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

REPLY BRIEF FOR APPELLANTS

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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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SUMMARY OF ARGUMENT

In *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), the Supreme Court addressed the public use requirement of the Takings Clause of the Fifth Amendment of the United States Constitution. 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. The lengthy Committee Report, which the District of Columbia filed in the district court more than seven months after the District filed a motion to dismiss, does not provide support for the summary judgment ruling.

The district court erred in dismissing certain plaintiffs on the grounds of *Younger* abstention and mootness. The Rumbers' motion to enforce the settlement agreement should be enforced. The statute of frauds should not apply because the agreement was a settlement agreement and not a sale of a leasehold interest. The fourth amended complaint should be permitted to be filed to take into account factual developments and the additional claims presented. The due process claim is a new claim and should be considered.

ARGUMENT

I. The district court erred in granting the District summary judgment on the public use claim.

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

The district court treated the District's motion to dismiss as a motion for summary judgment. *Rumber v. District of Columbia*, 598 F.Supp.2d 97 (D.D.C. 2009), App. 110, 121, 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. The court must give parties a reasonable opportunity to present material pertinent to a Rule 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.

The District filed a supplemental memorandum in the district court proceedings on June 17, 2008, that included as exhibits the Committee Report [which will be discussed in more detail below] and the Superior Court Omnibus Order. The District's supplemental memorandum was filed in support of the motion to dismiss. The reply in support of the motion to dismiss had been filed by the District on January 31, 2008.

In a minute order entered on September 29, 2008, the district court ordered that the case would be stayed until October 20, 2008, to allow the parties time to supplement or file additional briefs. This order provided the

District the opportunity to file a motion for summary judgment based on the Committee Report and the Omnibus Order. However, the District did not file any motion or other pleading. Further, the minute order did not advise plaintiffs or put them on notice that the district court would be treating the motion to dismiss as a motion for summary judgment. The district court subsequently granted summary judgment in the District's favor on February 26, 2009. In light of the District's failure to take advantage of the district court's stay to file a motion for summary judgment, the District's motion to dismiss should not be considered a motion for summary judgment.

In *Cotton v. District of Columbia*, 541 F.Supp.2d 195, 199 n. 1 (D.D.C. 2008), the district court explained that the case was before the court on defendants' motion for summary judgment. Even though the defendants had repeatedly requested in the text of their motion that the court dismiss plaintiff's claims, the court concluded that the defendants intended that their motion be one for summary judgment. The court reached that conclusion because the defendants invoked the legal standard for summary judgment and because they asked the court to review materials outside the pleadings.

By contrast, in this case, the motion filed by defendants was clearly a

motion to dismiss. The material filed with the supplemental memorandum on June 17, 2008, was not included with the renewed motion to dismiss third amended complaint, which was filed on November 1, 2007. In its Brief at page 45, the District states that it "filed the Committee Report (Dkt. No. 55, Attach. 1) with all its attachments (Dkt. No. 67, Attach. 1)." The District fails to point out that the attachments were filed more than seven months after the renewed motion to dismiss had been filed.

In the Brief for the District of Columbia at pages 6-20, 33-41, the District cites extensively to Exhibit A (which is the Committee Report) of the Supplemental Memorandum to the Motion to Dismiss. The District did not file the lengthy Committee Report in conjunction with its motion to dismiss. The District did not file a motion for summary judgment in which it would have set out arguments based on record citations to the lengthy Committee Report. Instead, the Committee Report was submitted months later as part of a supplemental memorandum. Any argument based on that lengthy Committee Report was not placed before the district court in the appropriate fashion, which would have been a motion for summary judgment.

After recounting selected passages from the Committee Report, the District asserts in its Brief at page 35 that plaintiffs do not challenge these facts. That is not correct. As just explained, the District did not put before the district court arguments about the Committee Report in a motion for summary judgment. Plaintiffs were not required to address "facts" that were filed by the District in a document more than seven months after it filed a motion to dismiss. If the District planned to use the passages in the Committee Report as "facts," it should have included them as factual statements supporting a summary judgment motion. Plaintiffs then could have requested discovery or further proceeded in the usual summary judgment procedure.

In addition, the district court erred in relying upon the Superior Court Omnibus Order. *Rumber*, 598 F.Supp.2d at 110. The District argued in its Brief at page 53 n. 9 that the Omnibus Order was sufficiently firm that it should have persuasive effect, citing *Martin v. Department of Justice*, 488 F.3d 446, 455 (D.C. Cir. 2007). However, in *Martin*, 488 F.3d at 454-55, the appeal had been dismissed and the district court's decision became the final judgment. Thus, the lower court judgment could have preclusive effect

"despite the lack of appellate review."

It is clear that the Omnibus Order cannot have even persuasive effect. The District notes in its Brief at page 24 that the DeSilva case has been appealed to the District of Columbia Court of Appeals. The Omnibus Order is in no sense a final judgment.

A court may not grant a motion to dismiss for failure to state a claim so long as the pleadings suggest a plausible scenario to show that the pleader is entitled to relief. *See Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009)(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Similarly, because the District did not use the lengthy Committee Report to support its motion to dismiss, the appellants should not have been required to have addressed the merits of that Report without some notice or other indication that the District was relying upon witness statements from a hearing as "facts."

The District cites *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007), in its Brief at pages 45-46 to support its argument that public records are subject to judicial notice on a motion to dismiss. The

records in that case were wage determinations. By contrast, in this case, the Committee Report is not a document that can be relied upon for the truth and accuracy of its contents, which is a compilation of many witness statements heard at a public hearing and other reports.

Further, the defendants did not invoke the legal standard for summary judgment. The minute order entered on September 29, 2008, did not advise plaintiffs that the material filed by the District on June 17, 2008, would convert the motion to dismiss filed on November 1, 2007, into a motion for summary judgment. It was error for the district court to treat the motion to dismiss for lack of jurisdiction as a motion for summary judgment.

B. The Skyland project does not satisfy the public requirement of the Takings Clause of the Fifth Amendment of the United States Constitution.

In *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), the Supreme Court addressed the public use requirement of the Takings Clause of the Fifth Amendment of the United States Constitution. 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 substance of the Skyland project and the method by which the Skyland bills have been enacted show that the Skyland project does not meet the public use requirement of the Fifth Amendment. It should be noted that the public use requirement has apparently also now considered a public benefit requirement. The uncertainty surrounding what may be considered a public use or benefit has increased after *Kelo*.

The presumption that acquiring the Skyland properties will provide a public benefit cannot be supported. In fact, the District has apparently abandoned its pursuit of acquiring land for purposes of economic development. *See* Michael Laris, *Strapped Counties Snap Up Parkland*, The Washington Post, August 14, 2009. App. 190-192. That article states, "(i)n the District, the priority is to sell or lease some underused government properties to revive neighborhoods and collect new taxes. 'We've kind of got the opposite problem' from governments trying to buy land, said Sean Madigan, a city spokesman. 'We're not seeing the kind of valuations that

we were a couple of years ago.' At the real estate market's height, developers would line up, sometimes by the dozens, to bid on opportunities in the District. Now some projects, such as an offer to redevelop the former Grimke Elementary School on Vermont Avenue N.W., have received only a handful of bids, city officials said."

In the Skyland project, the District and its predecessor, National Capital Revitalization Corporation ("NCRC"), have spent millions of dollars to pay for property acquisition and for other expenses, including legal fees. *See* Yolanda Woodlee and Nikita Stewart, *Mayor's Wife Worked With District Agency*, The Washington Post, July 4, 2007, at p. B10 (District's Department of Housing and Community Development, which monitors NCRC projects that receive federal grant money, issued a critical report in August, saying it spent too much on legal costs). App. 188-189. Appellants do not have an estimate as to how much the District has spent on Skyland, but it certainly is in the millions of dollars.

Further, the District has asserted that it acquired title to many of the Skyland properties on November 18, 2005 (when it put money into the court registry in D.C. Superior Court for the condemnation cases filed on July 8,

2005), and it has purchased outright other properties. Presumably, the District has not received any property tax revenue for those properties for almost four years now. One of the proposed benefits to the District of the Skyland project had been to increase property tax revenue. At this time, any new property tax revenue for the properties at Skyland will not be realized for several years, if at all. Thus, the District has expended millions of dollars and has given up the property tax revenue from the Skyland properties.

It is difficult to calculate how the Skyland project will ever provide an economic benefit to the District or a return on its investment. It is understandable that the District is now trying to sell properties so it can collect new taxes. By contrast, it must be assumed that the developer Rappaport is obtaining an economic benefit from its continued involvement in the Skyland project. A development company in the private sector must receive a return on its investment and time expended or it would cease involvement in the project.

Another factor described in *Kelo* 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. *See* Eleni Chamis, *Rappaport wins retail revamp in SE*, Washington Business Journal, May 17, 2002 (Rappaport Cos. and three other groups have been selected to redevelop Skyland Shopping Center; Greg Jeffries, senior development director at NCRC says the group also must identify funds to help assemble the property and determine whether it will need to acquire the land by eminent domain). App. 182; Tim Lemke, *Post-Supreme Court decision, Skyland to be taken by eminent domain*, Washington Business Journal, July 11, 2005 (NCRC held off on eminent domain until the Supreme Court ruled that governments can take private land for the purposes of economic development; NCRC has named The Rappaport Cos. to redevelop the center with a big box retailer - Rappaport has a verbal agreement with Target - and other stores). App. 185.

Moreover, it is important to appreciate the stark differences between the passage of the Skyland special bills that targeted the Skyland properties and the usual or customary eminent domain determinations. In many cases, there is a state constitutional provision, an eminent domain statute and possibly municipal regulations or established procedures of an economic

development agency. These constitutions, laws, regulations and procedures may include definitions, such as blight and development area, as well as hearing, notice and due process requirements. The city or economic development agency utilizes a process through which evidence is taken and a determination is made that the statutory requirements, such as the definition of blight, have been met.

In *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), the Supreme Court of Ohio held that the ordinance which permitted appropriation of property as a deteriorating area was void for vagueness. The court explained that the use of "deteriorating area" as a standard for determining whether private property can be taken is void for vagueness "because it fails to afford a property owner fair notice and invites subjective interpretation." *City of Norwood*, 853 N.E.2d at 383.

The Supreme Court of Ohio also addressed the constitutionality of R.C. 163.19, a provision in R.C. Chapter 163, which governs appropriation actions in Ohio. *City of Norwood*, 853 N.E.2d at 384. The court held that the provision in R.C. 163.19 which prohibits a court from enjoining the taking and using of property appropriated by the government after the

compensation for the property has been deposited with the court but prior to appellate review of the taking violates the separation-of-powers doctrine. *City of Norwood*, 853 N.E.2d at 356.

In *Brody v. Village of Port Chester*, 434 F.3d 121, 125 n. 3 (2nd Cir. 2005), the court explained the procedure used in New York. Section 203 of New York's Eminent Domain Procedure Law required the condemnor to keep a record of the public hearing. That record plays a key role in the law's judicial review procedure. *See* §§ 203, 207(A). Any affected property owner who wished to challenge any of the issues involved in the Determinations and Findings must do so by filing a petition for review in the Appellate Division of the Supreme Court for the judicial department in which the property is located.

The court then explained that New York's law splits the condemnation process from the proceedings to take title and to determine just compensation. The court explained that it is not likely that the average landowner would have appreciated that notice of the Determination and Findings began the exclusive period in which to initiate a challenge to the condemnor's determination. The court then concluded that, given the

constitutional significance of the public use requirement and the brief period allowed for reviewing the condemnor's public use determination, due process requires more explicit notice than that given to Brody. *Brody*, 434 F.3d at 132. In contrast to the procedures described in *Brody*, the District used an *ad hoc* process with no procedural protections for the property owners when it made the public use determination about Skyland.

In *Wayne County v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Supreme Court of Michigan overruled *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (1981). The court explained that "*Poletown's* 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." *Hathcock*, 684 N.W.2d at 786. The court concluded that "the condemnations proposed in this case do not pass constitutional muster because they do not advance a public use as required by Const. 1963, art. 10, § 2. Accordingly, this case is remanded to the Wayne Circuit Court for entry of summary disposition in defendants' favor." *Hathcock*, 684 N.W.2d at 787.

In contrast with the statutory and other requirements in condemnation proceedings in states, there is no state constitution or statute with which the

District of Columbia Council had to comply in passing condemnation bills or making a public use determination. In passing the Skyland bill, the D.C. Council evaded the provisions of the existing condemnation statute involving NCRC and simply passed a special bill including provisions just pertaining to Skyland. There was no comprehensive development plan. There were no defined terms which the record had to support. There was no hearing before the economic development agency, NCRC. There were no proposed findings of fact on which testimony was received. There was no established procedure through which property owners could challenge the public use determination. There was no provision to recognize that property owners and merchants would lose their livelihood, suffer great stress and incur costs while some other entities would benefit from the Skyland project.

Instead of utilizing an established eminent domain procedure, the District passed a sequence of bills and resolutions, all of which were targeted directly at the Skyland properties. The District added findings to one of the bills after this federal lawsuit was filed and did not give plaintiffs or other interested parties notice and an opportunity to testify about those

findings. The bills were not passed in reliance upon a comprehensive development plan. The Committee Report, upon which the District relies in its Brief, is essentially a compilation of testimonies at a public hearing and reports. The Committee Report is not structured to show compliance with an approved comprehensive economic development plan, to cite to defined terms in an eminent domain statute or to prove that the provisions and procedures of an eminent domain statute were satisfied. The Committee Report is dated November 3, 2004, which is almost four months after this federal lawsuit was filed.

Further, the Committee Report is from the Committee on Economic Development and is a report on Bill 15-752. The public hearing had been held by the Committee on Economic Development on April 28, 2004. An emergency version of Bill 15-752 was approved by the D.C. Council on May 6, 2004. Thus, the Committee Report was issued almost six months after Bill 15-752 had become law. The version considered by the Committee on Economic Development on November 3, 2004, contained the added findings. There was no public hearing on that version. Plaintiffs and others did not have the notice of the new version with the added findings of

Bill 15-752 and did not have an opportunity to comment on those findings. The Committee Report, on which the District relies, is based on the testimony from the April 28, 2004, hearing. The witnesses at that hearing were not given proposed findings on which to comment. Those findings simply appeared in the version of the bill introduced on November 3, 2004.

It is also rather telling that the Committee Report emphasizes the actions of NCRC in the redevelopment of Skyland. NCRC was abolished as of October 1, 2007. Its functions are now in the Office of the Deputy Mayor for Economic Development. Clearly, the Committee Report is not accurate to the extent that it relies upon or bases estimates on the actions of NCRC in developing Skyland. The theory that an economic development agency, such as NCRC, is better suited than a private developer for pursuing development activities and can operate more efficiently has been wholly refuted in the Skyland project. There are also questions whether the Office of the Deputy Mayor has the capabilities to serve as a developer of and landlord for the Skyland properties. If, as the District asserts, it has owned many of the Skyland properties since November 18, 2005, then the District also has the duties of being a long-term landlord, which should include

maintaining the properties and managing the tenants.

Further, the lack of a comprehensive development plan in Skyland is a stark difference from *Kelo*. In *Kelo*, the development corporation estimated that the development plan, which was a composite of the most beneficial features of six alternate developments plans that had been considered, would have a significant socioeconomic impact on the New London region. The economic advantages would occur in a city that had experienced serious employment declines and the city had been designated a "distressed municipality" by the state office of policy and management. *See Kelo v. City of New London*, 843 A.2d 500, 510 (Conn. 2004), *aff'd*, *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). The development plan was approved by the development corporation board, the city council and various state entities, as required by statute. *Kelo*, 843 A.2d at 510 and n. 8.

The Supreme Court of Connecticut began its analysis by reviewing the language of the relevant sections of chapter 132 of the General Statutes. *Kelo*, 843 A.2d at 512. After a lengthy analysis, the court concluded that the trial court properly construed the term "unified land and water areas" as not

excluding developed or occupied land. *Kelo*, 843 A.2d at 519. The court then addressed the public use question and stated:

> [W]e conclude that economic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution.

Kelo, 843 A.2d at 531. The court further explained:

> We, therefore, conclude that the plaintiffs have not proven beyond a reasonable doubt that the provisions of chapter 132 of the General Statutes authorizing the use of eminent domain are facially unconstitutional when used in furtherance of an economic development plan such as the development plan in the present case.

Kelo, 843 A.2d at 536.

The procedures used by the District of Columbia to target the Skyland properties could not be more different than the procedures in *Kelo*. Justice Kennedy found it significant 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).

For these reasons, the district court erred in granting summary judgment in favor of the District of Columbia on the public use claim.

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

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. For a number of reasons, plaintiffs Oh, DeSilva and Rose and Joseph Rumber should be permitted to pursue their claims in federal court. Their claims should not be dismissed based on the *Younger* abstention doctrine.

The District added the Rumbers as defendants in the Superior Court case on October 24, 2007, shortly after the District replaced NCRC, which was abolished as of October 1, 2007. In the Superior Court case, the District did not file a motion to add the Rumbers as defendants; it simply added them. The District then filed a motion for summary judgment against the Rumbers. The motion for summary judgment was filed against the newly-added defendants, the Rumbers. It did not pertain to defendant DeSilva. When NCRC had been the plaintiff, it filed motions to strike affirmative defenses in all the cases pending in Superior Court. Those

motions were all granted. Thus, defendant DeSilva did not have any defenses remaining and the summary judgment motion was not filed against him.

The original complaint in this case was filed in the United States District Court for the District of Columbia on July 13, 2004. NCRC brought the condemnation proceedings in the Superior Court for the District of Columbia on July 8, 2005, almost a year later. The District added the Rumbers as defendants in Superior Court on October 24, 2007, more than three years after Rose Rumber was named as the lead plaintiff in this case in federal court.

It is difficult to avoid concluding that the Rumbers were added as defendants in Superior Court years after both the federal court and Superior Court cases had commenced as a mechanism for the District to urge abstention.

The delay in Superior Court proceedings alone should preclude the use of abstention. *See Hoai v. Sun Refining and Marketing Co., Inc.*, 866 F.2d 1515, 1519 (D.C. Cir. 1989)(the District Court clearly has priority in time over the Superior Court with respect to the federal claims, which were

filed in federal court a full year before Hoai added them to the Superior Court action; abstention was inappropriate).

The delay by the District in bringing suit against the property owners in Superior Court also should preclude the use of abstention for other federal court plaintiffs, including DeSilva and Oh. The District asserts in its brief at page 51 that there is an order in the DeSilva condemnation case that has already transferred legal title. Contrary to the District's assertion, the issue of title has not been resolved. A court order cannot transfer title under the quick-take method of condemnation. The transfer of title pursuant to a declaration of taking occurs when the declaration is filed and money is deposited in the court. The transfer is not achieved pursuant to a court order.

The declaration of taking procedure is also known as the quick-take method. *See* 27 Am Jur 2d EMINENT DOMAIN §§ 687-695 (2004). The quick-take statutes must be strictly complied with by condemnors. Moreover, a declaration of taking that does not conform to the procedures of the quick-take statute does not vest title to the land in the condemnor. *Id*. at §§ 688-689. *See Dorsey v. Department of Transportation*, 279 S.E.2d 707,

710 (Ga. 1981)(a declaration of taking that does not conform to the statute did not vest title to the land in the condemnor).

When NCRC filed the Complaint to Condemn Real Property in the DeSilva and Oh cases on July 8, 2005, it did not have the funds to put into the court registry and effect a quick-take condemnation. The condemnation cases filed were regular condemnation cases and not quick-take. *See* Tim Lemke, *Post-Supreme Court decision, Skyland to be taken by eminent domain*, Washington Business Journal, July 11, 2005 (NCRC chose to acquire the land through a normal condemnation process, rather than use a quick-take option; by going through the normal condemnation process, the agency will only acquire the property after a court determines full market value). App. 185.

Because the District filed its condemnation complaints on July 8, 2005, without depositing funds in the court registry at that time, there have been substantial complications with the taking process. D.C. Official Code § 16-1314(b) requires that funds be deposited in the court registry for a quick-take condemnation. In addition, DeSilva and Oh have challenged whether a declaration of taking was filed, which would effectuate the quick-

take method of condemnation. There are other questions concerning the titles, including whether there was proper recording with the D.C. Recorder of Deeds. The questions about titles have been raised persistently on behalf of property owners DeSilva and Oh and remain unresolved.

The representation by the District in its Brief at page 51 to this Court that any relief granted would invalidate orders that have already transferred legal title cannot be supported. The Superior Court orders did not transfer title to the District. *See* D.C. Code § 16-1319, which provides: "If the appraisement of the jury … is not objected to …, the Mayor shall pay the amount awarded by the jury .. and thereupon the title to the property condemned shall vest in the District of Columbia." The consideration by this Court of plaintiffs' claims will not invalidate orders that have already transferred legal title.

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. The district court erred in failing to discuss the status of Verna and Graham Fields as business owners. Thus, the claims of Verna and Graham Fields should not be dismissed as moot. In its brief, the District does not dispute that the claims of Moon Kim also are not moot.

IV. 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. 131] is unenforceable because it was not signed by a representative for the defendants. *Id*. at 105.

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 concerning real estate. It was also not a sale of a leasehold interest, because the Rumbers' leasehold interest would terminate when condemnation occurred, as a result of the condemnation clause in their lease. The District is now claiming that it has

had title to the property where the Rumbers operate their business since November 18, 2005. The agreement could not have been a sale of a leasehold interest from the Rumbers to the District in 2007 if the District owned the property and the Rumbers' lease with DeSilva expired in 2005.

In addition, the emails from Mr. Risher and attorney Roxan Kerr refer to an agreement and a comprehensive negotiated settlement. The District, through its predecessor NCRC, acknowledged that there was an agreement. Thus, the statute of frauds objection has been waived. *See Morris v. Buvermo Properties, Inc.*, 510 F.Supp.2d 112, 116 (D.D.C. 2007)(where a party has admitted the existence of the agreement at issue, that party has waived and may not assert a statute of frauds objection).

As discussed below, Mr. Risher made an offer to the Rumbers for a payment because he understood the very difficult financial situation the Rumbers faced if their business was taken. The Rumbers would be at risk of losing both their business and their house. Mr. Risher had studied the Rumbers' situation at length and made an offer to them in recognition of their potential losses. Upon information and belief, Mr. Risher made the offer to the Rumbers in an effort to treat them with fairness, which is a basic

element of proper negotiations, particularly in eminent domain cases.

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.

V. 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. The District cites the fourth amended complaint throughout its brief. In light of its reliance upon the fourth amended complaint, the complaint should be permitted to be filed. *See Ellis v. Georgetown University Hospital*, __ F.Supp.2d __, 2009 WL 1916315, at **6 -7 (D.D.C. July 6, 2009)(key issue is whether non-movant will suffer any prejudice; at this stage of litigation, prior to briefing on summary judgment, there will be no undue prejudice if leave to amend is granted).

The district court found that count four of the fourth amended complaint was not a newly proposed claim, because it was addressed in the third amended complaint. *Rumber*, 598 F.Supp.2d at 103 n. 3. The due process claim in the fourth amended complaint is not the same claim

addressed on appeal and in the third amended complaint. It is a new claim and must be addressed on the merits. Further, due process claims are typically included under the rubric of a takings claim. *See Rumber v. District of Columbia*, 487 F.3d 941, 945 (D.C. Cir. 2007)(District maintains that appellants' allegations regarding the 2004 Skyland Act state a takings claim rather than an equal protection or due process claim). Thus, appellants should be permitted to pursue a due process 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. The District asserts in its Brief at pages 60-61 that the Rumbers did not dispute certain statements attributed to Ted Risher in his affidavit [which is undated]. App. 147. In fact, the Rumbers do dispute those statements.

The District apparently attempted to establish that Mr. Risher made certain statements in negotiations by filing an affidavit created for purposes of the litigation. The credibility of the Risher affidavit can certainly be questioned in light of the circumstances in which it was created and its lack of reliance upon any documents at the time of the negotiations. Further,

when Mr. Risher was at NCRC, negotiations and agreements concerning the Rumbers and other Skyland property owners and tenants had been conducted with Mr. Risher. There was no indication that Mr. Risher did not have the authority to negotiate. Upon information and belief, Mr. Baker was not involved in the negotiations with Skyland property owners, merchants and tenants.

After the District took over the Skyland project from NCRC on October 1, 2007 (which is after Mr. Risher had left NCRC), the District apparently retroactively established the policy that Mr. Risher had not had the authority to bind NCRC in any settlement discussions. That retroactive policy by the District permitted it to argue that any actions taken by NCRC and Mr. Risher, which the District wanted to abrogate, were not proper agreements. The Skyland property owners, merchants and tenants were deprived of agreements reached with NCRC personnel by the actions of the District when it replaced NCRC on October 1, 2007.

At the time of the conversations between the Rumbers and Mr. Risher, Mr. Risher was trying to alleviate the dire consequences threatening the Rumbers. He recognized that they were in a unique and very difficult

financial situation. The Rumbers had used their home on Minnesota Avenue, S.E., to secure monthly payments of $4,732 to purchase the business they were operating. Those payments were owed to the previous owners for twelve years from the date when the Rumbers agreed to purchase the business. App. 33, ¶ 10. If the Rumbers had to close their business because of the Skyland project, they would lose their business and still owe the monthly payments for a substantial period of time. Thus, they were at risk of losing both their business and their house because of the Skyland project. Mr. Risher made the settlement offer to the Rumbers in an effort to reduce the great financial risk they were facing.

Moreover, the offer was simply an offer to settle with the Rumbers. It was not a lease. The language about a lease was added in the drafting by the attorney at Holland & Knight, presumably as some form of boilerplate provision. It was not part of the agreement. Further, the agreement was plainly drafted as a settlement agreement and not as a lease. It is noteworthy that the Risher affidavit states that he "participated in settlement negotiations with Rose and Joseph Rumber and their counsel." The Risher affidavit does not refer to any negotiations about a lease with the Rumbers.

Thus, the statute of frauds does not apply.

After Mr. Risher left NCRC and the District took over from NCRC, the District initiated a new strategy against the Rumbers. The District clearly has not tried to ameliorate the crisis facing the Rumbers in light of the challenges to their financial future caused by taking away their business. Instead, the District has pursued a litigation strategy against the Rumbers that has greatly exacerbated their financial plight. The Risher affidavit was prepared for use by the District to further its new and harsh tactics against the Rumbers.

As explained above, 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 Final Reply 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 6,528 words.

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Elaine Mittleman

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Reply Brief for Appellants was served by first-class mail, postage prepaid, this 31st day of August, 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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