acknowledge that "they have sold the property on which the businesses operate." (Br. at 29). They nevertheless wish to pursue a remedy for the loss of their businesses. Since the Fields chose to sell the property on which their businesses operated, however, the district court was still correct to dismiss their claims as moot. [10]

IV. THE DISTRICT COURT PROPERLY DENIED LEAVE TO FILE THE PROPOSED FOURTH AMENDED COMPLAINT.

The district court properly rejected the proposed fourth amended complaint as futile. "It is within the sound discretion of the district court" to decide whether to grant leave to amend a complaint under Fed. R. Civ. P. 15(a). Williamsburg Wax Museum v. Historic Figures, Inc., 810 F.2d 243, 247 (D.C. Cir. 1987). "Reversal of a district court's decision not to permit amendment is thus appropriate only if there has been an abuse of discretion." Id. Denial of leave to amend may be based, as here, on "futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962). The fourth amended complaint was futile because its two new claims – regarding the alleged repeal of eminent domain

[10] Although the district court also found that plaintiffs' claims under the Uniform Relocation and Real Property Acquisition Policies Act of 1970 were not ripe, plaintiffs protest that they "were not bringing a claim under [this Act]" because their administrative remedies under the Act "have yet to be determined." (Br. at 47). Regardless, the district court was correct that a proper claim under the Act was not before it.

authority and the enforceability of a purported settlement agreement – fail as a matter of law.

A. The District Court Correctly Determined that the Council Did Not Repeal Its Authorization of the Use of Eminent Domain.

Plaintiffs' first new claim was that the District lacked "statutory authority [to exercise eminent domain] in light of the dissolution of the NCRC and the repeal of the Skyland Acts." (Br. at 56). It is true that the Council dissolved the NCRC in 2007. D.C. Code § 2-1225.01 (2008 Supp.) Plaintiffs fail to disclose, however, that the same legislation transferred the NCRC's authority to the District. D.C. Code § 2-1225.01 (2008 Supp.). The legislation also provided that "[c]ondemnation proceedings initiated by the NCRC . . . may be continued . . . by the Mayor in the name of the District and the Mayor may rely upon the authority pursuant to which the NCRC . . . acted as well as the findings previously made by the Council." D.C. Code § 2-1225.41(b) (2008 Supp.); see also D.C. Code § 2-1225.41(a) (2008 Supp.) (providing that the dissolution of the NCRC "shall not impair or affect the validity of the acquisition by the NCRC . . . of any properties nor shall repeal affect the authority

under which properties were previously taken, or for which condemnation proceedings were initiated").[11]

As the district court concluded, plaintiffs cannot explain how the dissolution of the NCRC and the transfer of its authority to the District "would alter or lessen the statutory authority of the [District] to exercise its eminent domain powers." (J.A. 113). The district court therefore properly found that this proposed claim was futile.

B. The District Court Properly Refused Enforcement of the Purported Settlement Agreement Between the NCRC and the Rumber Plaintiffs.

The district court found that the Rumbers' new claim for enforcement of a purported settlement agreement between them and the NCRC was also futile. It correctly held that the statute of frauds barred enforcement of this purported agreement.

In the District of Columbia, the statute of frauds applies, inter alia, to:

> a contract or sale of real estate, or of any interest in or concerning it . . . unless the agreement upon which the action is brought, or a note or memorandum thereof, is in writing . . . and signed by the party to be charged therewith or a person authorized by him.

[11] Prior to being part of permanent legislation, each of these statutory provisions was included in one temporary act and two emergency acts. See D.C. Act 17-71, 54 D.C. Reg. 7390 (2007) (emergency act); D.C. Act 17-126, 54 D.C. Reg. 10015 (2007), 55 D.C. Reg. 12 (2008) (temporary act); D.C. Act 17-152, 54 D.C. Reg. 10900 (2007) (emergency act).

D.C. Code § 28-3502 (2001). Here, the purported written agreement involved the sale of an interest in real estate – namely, a leasehold interest – but was unsigned. It was therefore unenforceable.

To circumvent the statute of frauds, plaintiffs contend that the purported agreement was "not a sale of a leasehold interest." (Br. at 53, 54). The unsigned agreement that they produced, however, expressly states otherwise. It declares that the parties agree on a total payment to the Rumbers "for the acquisition of their leasehold interest in the Property." (J.A. 132). The purported agreement further provides that "the Rumbers hereby assign to NCRC all rights, interest and obligation of the Rumbers as tenants under any lease involving all or any portion of the Property." (Id.) The Rumbers cannot avoid the plain terms of the alleged agreement, which involved a sale of their leasehold interest.[12]

Plaintiffs wish to characterize the alleged agreement instead as a settlement agreement. Although plaintiffs are correct that courts favor settlement agreements, a settlement agreement is still unenforceable if its particular terms fall within the statute of frauds. See Scoville St. Corp. v.

[12] The legislative record also contains a letter from the Rumbers, dated April 25, 2004, stating they were in the first year of a ten-year lease. (J.A. 487).

District TLC Trust, 1996, 857 A.2d 1071 (D.C. 2004). In Scoville, a party alleged the existence of an oral agreement "to settle the underlying litigation." Id. at 1077. The D.C. Court of Appeals noted, however, that the alleged oral agreement would be "more than a simple settlement contract." Id. "Rather, it would be described properly as an oral contract for the redemption of an interest in land," to which the statute of frauds applied. Id. at 1077-78, citing D.C. Code § 28-3502 (2001). The Court therefore held that the oral settlement agreement was unenforceable. Id. Similarly here, the purported agreement is more than a simple settlement, but the sale of an interest in land. The statute of frauds therefore applies.[13]

Plaintiffs erroneously rely on an email from an NCRC employee, Ted Risher, to satisfy the statute of frauds. The email dated May 8, 2007, states: "I am having [an attorney] draft the agreement right now." (J.A. 148). This email does not satisfy the statute of frauds because it does not state anything about what the agreement was or its terms or conditions. There is also no indication in the email that it relates to the purported written agreement, which the Rumbers

[13] While plaintiffs also argue that there are "numerous exceptions" to the statute of frauds, they do not explain how any exception would apply in this case. The cases upon which plaintiffs rely are inapposite. See, e.g., Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 361-63 (D.C. Cir. 1983) (finding an exception to the statute of frauds where the parties stipulated to the existence of their oral agreement).

allegedly intended to sign on September 28, 2007, several months later.

Plaintiffs also failed to show that Mr. Risher was "a person authorized" by the NCRC to make such an agreement. D.C. Code § 28-3502 (2001). Indeed, Mr. Risher affirmed that he advised the Rumbers and their counsel during negotiations that he did not have authority to bind the NCRC to any agreement. (J.A. 147, Risher Aff. ¶ 3). The Rumbers did not dispute that they were so advised. (See generally Reply to Opp. to Mot. to Enforce).

It is also undisputed that the NCRC did not intend to be bound except by a signed agreement. "An otherwise valid oral agreement does not constitute a contract if 'either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist . . . until the whole has been reduced to . . . written form.'" Perles v. Kagy, 473 F.3d 1244, 1250 (D.C. Cir. 2007), quoting Restatement (Second) of Contracts § 27 cmt. b (1981). Here, Mr. Risher also informed the Rumbers and their counsel during negotiations that NCRC would not be bound until a written agreement was signed by both the Rumbers and the NCRC. (J.A. 147, Risher Aff. ¶ 3). The Rumbers once again did not dispute that they were so informed. (See generally Reply to Opp. to Mot. to Enforce).

For all these reasons, the Rumbers were not entitled to enforcement of the purported agreement. And because both of the newly proposed claims were futile, the district court properly denied leave to amend the complaint for the fourth time.[14]

CONCLUSION

This Court should affirm the judgment of the district court.

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[14] Plaintiffs incorrectly contend that their due process claim (J.A. 104, 4th Am. Compl., Count IV) remains valid. (Br. at 57). They are correct that their due process claim was not a newly proposed claim, but it was previously dismissed and such dismissal was affirmed on appeal. See Rumber, 487 F.3d at 945 ("remand[ing] only [the] public use claim to the district court").

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) that this brief contains no more than 13,170 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing final brief was sent by electronic mail on this 31st day of August, 2009, to:

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