ARGUMENT SCHEDULED FOR OCTOBER 16, 2009

No. 09-7035

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROSE RUMBER, *et al.*,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici.

Appellants, plaintiffs below, are Rose Rumber, Joseph Rumber, Marion Fletcher, Graham Fields, Verna Fields, Boubaker Ben Salah, Muneer Choudhury, Peter DeSilva, Quval Le, Moon Kim, Duk Hea Oh, In Suk Baik, Mukhtar Ahmadi, Son Cha Kang, Ingak Lee, Hartej Singh, and Ling Chen. The plaintiffs below who were terminated are Mary R. Greene, Mary Rose Greene Trustees, Ealing Corporation and Samuel Franco. Appellees, defendants below, are the District of Columbia and the National Capital Revitalization Corporation. There were no *amici*.

B. Rulings.

This is an action brought under the Fifth Amendment to the U.S. Constitution. Appellants challenge the order entered on February 26, 2009, by the Honorable Ricardo M. Urbina, which granted the defendants' motions.

C. Related Cases.

This case was previously before this Court in Appeal No. 06-7004. In a published opinion, *Rumber v. District of Columbia*, 487 F.3d 941 (D.C. Cir. 2007), the previous order dismissing the public use claim as unripe was

reversed and the case was remanded in part.

There have been several cases in the Superior Court for the District of Columbia concerning the Skyland condemnation. The cases pending in Superior Court include *D.C. v. 7.06 Acres of Land*, 2005 CA 005321 E(RP); *D.C. v. 0.03 Acres of Land*, 2005 CA 005323 E(RP); *D.C. v. 0.40 Acres of Land*, 2005 CA 005336 E(RP); *D.C. v. 0.03 Acres of Land (Franco)*, 2005 CA 005335 E(RP); and *D.C. v. 2704 Good Hope Road, S.E.*, 2008 CA 007603 E(RP).

The cases in Superior Court involving Samuel Franco have been appealed to the District of Columbia Court of Appeals. There is a published opinion in the 2005 *Franco* case. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007). That case was remanded and is pending in Superior Court. Another *Franco* case is on appeal in the District of Columbia Court of Appeals. *Franco v. District of Columbia*, No. 09-CV-204. The appeal will be heard in that court in September 2009.

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Elaine Mittleman

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* Authorities upon which we chiefly rely are marked with asterisks.

U. S. Constitution:

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GLOSSARY

NCRC National Capital Revitalization Corporation, formerly an independent instrumentality of the District of Columbia, abolished as of October 1, 2007

NCRC Act The statute that had established NCRC, D.C. Official Code § 2-1219.01 through § 2-1219.29

Skyland A shopping center located in the area of the intersections of Alabama Avenue, S.E., Good Hope Road, S.E., and Naylor Road, S.E., in Washington, D.C.

Skyland Act The National Capital Revitalization Corporation Eminent Domain Clarification and Skyland Eminent Domain Approval Amendment Act of 2004, D.C. Law 15-286

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STATEMENT OF JURISDICTION

Plaintiffs-appellants invoked the jurisdiction of the district court under 28 U.S.C. § 1331. Appendix ("App.") ___, ¶ 6. The district court entered a final order dismissing this case on February 26, 2009. App. ____. Plaintiffs filed a notice of appeal on March 30, 2009, [App. ____] within

the time allotted under Fed.R.App.P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The brief for appellants addresses the following issues:

1. Whether the district court erred in granting defendants' motions to dismiss and for summary judgment.

2. Whether the district court erred in finding that the *Younger* abstention doctrine bars certain claims from review in federal court.

3. Whether the district court erred in denying the plaintiff Rumbers' motion to enforce the settlement agreement.

4. Whether the district court erred in finding that the taking was for a valid public purpose.

5. Whether the district court erred in the takings analysis by failing to address the issue of pretext.

6. Whether the district court erred in denying the plaintiffs' motion to file the fourth amended complaint.

7. Whether the district court erred in dismissing certain claims based on ripeness.

STATEMENT OF THE CASE

Appellants (plaintiffs below) are owners and tenants of properties in the Skyland Shopping Center in Southeast, Washington, D.C. On July 13, 2004, they brought suit contending that legislation authorizing the defendants, the District of Columbia ("D.C.") and the National Capital Revitalization Corporation ("NCRC"), to exercise eminent domain over their property is unconstitutional and that the state remedies available are inadequate or futile.

Plaintiffs filed motions for preliminary injunction, which were denied by the district court on May 31, 2005, and on July 14, 2005. App. _____.

On June 15, 2005, the defendants filed a motion to dismiss the plaintiffs' third amended complaint on the grounds that the plaintiffs' claims were not ripe. On December 12, 2005, the district court issued an Order and Memorandum Opinion, *Rumber v. District of Columbia*, 427 F.Supp.2d 1 (D.D.C. 2005), App. _____, in which it granted the defendants' motion to dismiss on grounds of ripeness.

This case was previously before this Court in Appeal No. 06-7004. In a published opinion, *Rumber v. District of Columbia*, 487 F.3d 941 (D.C.

Cir. 2007), the previous order dismissing the public use claim as unripe was reversed and the case was remanded in part.

On November 11, 2007, the defendants filed a renewed motion to dismiss third amended complaint. Plaintiffs filed an opposition to the renewed motion to dismiss on January 24, 2008. Plaintiffs filed a motion for leave to file a fourth amended complaint on January 6, 2008. The Rumbers plaintiffs filed a motion to enforce the settlement agreement on January 30, 2008.

On February 26, 2009, the district court issued an Order and Memorandum Opinion, *Rumber v. District of Columbia*, 598 F.Supp.2d 97 (D.D.C. 2009), App. _____, in which it granted the defendants' motions to dismiss and for summary judgment; denied plaintiffs' motion to file a fourth amended complaint; and denied the Rumber plaintiffs' motion to enforce the settlement agreement. A timely notice of appeal was filed on March 30, 2009.

STATEMENT OF FACTS

I. The Factual Allegations

The District of Columbia enacted a series of bills which permitted

NCRC to take property at Skyland Shopping Center in Southeast, D.C., by eminent domain. App. ____, ¶¶ 2-4. On April 5, 2005, the D.C. Council approved the National Capital Revitalization Corporation Eminent Domain Clarification and Skyland Eminent Domain Approval Amendment Act of 2004 ("Skyland Act"), D.C. Legisl. 15-286 (Act 15-679). The passage of that bill authorized NCRC to exercise eminent domain power to acquire and redevelop the Skyland Shopping Center. App. ____, ¶ 3.

Plaintiffs are property owners, tenants and merchants in the Skyland Shopping Center, which is an approximately 16.5 acre shopping center at the intersection of Alabama Avenue, Good Hope Road and Naylor Road, S.E. App. ____, ¶ 8. The Skyland Shopping Center has been targeted for redevelopment for a number of years. The owners and tenants at Skyland were singled out and placed in a bad public light by officials of the D.C. government. App. ____, ¶¶ 61-66, 86-87.

A joint hearing on the Skyland legislation was held before several committees of the D.C. Council on June 17, 2004. App. ____, ¶ 30. The permanent Skyland legislation was introduced on July 12, 2004. The final legislation included a new section 2 that had not been part of the legislation

at the public hearing conducted on April 28, 2004. App. ____, ¶¶ 69-72. Plaintiffs alleged that the new section 2 included detailed findings about Skyland Shopping Center which were arbitrary, capricious and unsupported by statistics or other substantive data. Plaintiffs also alleged that the findings were pretextual and were inserted into the final bill to bolster the impression that Skyland Shopping Center is a blighted area. App. ____, ¶¶ 73-80.

Plaintiffs include merchants and business owners who will be displaced by the redevelopment of Skyland Shopping Center. The compensation available to the business owners for relocation or closure of their existing businesses is pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 ("URA"), 42 U.S.C. § 4621 et seq. The statutory provisions include a dollar maximum allowed for expenses, which is wholly inadequate to enable the business owners to reestablish their businesses elsewhere. Plaintiffs alleged that they faced great uncertainty concerning their property and the relocation of their businesses. App. ____, ¶¶ 39-41, 45-47, 53-59, 95-96.

II. The District Court Litigation

On July 13, 2004, plaintiffs brought suit to enjoin the defendants from commencing eminent domain proceedings and included claims based on the takings, due process and equal protection provisions of the Fifth Amendment of the United States Constitution. The complaint was amended several times (in part because of the successive versions of the Skyland legislation) and defendants filed a motion to dismiss the amended complaint.

The district court granted the defendants' motion to dismiss. *Rumber v. District of Columbia*, 427 F.Supp.2d 1 (D.D.C. 2005). This case was previously before this Court in Appeal No. 06-7004. In a published opinion, *Rumber v. District of Columbia*, 487 F.3d 941 (D.C. Cir. 2007), the previous order dismissing the public use claim as unripe was reversed and the case was remanded in part.

On February 26, 2009, the district court issued an Order and Memorandum Opinion, *Rumber v. District of Columbia*, 598 F.Supp.2d 97 (D.D.C. 2009), App. _____, in which it granted the defendants' motions to dismiss and for summary judgment; denied plaintiffs' motion to file a fourth

amended complaint; and denied the Rumber plaintiffs' motion to enforce the settlement agreement. A timely notice of appeal was filed on March 30, 2009.

III. The Superior Court of the District of Columbia Litigation

On July 8, 2005, National Capital Revitalization Corporation filed six separate condemnation complaints in the Superior Court of the District of Columbia concerning property at Skyland Shopping Center. Three of those complaints were for property owned by plaintiffs Baik, Oh and DeSilva in this matter. NCRC filed motions to strike the affirmative defenses which the property owners had pleaded in their answers. NCRC's motions to strike affirmative defenses were subsequently granted.

On November 18, 2005, NCRC deposited in the Registry of the Superior Court its estimate of just compensation for each of the six condemnation cases. NCRC also filed motions for immediate possession of the properties and those motions were granted.

There have been several cases in the Superior Court for the District of Columbia concerning the Skyland condemnation. The cases pending in Superior Court include *D.C. v. 7.06 Acres of Land*, 2005 CA 005321 E(RP);

D.C. v. 0.03 Acres of Land (Oh), 2005 CA 005323 E(RP); *D.C. v. 0.40 Acres of Land (DeSilva)*, 2005 CA 005336 E(RP); *D.C. v. 0.03 Acres of Land (Franco)*, 2005 CA 005335 E(RP); and *D.C. v. 2704 Good Hope Road, S.E.*, 2008 CA 007603 E(RP).

The cases in Superior Court involving Samuel Franco have been appealed to the District of Columbia Court of Appeals. There is a published opinion in the 2005 *Franco* case. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007). That case was remanded and is pending in Superior Court. Another *Franco* case is on appeal in the District of Columbia Court of Appeals. *Franco v. District of Columbia*, No. 09-CV-204. The appeal will be heard in that court in September 2009.

IV. Proceedings and negotiations involving the Rumbers

On April 25, 2007, Rose and Joseph Rumber met with Ted Risher and other officials of NCRC. At that meeting, Mr. Risher made an offer to the Rumbers. Mr. Risher indicated that he would have counsel for NCRC draw up the agreement. During the following months, there was considerable discussion about the offer from Mr. Risher. Roxan Kerr, an attorney at Holland & Knight, outside counsel for NCRC, drafted the agreement and

undersigned counsel reviewed it. Based on conversations between counsel, the Rumbers were expecting to sign the agreement on September 28, 2007, which was before NCRC ceased to exist on October 1, 2007. The Agreement provided in Paragraph 4 that, upon receipt of the payment identified in paragraph 3, the Rumbers shall withdraw from Rumber v. District of Columbia, which had been remanded to the District Court for the District of Columbia and the parties shall file a Dismissal Agreement in the form attached to the Settlement Agreement as Exhibit B. App. _____, ¶¶

On September 27, 2007, an email from undersigned counsel to Roxan A. Kerr, of Holland & Knight LLP, stated that, "The Rumbers are expecting to sign this tomorrow." In an email on September 28, 2007, from Ms. Kerr to undersigned counsel, Ms. Kerr stated that, "It is stated all over the [settlement agreement] that this comprehensive negotiated settlement is exclusive of relocation benefits." Ms. Kerr indicated that the Settlement Agreement constituted a "comprehensive negotiated settlement." App. ____, ¶¶

NCRC was abolished as of October 1, 2007. The District of

Columbia was subsequently substituted for NCRC as plaintiff in the Superior Court cases. *See* National Capital Revitalization Corporation and Anacostia Waterfront Corporation Reorganization Clarification Emergency Act of 2007, D.C. Act No. 17-0071, effective July 20, 2007 ("NCRC Reorganization Act"). The NCRC Reorganization Act also provided that the National Capital Revitalization Corporation Act of 1998, effective September 11, 1998 (D.C. Law 12-144; D.C. Official Code § 2-1219.01 *et seq*.), was repealed as of October 1, 2007. The 1998 Act which is now repealed included the special Skyland Act (D.C. Official Code § 2-1219.19). App. ____.

On October 24, 2007, the District added the Rumbers as defendants in the DeSilva condemnation case pending in Superior Court by filing a Notice of Condemnation and an Amendment to Complaint. The District did not file a motion to add the Rumbers as defendants, but simply added them. It relied upon Super. Ct. Civ. R. 71A(f), which provides that, "[w]ithout leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired." App. ____, ¶

When it added the Rumbers as defendants, the District failed to cite

or rely upon Super. Ct. Civ. R. 71A(c)(2). That provision states that, upon commencement of the action, the plaintiff shall add as defendants all persons having or claiming an interest in the property whose names can be ascertained by a reasonably diligent search of the records. All others may be made defendants under the designation, "Unknown Owners." Under this provision, if the District (then NCRC) thought that the Rumbers had an interest in the Property, they should have been included as defendants when the action was commenced on July 8, 2005. The Rumbers certainly do not qualify as "Unknown Owners," because they have long been tenants at Skyland and were known to NCRC. Further, the District did not claim in its Amendment that the Rumbers were previously unknown. It is the position of the Rumbers that the District should not have been able to add the Rumbers as defendants, more than two years after the Superior Court action was commenced. App. ____, ¶

In addition, the Notice of Condemnation and Amendment to Complaint, filed on October 24, 2007, relied upon D.C. Official Code, § 2-1219.19 (2006), as authority for the taking. However, that code section was repealed as of October 1, 2007, and should not be authority for a Notice

filed on October 24, 2007. App. ____, ¶¶

V. Skyland Holdings, LLC, Planned Unit Development application

Skyland Holdings, LLC, submitted on February 17, 2009, an Application to the District of Columbia Zoning Commission for Consolidated Review and Approval of a Planned Unit Development ("PUD") and Zoning Map Amendment. The Application is No. 09-03. The Applicant is Skyland Holdings, LLC, which consists of The Rappaport Companies, William C. Smith & Company, Harrison Malone Development LLC, the Marshall Heights Community Development Organization and the Washington East Foundation. App. _____.

The Application states at page 1 n. 1 that "(t)he Subject Property is owned by the District of Columbia." The Application does not explain the agreement and relationship between the Applicant and the District of Columbia concerning this Application. Specifically, the terms under which the Applicant may gain control or an interest in the Subject Property are not described. In addition, there is no discussion of any financing terms or financial arrangements between the Applicant and the District of Columbia. App. _____.

Eric D. Jenkins stated in a Declaration dated April 2, 2009, that he was the Development Manager with the Office of the Deputy Mayor for Planning and Economic Development. He had been the project manager for the development of the Skyland Shopping Center property since March 27, 2009. Mr. Jenkins stated that the District acquired title to the final property within the Skyland site in October 2008. That enabled the development team filed a Planned Unit Development ("PUD") application with the Zoning Commission in February 2009. According to Mr. Jenkins, the set down hearing on the PUD application was anticipated to occur in July 2009, with approval of the application expected a few months later. The commencement of construction is anticipated to begin in October 2010. App. _____, ¶ 2.

Mr. Jenkins also stated in his Declaration that "[t]his timeline for project completion may be derailed, however, unless the District soon establishes clear legal title to the Skyland property. Without clear legal title, the developer is unwilling to purchase the property from the District and commence construction of the Skyland project. It is my understanding that construction could not begin because the lack of clear legal title presents a

financing issue for the developer." App. _____, ¶ 3.

SUMMARY OF ARGUMENT

In *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), Justice Stevens stated that the city would not be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The district court erred in treating the defendants' motion to dismiss as a motion for summary judgment and then granting summary judgment on the public use question without analyzing the issue of pretext.

The Rumbers' motion to enforce the settlement agreement should be enforced. The fourth amended complaint should be permitted to be filed to take into account factual developments and the additional claims presented.

The district court erred in dismissing certain plaintiffs on the grounds of *Younger* abstention and mootness.

ARGUMENT

I. Standard of Review

This Court reviews de novo the district court's dismissal under Fed.R.Civ.P. 12(b)(6). The complaint's allegations are accepted as true and

all reasonable inferences are drawn in favor of the plaintiff. In assessing the motion to dismiss, the documents plaintiffs had in their possession or had knowledge of and upon which they relied in bringing suit may be considered. *Goldstein v. Pataki*, 516 F.3d 50, 53 and n. 1 (2nd Cir.), *cert. denied*, __ U.S. __, 128 S.Ct. 2964, 171 L.Ed.2d 906 (2008).

This Court reviews the district court's grant of summary judgment de novo. *Haynes v. Williams*, 392 F.3d 478, 481 (D.C. Cir. 2002). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

II. The district court erred in dismissing the claims of plaintiffs Oh, DeSilva and Rose and Joseph Rumber by applying the *Younger* doctrine.

A. The facts and tactics of the litigation in Superior Court require that plaintiffs be permitted to bring their claims in federal court.

Applying the *Younger* doctrine, the district court dismissed the claims of plaintiffs Oh, DeSilva and Rose and Joseph Rumber. *Rumber*, 598 F.Supp.2d at 110-11. The district court erred in finding that the *Younger*

doctrine applied in light of the facts and tactics of the litigation pending in Superior Court. In applying the *Younger* doctrine, the district court relied upon a Superior Court Omnibus Order. App. _____. For a number of reasons, that Order should not be relied upon.

The abstention doctrine was described in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Supreme Court held that, except in extraordinary circumstances, a federal court should not enjoin a pending state proceeding that is judicial in nature and involves important state interests. A three-prong test is applied in determining whether to abstain under *Younger*:

> [F]irst, a federal court may dismiss a federal claim only when there are ongoing state proceedings that are judicial in nature; second, the state proceedings must implicate important state interests; third, the proceedings must afford an adequate opportunity in which to raise the federal claims.

Bridges v. Kelly, 84 F.3d 470, 476 (D.C. Cir. 1996).

In *Rio Grande Community Health Center, Inc. v. Rullan*, 397 F.3d 56, 70-71 (1st Cir. 2005), the court found that *Younger* abstention applies when the federal court action interferes with state proceedings, such as where the plaintiff is seeking a declaratory judgment that a prosecution is illegal. The

mere possibility of inconsistent results in the future is insufficient to justify *Younger* abstention.

Two plaintiffs in this case, Oh and DeSilva, are the property owners concerning two of the six condemnation complaints filed in 2005 in Superior Court. In those six cases, the six judges granted NCRC's motions to strike affirmative defenses and referred to each other's decisions in granting those motions. However, the D.C. Court of Appeals in *Franco*, 930 A.2d at 176, has now stated that the pretext defense must be permitted to go forward and cannot be decided on the basis of a motion to strike. As a result, Oh and DeSilva have not been afforded an adequate opportunity to raise that defense. They should be permitted to address their claims in this litigation.

The Rumbers are in a different situation. They are the owners of Skyland Liquors and have been the tenants of DeSilva. They did not own real property and were not included as defendants in the DeSilva case when it was filed in 2005.

However, after October 1, 2007, the District of Columbia was substituted as plaintiff for NCRC in the condemnation cases in Superior

Court. The District of Columbia, represented by the Office of the Attorney General after the withdrawal of outside counsel Holland & Knight LLP, filed a notice and amendment to the complaint in the DeSilva case in Superior Court on October 24, 2007. The notice and amended complaint added the Rumbers as defendants in the DeSilva condemnation proceeding.

There is a substantial question as to the motivation of and justification for the District adding the Rumbers as defendants more than two years after the condemnation case was filed on July 8, 2005. In the memorandum supporting the motion before the district court at page 9, which was filed on November 1, 2007, the District indicated that the Rumbers are actively participating in the action in Superior Court.

However, the District failed to advise the district court that the Rumbers are now defendants in the Superior Court case as a result of their having been added by the District on October 24, 2007. The Rumbers were added to the Superior Court proceeding only eight days before the District stated to the district court that the Rumbers were actively participating at present in the Superior Court case. Moreover, the Rumbers timely filed their Answer in Superior Court on November 13, 2007, which was after the

District stated to the district court that the Rumbers were actively participating in the Superior Court case.

Further, the District filed a summary judgment motion against the Rumbers in Superior Court, even though the Rumbers were seeking to be dismissed as defendants. The District put the Rumbers in the onerous position of being expected to oppose a summary judgment motion on the complex issues addressing public use when, from the perspective of the Rumbers, they should not even be parties to the Superior Court litigation because they were not entitled to any condemnation award.

The Rumbers had not been included in the original condemnation case. Neither NCRC nor the Rumbers had asserted that the Rumbers were entitled to any portion of the just compensation award in the condemnation case in Superior Court. The allocation of condemnation awards was discussed in *Pennsylvania Ave. Dev. v. One Parcel of Land, Etc.*, 670 F.2d 289 (D.C. Cir. 1981). The D.C. Circuit noted that, "If there is a prior agreement between the parties as to allocation of a condemnation award, that agreement, of course, governs the disposition of the award." *Id*. at 292.

One important consideration is whether there is a condemnation

clause in the lease. As the court explained, "Under most leases, allocation of the award between lessor and lessee is not problematical because 'leases generally include a clause which makes them terminate in the case of condemnation. This is sufficient to bar the award. It is unnecessary to state expressly that the tenant is to have no compensation for his term.' Friedman on Leases 510-11 (1974)." The lease dated March 17, 2003, between Peter DeSilva, the Lessor, and Rose Rumber and Joseph Rumber, the Lessee, contains a condemnation clause. As a result, the Rumbers are not entitled to any compensation in the condemnation litigation in Superior Court and they had not made any claim for such an award. In spite of the condemnation clause in the Rumber lease, the District added the Rumbers as defendants.

In addition, the Rumbers are seeking in federal court, not the Superior Court, to have the Settlement Agreement enforced. One provision of that agreement is that the Rumbers agree to be dismissed as plaintiffs in this action after receiving the agreed-upon payment. That provision indicates that the enforcement affects the federal case and cannot be addressed by the Superior Court.

The maneuvering by the District, as successor to NCRC, shows that

there are extraordinary circumstances warranting equitable relief. These may exist when the pending state action was brought in bad faith or for the purpose of harassing the federal plaintiff. *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1127 (D.C. Cir. 2004). It can be argued that the District added the Rumbers as defendants in Superior Court to bolster its argument made eight days later in the district court that the Rumbers were actively participating in the case in Superior Court, even though they had not yet filed an Answer in Superior Court. The actions of the District have forced the Rumbers into an extremely convoluted and burdensome tangle of litigation, making it very difficult for them to have any opportunity to protect their interests. The litigation tactics by the District present the type of extraordinary circumstances which should preclude abstention.

Finally, plaintiffs Duk Hea Oh and Rose and Joseph Rumber own and operate businesses at Skyland. They will be harmed by the loss of their businesses and livelihood. The issues about the businesses are not permitted or included in the condemnation cases pending in Superior Court. Because the interests of plaintiffs Oh and Rose and Joseph Rumber extend beyond ownership of real property and are at issue in this case and not in Superior

Court, abstention should not apply.

B. The district court erred in relying upon the Superior Court Omnibus Order.

The district court erred in relying upon the Superior Court Omnibus Order. *Rumber*, 598 F.Supp.2d at 110. The district court referred to a "Superior Court Omnibus Order" without specifying in which Superior Court case that order was issued. The order was in case 2005 CA 005336 E(RP). That case was originally filed in July 2005 against Peter DeSilva. The District added the Rumbers as defendants more than two years later. Mrs. Oh is not a party to that case. The case in which Mrs. Oh is a defendant in Superior Court is 2005 CA 005323 E(RP). Any order from case 2005 CA 005336 E(RP) cannot be used against Mrs. Oh in this litigation.

Further, the order is not a final judgment in a Superior Court case. It was based on a summary judgment motion filed by the District of Columbia. The case is still pending in Superior Court. The district court apparently assumed incorrectly that the Omnibus Order was a final judgment, because the district court relied upon *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), which held that a final judgment precludes

parties from relitigating issues. There has been no final order in the Superior Court cases involving Mrs. Oh and Peter DeSilva and the Rumbers.

In addition, the Omnibus Order was based on a summary judgment motion filed by the District of Columbia and only applied to the Rumbers. After NCRC filed the six condemnation cases in 2005, it subsequently filed motions to strike affirmative defenses. Those motions were granted against the defendant property owners, including DeSilva. *See Franco*, 930 A.2d at 164. In the memorandum supporting the motion to dismiss before the district court at page 9, which was filed on November 1, 2007, the District explained that "[p]laintiffs Oh and DeSilva have already litigated the issue of the validity of their constitutional and statutory challenges to the taking of their properties (they lost) and are nearing trial on the just compensation phases of the cases."

The District subsequently added the Rumbers as defendants and filed the motion for summary judgment. Because DeSilva's defenses had already been stricken, the summary judgment motion did not apply to him. The omnibus order, which should not apply to him because his defenses had

previously been stricken, cannot be used to preclude his claims in this litigation.

At the time the motion for summary judgment was under consideration by the Superior Court, the Rumbers were challenging whether they should be defendants, explaining that they had been added by the District of Columbia after it replaced NCRC in the litigation. The Rumbers argued that the District failed to cite or rely upon Super. Ct. Civ. R. 71A(c)(2) when it added the Rumbers as defendants. That provision states that, upon commencement of the action, the plaintiff shall add as defendants all persons having or claiming an interest in the property whose names can be ascertained by a reasonably diligent search of the records. All others may be made defendants under the designation, "Unknown Owners." Under this provision, if the District (then NCRC) thought that the Rumbers had an interest in the Property, they should have been included as defendants when the action was commenced on July 8, 2005. The Rumbers certainly do not qualify as "Unknown Owners," because they have long been tenants at Skyland and were known to NCRC. Further, the District did not claim in its Amendment that the Rumbers were previously unknown.

Moreover, it is helpful to consider the special pleading requirements in a condemnation case. According to Super. Ct. Civ. R. 71A(e), a defendant has to include all objections and defenses to the taking of the property in an answer. No other pleading or motion asserting any additional defense or objection is allowed. *See Franco*, 930 A.2d at 164 n. 4. After the District added the Rumbers as defendants, the Rumbers were in an untenable litigation posture exacerbated by the strictures of Rule 71A(e).

The Superior Court judge issued the Omnibus Order and ruled on summary judgment even though the Rumbers described to the court the unfairness of forcing them to litigate a complex issue when they were asserting they should not be defendants and should not have to bear the sole burden of litigating a summary judgment motion. The Rumbers submit that the court should have ruled first on whether they should be defendants, before they were subjected to a summary judgment motion.

An example of the harsh treatment received by the Rumbers is that the omnibus order found that the Rumbers presented no evidence that they were known to NCRC or the District when the original complaint was filed. First, there is no explanation as to why the Rumbers have such a burden. It

was so obvious that the Rumbers were known to the District that, even if they had such a burden, the court should have taken judicial notice of the fact.

The Rumbers, plaintiffs in this litigation, filed this case against the District on July 13, 2004. The defendants in this litigation plainly were aware of the Rumbers. *See* Defs. Opp'n to Pls.' Mot. For Prelim. Inj., Ex. 2, in which the Declaration of Francis W. Winterwerp stated at ¶ 4 that "Diversified, on behalf of NCRC, has communicated with the owners of Skyland Liquors (Rose and Joseph Rumber), Alabama Express Liquors (In Suk Baik), Fields Records and All-in-One Hair Salon (Verna and Graham Fields), along with the other tenants. … Copies of some of our correspondence with these tenants is attached as Exhibit A." A July 16, 2004, letter from NCRC to Joseph and Rose Rumber is attached to the Winterwerp Declaration. App. _____.

Further, the District stated in its recent Motion for Possession in Superior Court that "On or about July 16, 2004, the National Capital Revitalization Corporation ('NCRC') sent notice to Defendants Joseph and Rose Rumber of a meeting to inform Skyland tenants of the relocation

requirements and procedures for obtaining relocation assistance …" App. _____, ¶ 6. The District cannot be excused from its tactic of adding the Rumbers as defendants in Superior Court on October 24, 2007, based on a finding that the District and NCRC did not know the Rumbers existed when NCRC filed the original complaint in July 2005.

In addition, the Omnibus Order is dated June 6, 2008, and was issued months after plaintiffs in this litigation filed their opposition to the motion to dismiss on January 24, 2008. The district court did not advise plaintiffs that it would be relying upon the Omnibus Order. The district court also did not provide plaintiffs any opportunity to address the application of that Superior Court order to the litigation pending in federal court. Appellants respectfully submit that the Omnibus Order should not be conclusive or even persuasive in this litigation.

For these reasons, the district court erred in dismissing the claims of plaintiffs Oh, DeSilva and Rose and Joseph Rumber by applying the *Younger* doctrine.

III. The district court erred in dismissing certain claims as moot.

The district court dismissed as moot the claims of plaintiffs Fields and Lee. *Rumber*, 598 F.Supp.2d at 112. The district court erred because the plaintiffs have a legally cognizable interest in the outcome.

If the plaintiffs succeed on the public use claim, then the Court could order that the plaintiff property owners have title to the property or make any other such order as it deems proper and necessary. *See Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455, 460 (4th Cir. 1963)(if it is ultimately held that the taking, itself, was improper, the condemnor, who had entered upon the land pending appeal, would be responsible to the owner for damages).

The district court erred in dismissing plaintiff Fields. First, the district court does not explain that there are two Fields plaintiffs, Verna and Graham Fields. They were property owners and have sold their property to NCRC. However, the Fields also have had businesses at Skyland. Even though they have sold the property on which the businesses operate, they still have a claim concerning the loss of their businesses in light of the *per se* inadequate compensation under the Uniform Relocation Act. The district court erred in failing to discuss the status of the Fields as business owners.

Thus, the claims of Verna and Graham Fields should not be dismissed as moot.

It appears that the district court omitted plaintiff Moon Kim in the list of plaintiffs whose claims are not moot. The claims of Moon Kim also are not moot.

IV. The district court erred in failing to address the pretext question concerning whether the Skyland project qualifies as a public use.

A. The district court erred in treating the motion to dismiss as a motion for summary judgment.

The district court treated the motion to dismiss as a motion for summary judgment. *Rumber*, 598 F.Supp.2d at 100 n. 1 and 112-13. However, the district court did not provide the plaintiffs the opportunity to present material pertinent to a Fed. R. Civ. P. 56 motion. *See Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003)(failure of the district court to comply with Fed. R. Civ. P. 12(b), concerning giving parties a reasonable opportunity to present material pertinent to a Rule 56 motion, is an abuse of discretion). As a result, it was an abuse of discretion for the district court to treat the motion to dismiss as one for summary judgment. In light of the complex issues and questions of fact in this case, it was not

harmless error for the district court to treat the motion to dismiss as a motion for summary judgment. Further, as discussed above, the district court should not have relied upon or given weight to the "Superior Court Omnibus Order."

B. The question of pretext must be addressed after *Kelo*.

In *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), Justice Stevens stated that the city would not be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. Pretext may be present when there is a one-to-one transfer of private property without a comprehensive development plan and where a particular private party is identified before the taking. *Kelo v. City of New London*, 545 U.S. at 478 and n. 6. Moreover, a "one-to-one transfer of property, executed outside the confines of an integrated development plan … would certainly raise a suspicion that a private purpose was afoot." *Kelo*, 545 U.S. at 487 n. 17 (citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001)).

The District of Columbia Court of Appeals found that a pretext defense is not necessarily foreclosed by *Kelo*. *Franco v. Nat'l Capital*

Revitalization Corp., 930 A.2d 160, 169 (D.C. 2007). In *Kelo*, the Supreme Court placed great reliance upon the existence of a "carefully considered development plan, the "comprehensive character of the plan" and the "thorough deliberation that preceded its adoption." *Kelo*, 545 U.S. at 474, 483-84.

The impact of the Supreme Court's ruling in *Kelo* on the questions concerning public use and pretext has been widely discussed. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. (2009)(this article contends that pre-condemnation involvement by private developers may increase the likelihood of a pretextual transfer); Daniel S. Hafetz, *Ferreting Out Favoritism*, 77 Fordham Law Review 3095 (2009)(this note argues that courts may infer favoritism from circumstantial evidence arising from the condemnation process).

The public use and pretext questions are subject to judicial review and must be determined on a case-by-case basis. *County of Hawaii v. C&J Coupe Family Ltd. Partnership*, 198 P.3d 615 (2008). The Supreme Court of Hawaii remanded the case for a determination of whether the asserted

public purpose was a pretext for a primarily private benefit to the developer. *Id*. at 652-53.

In *Goldstein v. Pataki*, 516 F.3d 50, 62-63 (2nd Cir.), *cert. denied*, __ U.S. __, 128 S.Ct. 2964, 171 L.Ed.2d 906 (2008), the Second Circuit rejected a pretext claim "founded only on mere suspicion." However, the court recognized the possibility that "the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer objective scrutiny of the justification being offered is required."

In his concurring opinion in *Kelo*, Justice Kennedy described aspects of the *Kelo* case that convinced him no more stringent standard of review might be appropriate in that case. The factors which Justice Kennedy found significant in *Kelo* included that (i) "[t]his taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression"; (ii) "the projected economic benefits of the project cannot be characterized as *de minimus*"; (iii) "[t]he identity of most of the private beneficiaries were unknown at the time the city formulated its plans"; and (iv) "[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Kelo*,

545 U.S. at 493 (Kennedy, J., concurring).

Before the *Kelo* ruling of the Supreme Court that mentions pretext, several federal district courts had addressed the public purpose question. *See Aaron v. Target Corp.*, 269 F.Supp.2d 1162, 1177 (E.D. Mo. 2003)(property owners showed a serious question concerning the merits of the public use grounds for taking where the property was to be condemned and transferred to another private party for use as a retail store), *rev'd on other grounds by* 357 F.3d 768, 777 (8th Cir. 2004); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1230 (C.D. Cal. 2002)(property owner demonstrated at least a fair question that the challenged condemnation had a valid public purpose where the property was to be turned over to Costco); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1130 (C.D. Cal. 2001)(rejecting condemnor's argument that the public purpose was preventing blight because there was no evidence in the record that the "future blight" was the actual reason for the condemnation action).

C. The Skyland project meets the criteria cited in *Kelo* to show that the taking was pretextual.

The Skyland project meets criteria cited in *Kelo* to show that the

taking was pretextual. First, the Skyland Bill was passed without any mention of or reliance upon a comprehensive development plan. Further, the Skyland project was not designed to address a serious city-wide depression.

It must be appreciated that the Skyland project itself remains speculative. The Skyland Act was passed in 2004 and it is now 2009. The economy has been in a serious recession. The Skyland project was originally challenged by plaintiffs as being difficult to achieve and the present condition of the retail and housing market has substantially magnified those concerns. Thus, any claim that an economic benefit will accrue to the public is not supported by the record.

In fact, the New London project at issue in *Kelo* and the Atlantic Yards project at issue in *Goldstein* have also faced substantial obstacles. *See* Lisa Prevost, *Condo Developers Change Tack*, The New York Times, November 9, 2008 (Fort Trumbull redevelopment plan remains stalled; the New London Development Corporation, the nonprofit agency overseeing the project, terminated its agreement with the chosen developer); Charles V. Bagli, *Atlantic Yards Project Enters a Crucial Period*, The New York Times,

June 25, 2009 (developer Bruce C. Ratner is trying to raise more than $500 million over the next four months to build the most expensive basketball arena in the country; critics and some supporters have complained that the Atlantic Yards project's public benefits are disappearing before construction even starts; much of the housing at Atlantic Yards has been delayed along with the creation of eight acres of open space); Michael M. Grynbaum, *Atlantic Yards Developer is Allowed to Defer Payments*, The New York Times, June 24, 2009 (developer Bruce C. Ratner can make $80 million of the $100 million in payments to the Metropolitan Transportation Authority for the Atlantic Yards project through 2031; Ratner was originally obligated to pay $100 million up front). App. _____.

The *Goldstein* court had explained that "the Atlantic Yards Project will target a long-blighted area, result in the construction of a publicly owned (albeit generously leased) stadium, create a public open space, increase the quantity of affordable housing, and render various improvements to the mass transit system." *Goldstein*, 516 F.3d at 64.

The justifications for the Atlantic Yards Project that the Second Circuit found persuasive may well prove to be substantially diminished. If

there is little or no actual economic development for a project, then the private benefit may easily outweigh any public benefit. Even more destructive for a claim of public use is the possibility that functioning businesses might be destroyed and new development will not accomplished and new businesses established, at least in a reasonable span of time.

The fact that a special bill was passed by the D.C. Council does not in any manner guarantee that a successful redevelopment project will be achieved. Thus, any claims of economic benefit to the public do not have a rational basis, are wholly speculative and cannot support a finding that the taking serves a public use.

The assumption that a government agency can take the private property of numerous individuals and transform those parcels into a first-rate mixed-use development is fundamentally flawed. The Skyland project illuminates how ill-conceived is the concept of economic development by a municipal government. First, there were significant problems with the operations of NCRC. *See* Yolanda Woodlee and Nikita Stewart, *Investigators Seize Embattled Agency's Computers*, The Washington Post, June 29, 2007, at p. B02 (D.C. Council member Kwame R. Brown has

criticized the National Capital Revitalization Corporation and the Anacostia Waterfront Corporation, saying they have taken too much time to develop city property and are poorly managed because of high turnover; NCRC has had six chief executives in six years; its officials have been criticized for moving too slowly in redeveloping the Skyland Shopping Center). App. _____. The Skyland project is now being monitored by the Office of the Deputy Mayor for Planning and Economic Development. There continue to be numerous personnel changes in that office.

Further, it is unclear what arrangements have been made between the District and the developer Rappaport as to the status of the project in light of the present economic conditions. At this time, there apparently is great uncertainty as to whether the developer Rappaport can obtain financing for the project. *See* Declaration of Eric D. Jenkins ("It is my understanding that construction could not begin because the lack of clear legal title presents a financing issue for the developer."). App. _____, ¶ 3.

It is significant that there seem to be serious title issues concerning the Skyland parcels. Mr. Jenkins stated in his Declaration that "the District acquired title to the final property within the Skyland site in October 2008.

This enabled the development team to file a Planned Unit Development (PUD) application with the Zoning Commission promptly in February of this year." App. ____, ¶ 2.

However, Mr. Jenkins then stated in this Declaration that "[t]his timeline for project completion may be derailed, however, unless the District soon establishes clear legal title to the Skyland property. Without clear legal title, the developer is unwilling to purchase the property from the District and commence construction of the Skyland project. It is my understanding that construction could not begin because the lack of clear legal title presents a financing issue for the developer." App. _____, ¶ 3.

According to Mr. Jenkins, the District has title to the property which is sufficient to enable the development team to file a PUD application. By contrast, according to Mr. Jenkins, the District does not have "clear legal title" which is sufficient to permit the developer to obtain financing.

If there is no financing and the Skyland project cannot be built, then it is uncertain what will happen at that site. If the District of Columbia buys the Skyland parcels and then transfers title to those parcels to developer Rappaport at a substantially reduced price, the economic benefits would

accrue to the developer Rappaport at the direct expense of the District and its taxpayers. Appellants do not know what memorandum of understanding, agreement and financial arrangements exist between Rappaport and the District.

However, it may well be that the District has offered Rappaport a very favorable inducement. A private developer, such as Rappaport, would likely not spend years waiting on a prospective transfer of the Skyland parcels if there were not substantial and relatively certain financial rewards during that period of years and as a result of the transfer of ownership from the District to the developer. *See* Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 Ind. L. Rev. 227, 253-54 (2009)(Atlantic Yards project in Brooklyn has been criticized for its lack of true community involvement; negotiations were held with organizations that were largely organized for the purpose of participation in the community benefit agreement; these groups then received specific contributions from the developer, thereby creating the appearance that the groups were interested in their own financial gain rather

than benefits for the community at large).

Further, because the agreement between the developer and the District is not known (at least to appellants), there can be no assurance that the developer will carry out whatever plan may have been proposed. There have already been substantial revisions to the design of the prospective Skyland project. There is no certainty as to what form any final Skyland project might take. There is the possibility that the present Skyland merchants will be forced to move, the buildings will be demolished and nothing will be built on the newly-consolidated acreage. It is important to appreciate what has happened to other economic development proposals. The dream often does not become the reality.

The early reports about the proposed Skyland development indicated that Target would be an anchor tenant. *See* Debbi Wilgoren, *D.C. Makes First Land Deal at Skyland; Some Owners Vow to Fight Redevelopment of Shopping Center in Southeast*, The Washington Post, April 10, 2005, at p. C06 ("NCRC has chosen developer Gary Rappaport to build the shopping center. Rappaport, who has developed retail complexes throughout the region, said he has a commitment from Target to locate there but cannot

negotiate a lease until NCRC controls the land."). App. _____.

The claim by Rappaport that he had a commitment from Target may have served as an inducement for NCRC to give Rappaport favorable terms in any development agreement or memorandum of understanding. Contrary to the reported assertion by Rappaport, there has been so substantive indication that Target will be an anchor tenant at the proposed Skyland development.

The recent experience of the proliferation of ever-more elaborate sports stadiums shows that tearing down the old park to build the more upscale new facility with no history or memories attached can generate serious financial difficulties and uncertainties. *See* Charles V. Bagli, *As Arenas Sprout, a Scramble to Keep Them Filled*, The New York Times, June 29, 2009 (developer Bruce C. Ratner is racing to start construction of arena for the Nets basketball team, even as Newark woos the Nets for its money-losing Prudential Center arena). App. ____.

Another factor relied upon by Justice Kennedy was that the identity of the private beneficiaries was unknown when the city formulated its plans. In the Skyland project, the beneficiaries were known years before the

taking. *Franco*, 930 A.2d at 163 (in October 2002, NCRC entered into a Joint Development Agreement with four private corporations to redevelop the Skyland Shopping Center). It must be noted that the Joint Development Agreement is not the type of comprehensive development plan discussed in *Kelo*.

Justice Kennedy also relied upon the fact that the "city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

In *Goldstein v. Pataki*, 516 F.3d at 56, the appellants had claimed that the public uses being proffered were *post hoc* justifications. Specifically, they had asserted that "Defendants never claimed that the Takings Area was blighted until years after the Project was officially announced and *Kelo* had been decided." The Second Circuit refuted that claim by appellants, explaining that "the Renewal Area, which makes up '[n]early half' of the Project site, was first designated as blighted in 1968, a designation that has since been reaffirmed by New York City ten times, most recently in 2004. … The blight study commissioned by ESDC [Empire State Development

Corporation] in 2006 determined that the conditions of blight extended well into the Takings Area, and the complaint alleges no facts to the contrary." *Goldstein*, 516 F.3d at 59.

The actions of the District of Columbia in Skyland could not be more at odds with the process in *Kelo* and the discussion by the Second Circuit in *Goldstein*. The D.C. Council added findings to the Skyland Act in a new section 2 after the hearings. Plaintiffs and others were not aware of those findings and had no opportunity to challenge them. Further, the findings were placed into the Skyland Act with no record support.

The public hearing occurred months earlier, on June 17, 2004. The hearing did not address the statutory definition of blight, because the bill at that time included no discussion of blight or reliance upon a finding of blight. Instead, the bill [Bill 15-752] simply stated baldly that "the Council, finding that the properties below are necessary and desirable for the public use, approves the exercise of eminent domain by the National Capital Revitalization Corporation" for the properties described in the paragraph below. App. ____, ¶¶ 25, 26.

Plaintiffs have emphasized that the findings in new section 2

specifically targeted and affected plaintiffs, as well as their businesses and property. Plaintiffs should have been given notice and an opportunity to comment on the detailed findings about the Skyland Shopping Center before those findings were included in the final Skyland Act.

Further, the findings were pretextual and described the Skyland Shopping Center as a "blighting factor," rather than using the statutorily defined term, "Blighted area." The statute also singled out the Skyland property in a special provision to permit eminent domain just for that property, without complying with the established statutory requirements for eminent domain. App. _____, ¶¶ 72-79.

In addition, plaintiffs asserted that officials of the D.C. government have targeted the group of Skyland owners and tenants. The officials described Skyland in negative and derogatory terms. The owners and tenants of Skyland include minorities and women who are lacking access to and influence with politically-connected and powerful developers and those in power. *See Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting)(taking for any economically beneficial goal will likely have a disproportionate effect on poor communities which are the least politically powerful). App.

_____, ¶¶ 61-66; 86-87.

In *Goldstein*, the Renewal Area had been designated as blighted in 1968 and the designation had been reaffirmed by New York City ten times since then. By sharp contrast, the District of Columbia has never found that the Skyland area is a statutorily-defined "Redevelopment district," "Blighted area" or "Project area." App. _____, ¶¶ 75, 79-80.

Moreover, it is noteworthy that, when Southwest Washington was being redeveloped in the 1950's, the owners of commercial property and the retail tenants were given a "priority of opportunity to relocate" in the new redevelopment. *See Donnelly v. District of Columbia Redevel. Land Agency*, 269 F.2d 546, 547 n. 4 (D.C. Cir. 1969). In sharp contrast to that consideration given to existing owners and tenants in the Southwest development, many of the Skyland business owners and merchants have been told that they will not be permitted to participate in the new Skyland project. Their businesses will be closed and they will be forced to find a new location if they have any chance whatever to continue to earn a livelihood as business owners and merchants.

For these reasons, the district court erred in finding that the taking

was for a valid public purpose without permitting plaintiffs to respond as though a summary judgment motion had been filed. The district court also erred in relying upon the Superior Court Omnibus Order. Finally, the district court failed completely to address the pretext issue presented in *Kelo*.

V. The district court erred in addressing claims under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

The district court found that the claim of plaintiffs Oh, DeSilva, and Rose and Joseph Rumber under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.C. § 4621 et seq., is not ripe. *Rumber*, 598 F.Supp.2d at 109. The court further noted that the defendants had responded in their reply that plaintiffs did not exhaust their administrative remedies and that plaintiffs provided no response to defendants' allegation.

First, plaintiffs would not have had an opportunity to rebut an argument included in defendants' reply. Second, the plaintiffs were not bringing a claim under the URA based on any finding as to administrative remedies, which have yet to be determined. The discussion about the URA

concerned the issue of abstention.

The plaintiffs, instead, were pointing out that the URA is *per se* an inadequate and even illusory remedy, so that other claims, such as the fundamental takings claim, should be addressed in this litigation. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.C. § 4621 et seq., provides some compensation for relocation expenses to displaced merchants and business owners. However, the statute itself contains strict limits to permitted compensation. It does not purport in any sense to provide "just compensation" to merchants and business owners. *M/V Cape Ann v. U.S.*, 199 F.3d 61, 65 (1st Cir. 1999)(under the URA, the government need not provide a suitable alternate location for displaced businesses, but rather must advise displaced businesses of the availability of such sites).

Moreover, the courts have been clear that the remedies available under the URA are quite limited. *Pietroniro v. Borough of Oceanport,* 764 F.2d 976, 980-81 (3rd Cir. 1985)(reference to five alternative locations and several local realtors satisfied the URA, even though none of the locations was economically feasible); *American Dry Cleaners & Laundry, Inc. v.*

United States Dep't. of Transp., 722 F.2d 70, 71-73 (4th Cir. 1983)(government need not provide a suitable alternate location, but must advise businesses of the availability of such sites; referrals to many possible relocation sites, none of which were acceptable to the displaced business, sufficient assistance under the URA).

In this litigation, the plaintiffs were not bringing a claim after an administrative determination of relocation benefits pursuant to the URA. There has been no determination concerning relocation benefits for Mrs. Oh and the Rumbers. Mr. DeSilva is a property owner, not a tenant, so presumably he would have no relocation benefits under the URA. The district court apparently relied upon the argument of the District in finding that the URA claim was not ripe.

VI. The district court erred in denying the Rumber plaintiffs' motion to enforce the settlement agreement.

The district court erred in denying the Rumber plaintiffs' motion to enforce the settlement agreement. *Rumber*, 598 F.Supp.2d at 104-106. In addressing the Rumber settlement agreement, the district court held that the statute of frauds applies and the Agreement [App. _____] is unenforceable because it was not signed by a representative for the defendants. *Id*. at 105.

The facts concerning the settlement agreement are set out in the proposed fourth amended complaint at ¶¶ 110-115. *See* Prop. 4th Am. Compl. App. _____, ¶¶ 110-115.

Settlement agreements are highly favored by the courts. *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1015 (D.C. Cir. 1985). The enforcement of settlement agreements is determined by state contract law. *Makins v. District of Columbia*, 277 F.3d 544, 547 (D.C. Cir. 2002). Relying upon the law of the District of Columbia, an enforceable contract exists when there is an agreement as to all the material terms and an intention of the parties to be bound. *United States v. Mahoney*, 247 F.3d 279, 285 (D.C. Cir. 2001).

The Settlement Agreement should be enforced. The terms are clear and based on an offer from NCRC official Ted Risher that was accepted by the Rumbers. Counsel for NCRC drafted the Settlement Agreement and the Rumbers expressed their intention to sign the Settlement Agreement on September 28, 2007.

There are numerous exceptions and waivers relating to the statute of frauds. *See Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 364

(D.C. Cir. 1983), in which the D.C. Circuit held that an oral agreement to execute a contract for sale was an enforceable contract; *Tauber v. District of Columbia*, 511 A.2d 23, 27 (D.C. 1986), in which the D.C. Court of Appeals explained that noncompliance with the statute of frauds can be rendered inconsequential on the basis of equitable estoppel, promissory estoppel or on the basis of waiver, where the party has admitted to the contract. *See also Forward v. Beucler*, 702 F.Supp. 582, 586 (E.D. Va. 1988)(under Virginia law, oral promise to transfer limited partnership interest was not barred by the statute of frauds, as transfer was not "contract for the sale of real estate"). This settlement agreement is not a contract for the sale of real estate, so the statute of frauds should not apply.

The fact that the settlement agreement was not signed by the National Capital Revitalization Corporation ("NCRC") or the District does not, by itself, show lack of compliance with the statute of frauds. In an email (App. _____) dated May 8, 2007, Ted Risher, Director, Real Estate Development of NCRC, wrote to undersigned counsel, "I'm having Roxan draft the agreement right now." Roxan is Roxan Kerr, an attorney at Holland & Knight, outside counsel for NCRC. It is clear that Mr. Risher indicated

there was an agreement and he was instructing outside counsel to draft it in written form. *See Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295-96 (7th Cir. 2002)(sender's name on an email satisfies the signature requirement of the Illinois statute of frauds).

Moreover, it would be instructive for the District to explain why it failed to sign the settlement agreement after NCRC had authorized its attorneys to draft the agreement and after the Rumbers had indicated that they planned to sign the agreement. *America v. Preston*, 468 F.Supp.2d 118, 122 (D.D.C. 2006)(determination whether a material breach has occurred is a question of fact). One possible explanation is that the District unilaterally repudiated the agreement after it had been negotiated by NCRC. If that is the explanation, then the District should not be able to rely upon the defense of the statute of frauds.

To the extent the District chose to rely upon the failure of NCRC or the District to sign the agreement, it should offer an explanation why no one signed it. Otherwise, the District, as successor to NCRC, has not been negotiating in good faith. The District cannot repudiate an agreement negotiated before it became the successor organization simply by refusing

(without explanation) to sign an agreement and then to claim that there was a requirement that the agreement had to be signed. *See Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 363 (D.C. Cir. 1983)(parties may enter into a binding agreement that later is memorialized in a written instrument).

The district court treated the settlement agreement as though it were a real estate transaction. However, the agreement reached between Ted Risher of NCRC and the Rumbers was not a contract or sale of real estate. It was also not a sale of a leasehold interest, because the Rumbers' leasehold interest would terminate when condemnation occurred, because of the condemnation clause in their lease.

A recent action taken by the District against the Rumbers also must be considered. On March 24, 2009, the District filed a Motion for Possession [App. _____] in Superior Court. In that motion, the District requested that the court order the Rumbers to pay monthly rent in the amount of $1,740.00 from November 18, 2005, through the date that possession is ultimately surrendered to the District. *See* Memorandum in Support of Motion for Possession at ¶ 9. The agreement in 2007 between the Rumbers and NCRC could not have been the sale of a leasehold interest to NCRC if the District

is now claiming that the Rumbers owe rent to the District (successor to NCRC) for a period beginning on November 18, 2005. The Rumbers could not have sold a leasehold interest to NCRC, if NCRC (according to the District's Motion for Possession) has a claim on the rent for the same time period. The statute of frauds for the sale of a leasehold interest does not apply to the Agreement reached in 2007 between Ted Risher of NCRC and the Rumbers.

Further, the agreement included a provision in paragraph 4 which provided that, upon receipt of the payment identified in paragraph 3, the Rumbers would withdraw from Rumber v. District of Columbia, which had been remanded to the District Court for the District of Columbia and the parties would file a Dismissal Agreement in the form attached to the Agreement as Exhibit B. *See* Prop. 4th Am. Compl. App. _____, ¶ 113.

The district court asserted that the plaintiffs' motion did not explain why the scheduled signing did not occur. However, plaintiffs explained in their reply that the District refused to sign. The scheduled signing did not occur because NCRC and the District, as its successor, refused to sign or to give any explanation why they refused to sign. The burden should be on the

District to give a good faith explanation as to why the agreement was not signed by NCRC or the District.

It was error for the district court to refuse to honor the settlement agreement, which included a provision that the Rumbers would withdraw from this litigation and that the parties would sign a dismissal agreement.

VII. The district court erred in denying the motion to file a fourth amended complaint.

The district court erred in denying the motion to file a fourth amended complaint. *Rumber*, 598 F.Supp.2d at 103-104. Leave to amend a complaint should be freely given when justice requires. Fed. R. Civ. P. 15(a); *Pharmaceutical Research and Mfrs. v. Thompson*, 259 F.Supp.2d 39, 58 (D.D.C. 2003).

Appellants sought leave to amend the complaint to include the substantial developments that had occurred in the more than two years since the complaint had been amended. The developments included the filing of condemnation cases in D.C. Superior Court by the National Capital Revitalization Corporation on July 8, 2005. In addition, NCRC was abolished and its responsibilities were transferred to the Mayor as of October 1, 2007.

The proposed fourth amended complaint added a third claim concerning whether NCRC and the District acted without statutory authority in light of the dissolution of NCRC and the repeal of the Skyland Acts. Even if condemnation proceedings initiated by NCRC can by continued by the Mayor, there is uncertainty as to new or revised condemnation proceedings. For example, the District added the Rumbers as defendants in the Superior Court proceeding on October 24, 2007, which was after NCRC was abolished.

It appears that section 2 of the Skyland Act was repealed as of October 1, 2007. However, the D.C. Council affirmed the findings made in section 2 of the Skyland Act in an emergency bill that was enacted on November 27, 2007. The District relied upon section 2 in its motion which was filed on November 1, 2007. That date is between the date when the Skyland Act was repealed [October 1, 2007] and that date on which the D.C. Council affirmed the findings made in section 2 of the Skyland Act [November 6, 2007]. Prop. 4th Am. Compl. App. _____, ¶¶ 103-105; 136-139. The succession of bills passed by the D.C. Council and their applicability present questions not addressed by the district court.

The district court found that count four of the fourth amended complaint was not a newly proposed claim, because it was addressed in count four of the third amended complaint. *Rumber*, 598 F.Supp.2d at 103 n. 3. However, the district court apparently did not rule on count four of either the third or the proposed fourth amended complaint. It appears that count four remains a valid claim.

The district court found that claim five of the proposed fourth amended complaint was futile, because it concerned enforcing the settlement agreement between the Rumber plaintiffs and the defendants. In addressing the settlement agreement issue, the district court relied or should have relied on the facts alleged in the proposed fourth amended complaint concerning the settlement agreement. As a result, the proposed fourth amended complaint should be considered filed. *Rumber*, 598 F.Supp.2d at 104.

The proposed fourth amended complaint included substantive additional facts and claims. The district court erred in denying the motion to file the fourth amended complaint.

CONCLUSION

For the foregoing reasons, appellants respectfully request that the judgment be vacated and the matter be remanded for further proceedings.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellants was prepared using 14 point Times New Roman typeface, as specified by Fed. R. App. P. 32(a)(5) and Cir. R. 32(a)(1). This brief complies with the word limit imposed by Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32(a)(3) and contains 12,480 words.

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Elaine Mittleman

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for appellants was served by first-class mail, postage prepaid, this 6th day of July, 2009, to Carl J. Schifferle, Assistant Attorney General, Office of the Solicitor General, Office of the Attorney General for the District of Columbia, One Judiciary Square, 441 4th St., N.W., Suite 600 South, Washington, D.C. 20001.

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