

NORTH CAROLINA COURT OF APPEALS

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County

15-CVS-5836

PRINTED RECORD ON APPEAL

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STATEMENT OF ORGANIZATION OF TRIAL COURT

Defendant Beverly L. Rubin appeals from the 1) Order Denying Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus; and 2) Order Granting Plaintiff's Motion for Relief from Judgment, filed on 21 January 2020 in the Superior Court of Wake County, The Honorable G. Bryan Collins, Superior Court Judge presiding. Defendant filed and served written notice of appeal on 29 January 2020. (R p 169).

The record on appeal was filed in the North Carolina Court of Appeals on _____ 2020 and was docketed on _____ 2020.

STATEMENT OF JURISDICTION

The action was commenced by the filing of a Complaint on 30 April 2015 and issuance of a summons.

The parties acknowledge that the trial tribunal had personal jurisdiction over the parties.

15CV005836

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2015 APR 30 PM 4:00 SUPERIOR COURT DIVISION
TOWN OF APEX, WAKE COUNTY, N.C. 15-CVS-
BY Plaintiff,)
v.) COMPLAINT
BEVERLY L. RUBIN,) [COMP]
Defendant.)

NOW COMES the Town of Apex, Plaintiff herein, and for its cause of action says and alleges:

1. The Plaintiff, Town of Apex is a duly chartered Municipal Corporation of the State of North Carolina with its principal offices in Apex, North Carolina. The Plaintiff possesses the powers, duties, and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. The Plaintiff alleges upon information and belief that those persons whose names and addresses are set forth in **Exhibit A**, attached hereto, are, insofar as the same can be ascertained by reasonable diligence, the only persons who may have or who claim to have an interest or estate in the property subject to this action, which is described in **Exhibit B**, attached hereto. The named interested persons are under no legal disability to Plaintiff's knowledge except as may be stated in said **Exhibit A**.

3. Pursuant to the authority vested in the Plaintiff under the provisions of Section 6.5 of its Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, it is necessary to condemn and appropriate certain property interests described in **Exhibit B** and **Exhibit C** for

public use for sanitary sewer and sewer facilities and for the other facilities described in said exhibits, and appurtenances thereto, to improve the public utility systems of the Town of Apex.

4. The property which is the subject of this action, the interest or estate acquired, and the areas appropriated are all described in **Exhibit B** and **Exhibit C**.

5. The Plaintiff alleges upon information and belief that the property described in **Exhibit B** is subject only to such liens and encumbrances as are set forth in **Exhibit A**.

6. The Plaintiff and the Defendant have been unable to agree as to the purchase price of the property interests herein appropriated.

WHEREFORE, Plaintiff prays that just compensation for the appropriation herein set forth be determined according to the provisions and procedures contained in Article 9 of Chapter 136 of the North Carolina General Statutes and for such other relief as to the Court may deem just and proper.

This the th30 day of April, 2015.



David P. Ferrell
N.C. State Bar No. 23097
Ashley P. Holmes
N.C. State Bar No. 42911
Vandeventer Black LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Email: dferrell@vanblk.com
apholmes@vanblk.com
Attorneys for Plaintiff Town of Apex

EXHIBIT A

**NAMES AND ADDRESSES OF PERSONS WHO HAVE OR CLAIM AN INTEREST IN
THE SUBJECT PROPERTY AFFECTED BY THE TAKING:**

BEVERLY L. RUBIN
2613 Olive Chapel Rd
Apex, NC 27502

See also persons listed under Liens and Encumbrances below.

DISABILITIES OF DEFENDANTS: NONE KNOWN

LIENS AND ENCUMBRANCES:

Easement for water easement - - Town of Apex

All taxes for the County of Wake for the year 2014 and all previous years.

All easements, restrictive covenants, encumbrances, encroachments and other matters of record.

All easements, encumbrances, encroachments and other interests to which the Subject Property is subject by adverse possession, prescription or otherwise.

EXHIBIT B

DESCRIPTION OF SUBJECT PROPERTY AFFECTED BY THIS ACTION:

Those certain lands lying and being in the Buckhorn Township, Wake County, North Carolina and being more particularly described as follows:

All of that certain parcel containing 11.426 acres and bounded on the North by the Southern right of way line of Olive Chapel Road, on the Northeast by the property of Madeleine J. Calder (Book of Maps 2000 Page 1587, Wake County Registry), on the Southeast by the property of Aspnes (Book of Maps 1987, Page 691, Wake County Registry), on the South by the property of the Richardson Heirs (Parcel ID No. 0721.01-47-4087), and on the West by the property of Eatman (Book of Maps 1996 Page 292, Wake County Registry), and having the street address of 2613 Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

Beginning at an existing iron pipe in the Southern right of way line of Olive Chapel Road and the Northwesternmost corner of the said Calder property and proceeding along a common property line with Calder South 01 degrees 33 minutes 25 seconds West 761.61 feet to an existing iron pipe; thence proceeding along a different common property line with Calder North 85 degrees 31 minutes 27 seconds East 339.29 feet to an existing iron pipe; thence proceeding along the common property line with the said Aspnes property South 05 degrees 24 minutes 31 seconds West 836.88 feet to an existing iron pipe; thence proceeding along the common property line with the said Richardson Heirs North 83 degrees 49 minutes 51 seconds West 523.35 feet to an existing iron pipe; thence proceeding along the common property line with the said Eatman North 07 degrees 10 minutes 08 seconds East 1499.31 feet to an existing iron pipe set in the Southern right of way line of Olive Chapel Road; thence along the said Southern right of way North 75 degrees 23 minutes 32 seconds East 93.90 feet to the point and place of beginning.

All as shown on that certain "Survey for Steven M. Adams and Julie M. Adams", prepared by Larry I. Chasak, Professional Land Surveyor and dated July 27, 2001 and being that same property having Wake County Parcel ID No. 072101482119 and Account No. 0283566. This is the same property shown as Tract 2, 11.459 acres, on that certain "Recombination Map for Madeleine J. Calder", Recorded in Book of Maps 2000 Page 1587, Wake County Registry, and being further described in Deed Book 13973, Page 2151, Wake County Registry and being Wake County PIN #0721-48-2119, subject to all matters and items of record or listed in **Exhibit C**.

DESCRIPTION OF INTERESTS AND AREAS TAKEN:

Easement –Permanent Public Utility Easement

A perpetual easement to construct, install, improve, remove, upgrade, replace, inspect, repair, rephase, maintain, use, and operate a system of lines, pipes, and force mains for sanitary sewer and sewer facilities of the Town, together with all the appurtenant facilities and equipment necessary or convenient to any of the above, in, on, over, above, under, through, and across the area described immediately below:

COMMENCING at an iron pipe on the southern right-of-way line of Olive Chapel Road, being the northwestern corner of the Beverly L. Rubin property as referenced above; thence, S02-14-28W 621, 20 feet to a point on the western line of the Rubin property, being the point of BEGINNING of a 40 foot wide sanitary sewer easement; thence, leaving the western property line of Rubin, N78-30-20E 154.30 feet to a point on the eastern property line of Rubin; thence, with the eastern property line of Rubin, S03-33-03E 40.39 feet to point on the eastern property line of Rubin; thence, leaving said property line, S78-30-20W 158.50 feet to a point on the western property line of Rubin; thence, with said property line, NO2-14-28E 41.18 feet to the point and place of BEGINNING.

And more particularly described as "Town of Apex 40' Wide Sanitary Sewer Easement," said area containing 6256 square feet (0.14 acres) more or less, all as shown on that certain survey plat entitled "EASEMENT ACQUISITION EXHIBIT PROPERTY OWNER: BEVERLY L. RUBIN" by Griffin Land Surveying, Inc., said survey plat being attached hereto as **Exhibit C**.

Further specific terms and conditions of the Easement include, but are not limited to, the following:

1. Plaintiff shall have the right to remove and control vegetation or other obstructions in the easement areas.
2. All lines, facilities, structures and related apparatus installed in the easement areas shall be and remain the Property of Plaintiff, removable or replaceable at its option.
3. Plaintiff maintains the right to construct, install, operate, utilize, inspect, rebuild, reconfigure, replace, remove and maintain all lines, facilities, structures and related apparatus placed within the easement area in connection with the aforementioned purpose of the easement, and Plaintiff maintains the right to alter, substitute or add other devices from time to time as Plaintiff may deem advisable.
4. Defendant shall have the right to use the land over which said easement area and easement rights are hereby taken for all purposes not inconsistent with said easement rights, Plaintiff's specifications, or any federal, state, or local

law, rule or regulations, provided that Defendant may not construct any structure within the easement area, except upon prior written agreement thereto by Plaintiff.

5. Plaintiff, its officers, agents, workmen and contractors, shall have the right to go to and from said easement at all times over and above the subject property by such route or routes as shall occasion to the least practicable inconvenience to Defendant, including private roads and ways then existing thereon, on foot or by conveyance, with materials, machinery, supplies, and equipment as may be desirable; provided that, except in emergencies, existing roads and ways thereon shall be used to the extent that they afford ingress and egress to and from the easement.
6. The invalidity or unenforceability of any provision of Exhibit B shall not affect the validity or unenforceability of any other provision. Any invalid or unenforceable provision shall be deemed severed from Exhibit B to the extent of its invalidity or unenforceability, and Exhibit B shall be constructed and enforced as if it did not contain that particular provision to the extent of its validity and unenforceability.

I, MICHAEL P. GRIFFIN, certify that under my direction and supervision this map was drawn from an actual field survey; that the error of closure of the survey as calculated by coordinates is 1:10,000±; that the area shown hereon was calculated by coordinates.
Witness my hand and seal this 30TH day of SEPTEMBER 2014.

OLIVE CHAPEL ROAD
VARIABLE PUBLIC ROW

POINT OF COMMENCEMENT

BM 1996 PAGE 292
WAKE CO. REGISTRY

N/F
ARCADIA WEST DEVELOPMENT, LLC
DB 15773 PAGE 797
PIN 0721-38-6309

BEVERLY L. RUBIN
DB 13973 PAGE 2151
PIN 0721-48-2119

N/F
PARKSIDE BUILDERS, LLC
DB 15519 PAGE 2372
PIN 0721-49-2287

TOWN OF APEX
40' WIDE SANITARY
SEWER EASEMENT
6256 SQ. FT. 0.14 ACRE

POINT OF BEGINNING

N 02°14'20"W 41.18'
N 78°30'20"E 154.30'
S 78°30'20"W 154.30'
E 88°00'00" 3.10'
CONC. POOL SURROUND

BEVERLY L. RUBIN
DB 13973 PAGE 2151
PIN 0721-48-2119

Michael P. Griffin



EXHIBIT
C

LEGEND

THIS PROPERTY IS NOT LOCATED
IN THE 100 YEAR FLOOD ZONE.

EIP	EXISTING IRON PIPE	FES	FLARED END SECTION
IPS	IRON PIPE SET	WM	WATER METER
RAW	RIGHT OF WAY	CO	CLEAN OUT
N/F	NOW OR FORMERLY	FH	FIRE HYDRANT
EIS	EXISTING IRON STAKE	CB	CATCH BASIN



GRIFFIN LAND SURVEYING, INC.
P.O. BOX 148
FUQUAY-VARINA, NC 27526
(919) 567-1963

EASEMENT ACQUISITION
EXHIBIT

PROPERTY OWNER:
BEVERLY L. RUBIN

2613 OLIVE CHAPEL ROAD
WHITE OAK TOWNSHIP
WAKE COUNTY, NC

DRAWN BY	MPG	DATE	9/30/14
CHECKED BY	MPG	SCALE	1" = 100'

15CV005836

NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-_____

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

CIVIL SUMMONS (12 Months)

(N.C.G.S. §1A-1, Rules 3, 4 and G.S. §136-107)

____ Alias & Pluries Summons if checked.

Date original Summons Issued:

Date(s) subsequent Summons(es) Issued:

To: BEVERLY L. RUBIN, Defendant

2613 Olive Chapel Rd
Apex, NC 27502

A Civil Action Has Been Commenced Against You

You are notified to appear and answer the complaint as follows: (1) file the original of your written answer with the Clerk of Superior Court of the county named above within twelve (12) months from the date of service hereof and (2) serve a copy of your written answer upon the attorney for Town of Apex at the address listed below within twelve (12) months. If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

David P. Ferrell, Attorney for
Plaintiff, the Town of Apex
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone No. (919)754-1171

Date Issued: APR 30 2015

Time Issued: 400 pm

Signature: E. Ferrell
Clerk/Asst. Clerk/Deputy Clerk

ENDORSEMENT

This Summons was originally issued on the date indicated above and returned not served. At the request of the Plaintiff, the time within which this Summons must be served is extended thirty (30) days.

Date of Endorsement: _____ Time: _____ a.m./p.m.

Signature: _____ Clerk, Asst. Clerk/Deputy Clerk

RETURN OF SERVICE		
I certify that this Summons and a copy of the complaint were received and served as follows:		
DEFENDANT 1		
Date Served	Time Served <input type="checkbox"/> AM <input type="checkbox"/> PM	Name Of Defendant
<input type="checkbox"/> By delivering to the defendant named above a copy of the summons and complaint.		
<input type="checkbox"/> By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.		
<input type="checkbox"/> As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.		
Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)		
<input type="checkbox"/> Other manner of service (specify)		
<input type="checkbox"/> Defendant WAS NOT served for the following reason:		
DEFENDANT 2		
Date Served	Time Served <input type="checkbox"/> AM <input type="checkbox"/> PM	Name Of Defendant
<input type="checkbox"/> By delivering to the defendant named above a copy of the summons and complaint.		
<input type="checkbox"/> By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.		
<input type="checkbox"/> As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.		
Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)		
<input type="checkbox"/> Other manner of service (specify)		
<input type="checkbox"/> Defendant WAS NOT served for the following reason:		
Service Fee Paid \$	Signature Of Deputy Sheriff Making Return	
Date Received	Name Of Sheriff (Type Or Print)	
Date Of Return	County Of Sheriff	

15CV005836

FILED

STATE OF NORTH CAROLINA 2015 MAR 30 PM 4:01

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY WAKE COUNTY, C.S.C.

15-CVS-_____

TOWN OF APEX,)
BY _____)
Plaintiff,)

v.)

BEVERLY L. RUBIN,)
Defendant.)

**DECLARATION OF TAKING AND
NOTICE OF DEPOSIT**

The Plaintiff, Town of Apex, declares as follows:

1. The Plaintiff, Town of Apex, is a duly chartered Municipal Corporation of the State of North Carolina with its principal offices in Apex, North Carolina. The Plaintiff possesses the powers, duties, and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. The Plaintiff alleges upon information and belief, that those persons whose names and addresses are set forth in **Exhibit A**, attached hereto, are, insofar as the same can be ascertained by reasonable diligence, the only persons who may have or who claim to have an interest or estate in the property subject to this action, which is described in **Exhibit B**, attached hereto. The named interested persons are under no legal disability to Plaintiff's knowledge except as may be stated in said **Exhibit A**.

3. Pursuant to the authority vested in the Plaintiff under the provisions Section 6.5 of its Charter and of Article 9 Chapter 136 of the North Carolina General Statutes, it is necessary to condemn and appropriate certain property interests described in **Exhibit B**, and **Exhibit C** for public use for sanitary sewer and sewer facilities and for the other facilities described in the said exhibits, and appurtenances thereto, to improve the public utility systems of the Town of Apex.

4. The property which is the subject of this action, the interest or estate acquired, and the areas appropriated are all described in **Exhibit B**, and **Exhibit C**.

5. The Plaintiff and the Defendant have been unable to agree as to the purchase price of the property herein appropriated.

6. The Plaintiff has estimated the sum of \$10,771.00 to be just compensation for said taking; and the Plaintiff has this date deposited said sum with the Clerk of Superior Court of the county in which the action is pending, and the Defendant herein may apply to the Court for disbursement of said money as full compensation, or as credit against just compensation, to be determined in this action.

7. The property interests in the areas taken as described in **Exhibit B**, and **Exhibit C**, are hereby appropriated and title to the said interests in the areas taken, together with the right to immediate possession thereof, are hereby vested in the Plaintiff.

This the 30th day of April, 2015.



David P. Ferrell
N.C. State Bar No. 23097
Ashley P. Holmes
N.C. State Bar No. 42911
Vandeventer Black LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Email: dferrell@vanblk.com
apholmes@vanblk.com
Attorneys for Plaintiff Town of Apex

Exhibits A - C

Duplicate copies omitted.

**Originals set forth in their
entirety at R pp 5 - 9.**

15CV005836

FILED

2015 APR 30 PM 4:01

WAKE COUNTY CLERK

BY _____

Return to:
Vandeventer Black LLP
PO Box 2599
Raleigh, NC 27602

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-_____

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

MEMORANDUM OF ACTION

TAKE NOTICE:

1. That on the 30th day of April, 2015, the Town of Apex, under the provisions of Section 6.5 of the Charter of the Town of Apex and Article 9, Chapter 136 of the General Statutes, instituted the above-captioned civil action in the Superior Court of Wake County by the filing of a Complaint and Declaration of Taking and by the issuance of summonses; that pursuant

to N.C. Gen. Stat. § 136-104, the easement interests in the areas specified in said Complaint and Declaration of Taking vested in the Town of Apex on said date.

2. That the above-named Defendants and the persons named in **Exhibit A** hereto are the persons who the Town of Apex is informed and believes may have or claim to have an interest in said lands.

3. That the tract or tracts of land affected by the said taking are described as follows:

All of that certain parcel containing 11.426 acres and bounded on the North by the Southern right of way line of Olive Chapel Road, on the Northeast by the property of Madeleine J. Calder (Book of Maps 2000 Page 1587, Wake County Registry), on the Southeast by the property of Aspnes (Book of Maps 1987, Page 691, Wake County Registry), on the South by the property of the Richardson Heirs (Parcel ID No. 0721.01-47-4087), and on the West by the property of Eatman (Book of Maps 1996 Page 292, Wake County Registry), and having the street address of 2613 Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

Beginning at an existing iron pipe in the Southern right of way line of Olive Chapel Road and the Northwesternmost corner of the said Calder property and proceeding along a common property line with Calder South 01 degrees 33 minutes 25 seconds West 761.61 feet to an existing iron pipe; thence proceeding along a different common property line with Calder North 85 degrees 31 minutes 27 seconds East 339.29 feet to an existing iron pipe; thence proceeding along the common property line with the said Aspnes property South 05 degrees 24 minutes 31 seconds West 836.88 feet to an existing iron pipe; thence proceeding along the common property line with the said Richardson Heirs North 83 degrees 49 minutes 51 seconds West 523.35 feet to an existing iron pipe; thence proceeding along the common property line with the said Eatman North 07 degrees 10 minutes 08 seconds East 1499.31 feet to an existing iron pipe set in the Southern right of way line of Olive Chapel Road; thence along the said Southern right of way North 75 degrees 23 minutes 32 seconds East 93.90 feet to the point and place of beginning.

All as shown on that certain "Survey for Steven M. Adams and Julie M. Adams", prepared by Larry I. Chasak, Professional Land Surveyor and dated July 27, 2001 and being that same property having Wake County Parcel ID No. 072101482119 and Account No. 0283566. This is the same property shown as Tract 2, 11.459 acres, on that certain "Recombination Map for Madeleine J. Calder", Recorded in Book of Maps 2000 Page

1587, Wake County Registry, and being further described in Deed Book 13973, Page 2151, Wake County Registry and being Wake County PIN #0721-48-2119, subject to all matters and items of record or listed in **Exhibit C**. [to the Complaint and Declaration of Taking].

4. That the interest acquired by this Action in the lands described in Paragraph 3 are set forth in **Exhibit B**, and **Exhibit C** to the Complaint and Declaration of Taking filed herein.

This the 30th day of April, 2015.



David P. Ferrell
N.C. State Bar No. 23097
Ashley P. Holmes
N.C. State Bar No. 42911
Vandeventer Black LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Email: dferrell@vanblk.com
apholmes@vanblk.com
Attorneys for Plaintiff Town of Apex

Exhibits A - C

Duplicate copies omitted.

**Originals set forth in their
entirety at R pp 5 - 9.**

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
FILED SUPERIOR COURT DIVISION
15-CVS-5836

TOWN OF APEX,
Plaintiff,
v.
BEVERLY L. RUBIN,
Defendant.

2015 MAY 28 P 1:05

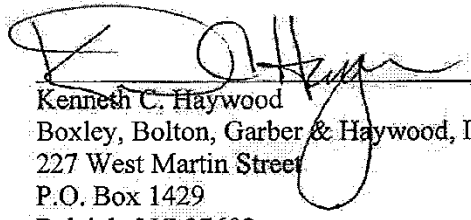
WAKE COUNTY, C.S.C.

BY

ACCEPTANCE OF SERVICE

Pursuant to Rule 4(j)(1)b of the North Carolina Rules of Civil Procedure, the undersigned counsel has been authorized by Beverly L. Rubin to accept the Summons, Complaint, Declaration of Taking and Notice of Deposit, and Memorandum of Action on behalf of Defendant Beverly L. Rubin in the above-captioned action, and does hereby accept and acknowledge service of the Summons, Complaint, Declaration of Taking and Notice of Deposit, and Memorandum of Action filed by Plaintiff in this matter on the date listed below. This acceptance of service shall not constitute a waiver of any other rights, or defenses, and is not admissible for any purpose other than to establish service of the Summons, Complaint, Declaration of Taking and Notice of Deposit, and Memorandum of Action.

This the 20 day of May, 2015.


Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Telephone: (919) 832-3915
Facsimile: (919) 832-3918
Attorneys for Defendant Beverly L. Rubin

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN

Defendants.

ANSWER AND AFFIRMATIVE
DEFENSES

FILED
2015 JUL -8 P 2:51
WAKE COUNTY, C.S.

NOW COMES Defendant Beverly L. Rubin, by and through counsel, and responds to each and every statement and allegation of the Complaint as follows:

1. That the statements and allegations of Paragraph 1 are admitted, subject to the limitations on Plaintiff's powers of eminent domain as contained in the U.S. and N.C. Constitutions and the North Carolina General Statutes.
2. It is specifically admitted that Beverly L. Rubin is the sole owner of the property that is the subject of this action. Except to the extent admitted herein, the remaining statements and allegations of Paragraph 2 are denied.
3. That the statements and allegations of Paragraph 4 are denied.
4. That this Defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations of Paragraph 4, and the same are therefore denied.
5. It is specifically admitted that the liens and encumbrances set forth in Exhibit A are to the best of the knowledge of Beverly L. Rubin the only ones of record with the Wake County Register of Deeds. Except to the extent admitted, the remaining statements and allegations of Paragraph 5 are denied.
6. It is specifically admitted that the Plaintiff and Defendant have not agreed as to the purchase price of the property interest attempting to be appropriated by the condemning authority, Town of Apex. Further, it is specifically admitted that the Town of Apex does not have the right to take any property interest of Beverly L. Rubin under the General Statutes in North Carolina and the North Carolina Constitution and United States Constitution. Except to the extent admitted, the remaining statements and allegations of Paragraph 6 are denied.

FIRST AFFIRMATIVE DEFENSE

Upon receiving a copy of the Complaint in this matter that the Town of Apex was attempting to take a portion of her property, Beverly L. Rubin notified the Town that she contested the right of the Town of Apex to take any of her property in this action. (See May 19, 2015 letter attached hereto). A private developer for its own financial gain to increase the value of its property for purposes of resale has used the Town's powers of eminent domain. Therefore, the risk for incurring any time or expense for construction activities by the Town of Apex or any private developer or builder within the area that is the subject to this condemnation case is solely placed upon those persons. Sufficient notice has been provided of the challenge by Beverly L. Rubin to the right to take her property by the Town of Apex.

SECOND AFFIRMATIVE DEFENSE

(Motion for Attorney's Fees, Expert Fees and Other Costs)

The Defendant Beverly L. Rubin's entitlement to just compensation for the taking of her property is a fundamental right guaranteed by both the North Carolina Constitution and the U.S. Constitution. The 5th and 14th Amendments of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution's requirement that just compensation be paid includes payments of all costs of defense. If the Defendant Beverly L. Rubin is required to pay the costs and expenses of defending this action, including her expert fees (including but not limited to appraisal and engineering fees), exhibit costs and attorney's fees out of the amount awarded, by the jury, then the Defendant Beverly L. Rubin's constitutional rights to recover just compensation would be violated. Thus, the Defendant Beverly L. Rubin moves the Court that she recover all costs of the defense of this action, including, but not limited, all expert and attorney's fees. This motion is made in a good faith effort in attempt to reverse an existing contract law on this issue.

WHEREFORE, the Defendant, Beverly L. Rubin, prays the Court for the following relief:

1. That the Court issue an order in this proceeding that the Town of Apex does not possess the right of eminent domain as applied to the areas stated within the Complaint that is a portion of the property owned by Beverly L. Rubin;
2. In the alternative, in the event this matter proceeds to trial by jury that a determination of just compensation for the property interest be taken be made in accordance with applicable laws; and the Defendant Beverly L. Rubin recover that amount from the Plaintiff together with interest at the highest rate allowed by law from the date of the taking;
3. That there be a trial by jury on all issues so triable;
4. That the costs of this action, including all mediation costs, expert witness fees and attorney's fees be taxed to the Plaintiff;

5. That a determination of the areas and interest taken be made;
6. That Plaintiff prepare a Plat showing the subject property including improvements and areas and interest taken; and
7. The Court award the Defendant Beverly L. Rubin such other and further relief as the Court deems just and proper.

This 7 day of July, 2015.

BOXLEY, BOLTON, GARBER & HAYWOOD, L.L.P.
Attorney for Defendant Beverly L. Rubin

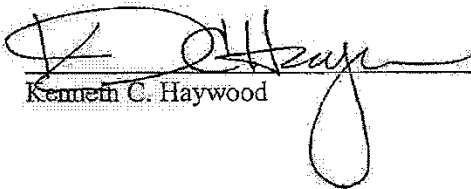


Kenneth C. Haywood
State Bar Number 19066
Post Office Drawer 1429
Raleigh, North Carolina 27602
Telephone: (919) 832-3915
khaywood@bbghlaw.com

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Answer and Affirmative Defenses upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 7 day of July, 2015.


Kenneth C. Haywood

BOXLEY, BOLTON, GARBER & HAYWOOD, L.L.P.

ATTORNEYS AT LAW

THE NASH SQUARE BUILDING

227 WEST MARTIN STREET

POST OFFICE DRAWER 1429

RALEIGH, NORTH CAROLINA 27602

TELEPHONE (919) 832-3915

FAX (919) 832-3916

J. MAC BOXLEY
LAWRENCE E. BOLTON
RONALD H. GARBER
KENNETH C. HAYWOOD
EVERETT M. BOLTON
NATHAN G. ZALESKI

May 19, 2015

David P. Ferrell
Vandeventer Black LLP
Post Office Box 2599
Raleigh, North Carolina 27602

VIA FACSIMILE AND
U.S. MAIL

Re: Town of Apex v. Beverly L. Rubin

Dear David:

I am writing in response to the recent complaint you filed on behalf of the Town of Apex. Our client intends to challenge, the right to take, by the Town of Apex in this matter. Therefore, we will be filing a motion to be heard by the Court on an expedited basis.

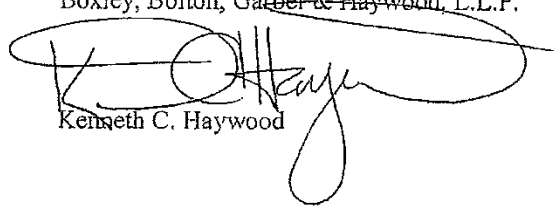
I am writing to alert you to our intent to file such a motion and would encourage your client and its partner, the developer of the tract of land on either side of Ms. Rubin to not commence any construction activities until after the motion is heard. Otherwise, if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for damages. I trust that you appreciate providing advance notice to you of our intention in order to be able to mitigate against any actions caused by premature construction activities.

Once we have a motion hearing date, I will notify you in advance.

With best regards, I am

Sincerely yours,

Boxley, Bolton, Garber & Haywood, L.L.P.


Kenneth C. Haywood

KCH/bf
cc: Beverly Rubin

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

FILED

TOWN OF APEX,

Plaintiff,

BY

v.

BEVERLY L. RUBIN

Defendants.

2016 APR -8 P 3:47

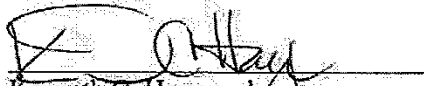
WAKE CO. C.S.C.

MOTION TO CONDUCT HEARING
PURSUANT TO N.C.G.S. §136-108

NOW COMES Defendant Beverly Rubin, by and through counsel, and requests that this Court conduct a hearing pursuant to N.C.G.S. §136-108 to determine all issues raised by the pleadings other than just compensation, including, but not limited to, whether the Plaintiff under the United States Constitution, North Carolina Constitution and the laws of this State has the right to take her property for the benefit of a private developer.

This 8 day of April, 2016.

BOXLEY, BOLTON, GARBER & HAYWOOD, LLP
Attorney for Beverly Rubin

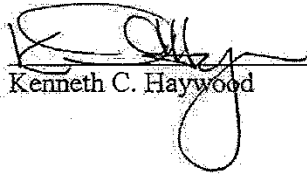


Kenneth C. Haywood
State Bar No. 19066
Post Office Drawer 429
Raleigh, North Carolina 27602
Telephone: (919) 832-3915
Email: Khaywood@bbghlaw.com

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Defendant's Motion to Conduct Hearing upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 8 day of April, 2016.


Kenneth C. Haywood

STATE OF NORTH CAROLINA

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

15-CVS-5836

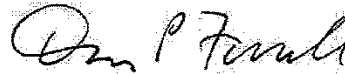
2016 JUL 13 A 11:25

WAKE COUNTY, N.C.
BY 

**MOTION FOR HEARING ON ISSUES
OTHER THAN DAMAGES**

NOW COMES Plaintiff, Town of Apex, by and through counsel, and move the Court pursuant to N.C. Gen. Stat. § 136-108 for a hearing on all issues raised by the pleadings other than the issue of damages, including, but not limited to, questions of authority to condemn, the interest taken, and area affected.

This the 13th day of July, 2016.



David P. Ferrell
N.C. State Bar No.: 23097
VANDEVENTER BLACK LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Email: dferrell@vanblk.com
Attorney for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing **MOTION FOR HEARING ON ISSUES
OTHER THAN DAMAGES** was served by mailing the same, via U.S. Mail, postage prepaid to
the following:

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Facsimile: (919) 832-3918
Attorney for Defendant

This the 13th day of July, 2016.



David P. Ferrell

STATE OF NORTH CAROLINA

WAKE COUNTY

2015 JUL 29 A 8:44

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-5836

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

AFFIDAVIT OF TIMOTHY L.
DONNELLY, PE

I, Timothy L. Donnelly, first being duly sworn, deposes and says:

1. I am over eighteen years of age and otherwise competent to make this affidavit and have personal knowledge as to the facts of this case and the facts alleged herein.
2. I am an employee of the Town of Apex ("the Town" or "Town of Apex"), and I currently serve as the Assistant Town Manager for the Town of Apex. Previously, and at all relevant times herein, I am a license professional engineer and served as the Public Works and Utilities Director for the Town, where I was familiar with and responsible for overseeing the Town of Apex's Public Sewer Utility System. I am familiar with the work performed by the Town's Utilities Department and am familiar with the books and records of the Department.
3. I am familiar with the Town of Apex utility project that necessitated the filing of the condemnation action herein.
4. In 2014, the Beaver Creek Pump Station, which was built and located approximately ½ mile from Rubin's property, was brought on-line.
5. The construction of the Beaver Creek Pump Station was necessary to meet and serve the anticipated growth in this area.
6. Development of residential subdivisions has occurred in the areas around and in close proximity to the Rubin Tract.

7. When residential subdivisions like Riley's Pond are developed, the roads and utilities are required by Apex to be stubbed-out near adjoining property lines to allow for future development and connections to the Town's utilities for adjacent properties. Such actions were performed by the developer of Riley's Pond subdivision in the Riley's Pond subdivision tract.

8. The Rubin tract, as well as the Riley's Pond subdivision and the properties to the east of the subdivision, are within the town limits of Apex.

9. On March 3, 2015, the Apex Town Council, in an effort to improve its sewer system and sewer connectivity and to promote the public health, interest, and general welfare, passed a resolution authorizing eminent domain proceedings to acquire a forty (40) foot wide gravity sewer easement, with a total area of .14 acres ("the Gravity Sewer Project"), across property owned by Beverly Rubin ("the Rubin Tract").

10. The Town of Apex routinely provides sanitary sewer services to property owners and residents.

11. The easement acquired by the Town of Apex in the condemnation action herein is owned by the Town of Apex and will be used for public sewer lines and facilities and all appurtenances necessary or convenient thereto in connection with the Gravity Sewer Project, which is a part of the Apex Public Sewer Utility System.

12. The Gravity Sewer Project crossing the Rubin tract will allow the Town of Apex to provide sewer service to residents of the Riley's Pond subdivision as well as the Weissner, Aspnes/Ball, Wegmann, Foster Farm, LLC, Frank A. Foster, and Green properties to the east of the Riley's Pond subdivision.

13. Moreover, the Gravity Sewer Project can also be tapped to connect and serve the Rubin home, which currently only has septic, rather than sewer, service.

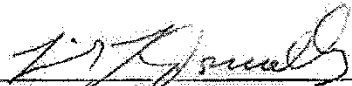
14. The location of the Gravity Sewer Project on the Rubin Tract was driven in large part by the topography of the property, and was the product of sound engineering practices and principles. Alternative locations were considered, and the chosen location was determined to be appropriate.

15. As a courtesy to Rubin and to minimize the impact of the project on the Rubin tract during construction, the sewer pipe was installed on the Rubin tract by digging a bore pit on properties on either side of the Rubin tract, boring under the Rubin tract, a casing was inserted in the bore tunnel, and the sewer pipe was inserted into the casing inside the bore tunnel from the side. The surface of the Rubin tract was not used or disturbed during construction.

16. The fact that a prior owner of the property adjacent to the Rubin tract attempted to purchase a portion of the Rubin tract and/or a sewer easement from Rubin, and agreed to reimburse the Town for the cost to acquire the property rights necessary to locate a sewer line and construct the sewer line, does not change the fact that this sewer line is part of a public project. The Town owns and maintains the sewer line across Rubin's property for the benefit and use of the public and owners and residents of Apex.

17. The Gravity Sewer Project has been completed, all easement rights acquired in the condemnation action herein, as well all lines, pipes, infrastructure, and appurtenances associated with the Gravity Sewer Project, are owned and operated by the Town of Apex.

This the 28th day of July, 2016.


Timothy L. Donnelly, PE

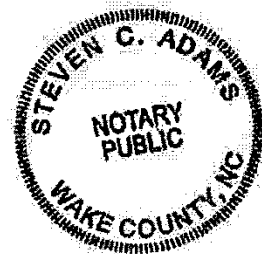
SWORN TO subscribed before me

this the 28th day of July, 2016.


NOTARY PUBLIC

My commission expires: 11-23-2020

[Official Seal]




CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing AFFIDAVIT OF TIMOTHY L. DONNELLY was served by facsimile and by mailing the same, via U.S. Mail, postage prepaid to the following:

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Facsimile: (919) 832-3918
Attorney for Defendant

This the ^{28th} ~~28~~ day of July, 2016.



David P. Ferrell

FILED

STATE OF NORTH CAROLINA

2016 OCT 18 PM 1:41

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

WAKE COUNTY, C.S.C.

15 CVS 5836

TOWN OF APEX,

BY _____

Plaintiff,

v.

BEVERLY L. RUBIN

Defendant.

JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.
2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

3. Within the Answer filed by Beverly L. Rubin, she asserted as a defense to the Complaint, that the Town of Apex did not have the right to take any of her property interests under the General Statutes in North Carolina and the North Carolina Constitution or the United States Constitution.

4. As early as May 19, 2015, less than a month after the condemnation lawsuit was filed, a letter was sent to counsel for the Town of Apex, informing the Town that Ms. Rubin intended to challenge the right to take the sanitary sewer easement by the Town of Apex.

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970).

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Ala. Ct. App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C. Gen. Stat. §6-21.7, which ruling is reserved for later judgment upon Defendant's submitting a Motion in Support of such request.

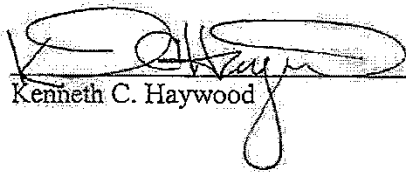
Signed This the 6th day of Oct., 2016.

Elaine M. O'Neal
Superior Court Judge Elaine M. O'Neal

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19th day of October, 2016.


Kenneth C. Haywood

STATE OF NORTH CAROLINA
WAKE COUNTY
TOWN OF APEX,

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-5836

2016 OCT 21 P 1:31

WAKE COUNTY, C.S.C.

Plaintiff

BY

v.

BEVERLY L. RUBIN,

Defendant.

**PLAINTIFF'S VERIFIED MOTION
FOR RECONSIDERATION, TO
ALTER, AMEND, AND/OR SEEK
RELIEF FROM JUDGMENT**

NOW COMES Plaintiff Town of Apex ("the Town"), by and through counsel, and hereby moves the Court pursuant to Rules 59 and 60(b) of the Rules of Civil Procedure and/or the Court's inherent authority, for reconsideration of, to alter, amend and/or seek relief from the judgment entered on October 18, 2016 and served on October 19, 2016 in the above captioned action (See Exhibits A, B). In support of the motion, the Town shows the Court as follows:

INTRODUCTION

The Court's decision to dismiss this condemnation action is a significant ruling that will have a negative impact not just on how Apex provides necessary utilities to its residents, but how municipalities across the state provide these services. A challenge to the right to take in a condemnation proceeding is rare -- and it is a unique inquiry for the Court. There were arguments advanced in Rubin's brief and at the hearing that were not based in evidence or have no application to the right to take analysis. Since the Court's communication of its decision to the parties did not state the basis for the Court's decision, the Town is not sure what the Court based its decision on, and the Town is concerned that the Court may have relied on these arguments, misapprehended the facts, and therefore misapplied the law; thus leading the Court to reach an incorrect decision. The outcome of this issue is too important not to attempt to address and clarify these issues at the trial

court level. Therefore, the Town respectfully files this motion, requests the Court consider this motion, and after hearing from the parties, reconsider and/or amend its prior ruling.

As you may recall from the hearing, Rubin in large part advances a “not in my backyard” approach, advocating for the Town to choose a different route to provide sewer to the Riley’s Pond subdivision residents and the landowners to the east of the Riley’s Pond property. Rubin advocated for the Town to cross her neighbor’s properties (Ball and Walden) with a sewer easement, instead of her property. This is a slippery slope. Rubin’s neighbors would presumably say “do not cross my property” as well, and the process goes on and on. This is precisely why Courts have adopted the approach of not second-guessing a condemner’s selected easement route unless there is an abuse of discretion in selecting the route. Again, it is not clear whether the Court relied on Rubin’s arguments and information presented on this point (which included an Affidavit from a purported expert witness), but the Town believes these issues should be further addressed to the trial court.

FACTS

1. Although most of the evidence and facts discussed herein existed at the time of the “all other issues” hearing, it was not known or reasonably anticipated that this evidence would be necessary. But given the Court’s ruling in the matter, the Court should consider this evidence. This verified motion also acts as an affidavit of Steve Adams.

2. The development of the residential subdivisions on each side of the Rubin tract started as Arcadia Ridge West and East in approximately August 2013. The earliest layout was from Peak Engineering and Design (“Peak”), who was engaged by Transom Row Properties, LLC. Peak worked on the project through the zoning condition and annexation phases and then was replaced by Jones and Cnossen Engineering (“JCE”).

3. Peak Engineering's earliest concept drawing from August 2013 shows the two proposed neighborhoods and the possible sewer routes, which showed a sewer easement across the narrow portion of Rubin's tract. (See Exhibit C).

4. Peak shared this drawing which showed the possible sewer easements across Rubin's property with neighbors: the Rubins, Ball-Aspnes and Weissner, as they were working with these landowners/neighbors on the zoning conditions for the possible annexation and approval for the subdivision sites.

5. This same drawing was used as part of the pre-application meeting with the Town staff in August 2013. Peak noted that Mrs. Ball objected to the alignment of the sewer easement through her property. Peak also noted the route through the Ball property had numerous challenges including impacts on vegetation, wetland impacts and the need to cross two (2) owners (Ball and Walden) to reach the sewer outfall that was already accessible on Eatman (Arcadia West) property.

6. The two subdivisions were originally submitted as one project and the lot numbering reflects this: Riley's Pond has Lots 1-50 and Arcadia West starts at Lot 51.

7. Regarding Riley's Pond residential subdivision (formerly Arcadia East), the developer at the time was Parkside Builders LLC, owned by Brad Zadell. The neighborhood meeting for Rezoning Case #13CZ08 (Bauchman Property) was held February 3, 2013. Notification records indicate that Ms. Rubin received notice of the meeting but did not attend the meeting. The rezoning and annexation for the Bauchman Property was approved by the Apex Town Council on December 17, 2013. The neighborhood meeting for Rezoning Case #13CZ26 (Evans Property) was held September 17, 2013. Notification records indicate that Ms. Rubin received notice of the meeting but did not attend the meeting. The rezoning and annexation for the Evans Property was approved by the Apex Town Council on November 19, 2013. These two rezoning cases (#13CZ08 and #13CZ26) were then combined to make up Riley's Pond (formerly

known as Arcadia Ridge East). The Parkside/Zadell Master Subdivision Plan was submitted by Jones & Cnossen to the Town on February 3, 2014. The neighborhood meeting for the subdivision was held on January 31, 2014. Notification records indicate that Ms. Rubin received notice of the meeting, but did not attend the meeting. The Parkside/Zadell Master Subdivision Plan was approved by the Town Council on January 20, 2015.

8. Rubin received notice and participated in the annexation process for Riley's Pond, including by requesting and receiving along with Ms. Ball restrictions and accommodations on the developers regarding the pond that is partially on Rubin's property and partially on the Riley's Pond property. (See Exhibit D).

9. The Riley's Pond subdivision was properly annexed by the Town. Rubin did not file a motion or appeal the annexation decision.

10. Regarding Acadia West residential subdivision, the developer at that time was Parkside Developers, LLC, owned by Brad Zadell. The rezoning and annexation of the Eatman tract (Arcadia West) was approved on December 17, 2013. The site plan for Phases 1-3 of Arcadia West was submitted February 3, 2014. The site plan for Phases 1-3 was approved on April 15, 2014. The Construction Drawings were finalized and originally signed August 27, 2014. There was a revision to the Resource Conservation Area (RCA) that was signed in December 2015, but no changes were made to any utility plans.

11. Once the Town annexes property and approves a residential subdivision, it has an obligation to provide municipal services like sewer to the subdivisions and residents that will live in the subdivision. Rubin misrepresents the status of Arcadia East / Riley's Pond in her brief (p. 7) and in her arguments to the Court. The property was annexed (November and December 2013) before the Town voted to condemn for a sewer easement to serve the annexed property (March

2015). The Town had to provide sewer to the property regardless of who owned it or the state of progress of its development.

12. The Town utilities and engineering staff considered how to provide sewer service to the Riley's Pond tract and the properties to the east of the Riley's Pond tract. A sewer easement across the narrow portion of Rubin's property was the most suitable, desirable, and sustainable from an engineering and utilities standpoint. On the south side of the Riley's Pond tract, there is a pond and dam, which have certain environmental impacts, dam safety and hazard construction conditions and challenges. Further, Rubin was involved in advocating for and helping to establish zoning restrictions on the Riley's Pond subdivision, including restrictions in and around the pond area. (See Exhibit D) These restrictions would make it difficult if not impossible to bring sewer to the Riley's Pond subdivision across the Ball and Walden tracts. The sewer must ultimately run west toward the Beaver Creek Pump Station.

13. Regarding Rubin's argument that a pump station should have been built on the Riley's Pond tract, pursuant to Section 801 of the Town of Apex Standards and Specifications, a pump station was not allowed to be constructed on the Riley's Pond tract since at the time there was a feasible gravity sewer option. The Town will consider a pump station and force main system only when gravity sewer is not feasible. (See Exhibit E). Gravity sewer was certainly feasible for the Riley's Pond tract given the location of sewer on the Arcadia West tract just across the Rubin property; only 156 feet away. Therefore, constructing a pump station on the Riley's Pond tract was not an option at that time.

14. Further, with a pump station and force main sewer pipe system, the force main sewer pipe would still have to cross in front of or across Rubin's property to connect with the existing sewer system and the Beaver Creek Pump Station. Rubin advocates for this approach

(Rubin Brief p. 6), but under this approach, she would still have to cross over a sewer pipe to access her property.

15. Ultimately the current location of the Town's sewer line easement on the Rubin property was the most suitable, desirable, and sustainable from an engineering and utilities standpoint. The topography of the Rubin property prohibited the gravity sewer line from being placed near Olive Chapel road.

16. The Town staff determined it needed to acquire the sewer easement at issue herein across Rubin's property. The Town staff and attorneys on the Town's behalf attempted to acquire the sewer easement from Rubin, but she did not agree to convey the easement. The Town's staff determined a condemnation action was necessary.

17. As the Town has done in other circumstances, the Town takes the position that developers should reimburse the Town for certain utility and other similar expenses related to a development. The Town staff proposed a similar arrangement to Parkside Developers and they agreed. In anticipation of the matter being presented to the Town Council, documents were prepared and executed to carry out this agreement if the condemnation was approved.

18. The Town staff initially considered placing the Parkside/ Zadell Master subdivision plan and the acquisition of an easement across Rubin's property on the September 2014 Town Council meeting agenda. (See Exhibit N). Later, discussions occurred to have the subdivision plan heard at the Town Council meeting in January 2015 and the easement acquisition heard at the Town Council meeting on February 17, 2015. (See Exhibit O).

19. Rubin was informed by Town attorney Laurie Hohe of the Town Council meeting where the condemnation was scheduled to be considered, February 17, 2015. Rubin informed the Town attorney that she could not attend that Town Council meeting. Following consultation with the Town Manager, the Town administrator agreed to continue the matter to the March 3, 2015

meeting date, and Rubin was so notified. Also, the Town attorney informed Rubin that she could speak to and address the Town Council regarding the condemnation action during the public comment period of the Town Council meeting, and she could certainly contact each council member individually before the meeting. (See Exhibit F). Rubin did not attend the March 3, 2015 Town Council meeting. The Town Attorney informed Rubin after the March 3, 2015 Town Council meeting of the Town Council's decision.

20. Apex is not a party to any contract or agreement between Parkside Builders, Parkside Developers, Brad Zadell, or other related entity and Royal Oaks, Riley's Pond Developers, LLC, or other related entity. The Town was not shown, nor has it ever seen prior to this response to Rubin's Subpoena, the contract between Parkside and Riley's Pond Developers, LLC regarding the Riley's Pond tract. The deed conveying the Riley's Pond subdivision tract to the Riley's Pond Developers is dated June 10, 2015.

21. Prior to filing the condemnation action herein, representatives of the Town met with Rubin's attorney to discuss the easement and whether she would grant an easement in exchange for payment. Rubin did not agree. So the condemnation complaint was filed shortly thereafter. The Town has quick take authority and planned to exercise the authority to construct the sewer line.

22. Rubin's speculation and innuendo about Tim Donnelly's motivations and actions in this matter are incorrect and not supported by evidence. Donnelly as Public Utilities Director is responsible for the Town's utilities and to be sure utilities are adequate for the annexed areas of the Town like Arcadia West and Riley's Pond. He would be a primary contact for landowners and developers who are planning and building residential subdivisions in Apex. There is no evidence that during the time Zadell was communicating with Town personnel, that Zadell informed Donnelly or the Town that Parkside Builders was not going to develop the Riley's Pond tract, but was going to sell the property to Riley's Pond Developers, LLC. Parkside submitted a proposed

subdivision plan to the Town on February 3, 2014, asked for it to be considered by the Town Council and it was approved by Town Council on January 20, 2015. Rubin has cited to documents prepared in February 2015 by Parkside or Riley's Pond Developers regarding the sale of the property, but these documents do not involve the Town.

23. After the condemnation action was filed, Rubin informed the Town that she would file a motion for preliminary injunction to stop the construction on her property. The Town responded and said if you are going to do it, do it quickly, for the project must proceed. Rubin never moved the court to stop the construction of the sewer line on her property (See Exhibit G).

24. Rubin argues that Zadell never intended to develop the Riley's Pond tract into a subdivision (Rubin Brief, p. 4). Rubin has no evidence of Zadell's intent, but evidence, including Rubin's own exhibits, show Parkside/ Zadell submitted a proposal subdivision plan to the Town on February 3, 2014 and he inquired about having the subdivision plan presented to the Town Council at their September 2014 meeting.

25. Since their acquisition of Riley's Pond subdivision tract, the current developers have subdivided lots, installed infrastructure, built single-family residences, and have homes permitted and/or under construction. (See Exhibit H).

26. The Town Council's March 3, 2015 vote on the resolution to condemn the sewer easement across Rubin's property passed 3 votes to 2. The two council members that voted "No", Dozier and Jensen, were deposed by Rubin. Dozier testified she voted no because she had opposed the rezoning application for the subdivision, so she voted no on the sewer line condemnation to be consistent with her prior vote. (Exhibit I, Dozier Depo, p 30-31). Dozier did not vote "no" because a developer owned the adjacent land that would receive sewer or because it may indirectly benefit a developer (Dozier Depo, p 46). Further, when showed the contracts between the Town and Parkside Builders (Rubin Hearing Exhibits 13 and 14), where Parkside agreed to pay the Town's

costs and expenses to acquire the sewer easement, Dozier said it does not change her opinion that this is a public project. (Dozier Depo, p 54-55). Jensen testified that he voted "no" on the sewer easement condemnation because he opposed the rezoning and the development, and wanted to be consistent with that prior vote (Exhibit J, Jensen Depo, p 14-15, 29). Jensen was also fine with the developer contracting with the Town to cover expenses and did not believe it changed the project from a public project. Jensen testified it [developers contracting to cover the Town's expenses] allows the Town to grow which benefits the entire Town. (Jensen Depo, p 43).

27. The sewer pipe across Rubin's property is sized to handle the connection and/or development of the Riley's Pond subdivision lots and properties to the east of Riley's Pond subdivision, which include the Weissner, Aspnes/Ball, Wegmann, Foster Farm, LLC, Frank A. Foster, and Green properties.

28. The easement acquired by the Town of Apex in the condemnation action herein and the sewer infrastructure in the ground is owned, operated, and maintained by the Town of Apex and is currently being used for public sewer lines and facilities. The Town owns and maintains the sewer line across Rubin's property for the benefit and use of the public and owners and residents of Apex.

29. The Gravity Sewer Project generally can also be tapped to connect and serve the Rubin property, which currently only has septic, rather than sewer, service.

30. As a courtesy to Rubin, and to minimize the impact of the project on the Rubin tract during construction, the sewer pipe was installed on the Rubin tract by digging a bore pit on properties on either side of the Rubin tract, boring under the Rubin tract, a casing was inserted in the bore tunnel, and the sewer pipe was inserted into the casing inside the bore tunnel from the side. The surface of the Rubin tract was not disturbed during construction. However, to remove the sewer pipe and casing from Rubin's property, this same procedure cannot be used. A ditch will

have to be dug and the surface of the Rubin's property would be disturbed to remove all Town facilities from the property.

31. Prior to the Town's acquisition of the sewer easement at issue herein, the Town acquired a water easement on the Rubin tract by condemnation in order to provide water to yet-to-be developed properties in close proximity to Rubin's tract (hereinafter "the water condemnation action"). (See Exhibits L, M). The water easement ultimately provided water to Acadia West residential development as well as the Riley's Pond residential development.

32. This line was part of the Town of Apex 2007 Master Water Plan to extend utilities into parts of town to promote development. In many cases, properties to be served by this water line, which are in close proximity to the Rubin tract, were vacant, single family residential, or rural tracts that became more desirable to be developed due to the existence of the water line.

33. Similar to this case, the Town attempted to acquire an easement from Rubin, Rubin refused to grant an easement in this prior proceeding, and the Town had to file a condemnation action against Rubin (See Exhibit K). Rubin had the full and fair opportunity to adjudicate the Town's legal right to condemn for the utility easement, but did not do so. Rubin did not file an answer contesting Apex's right to condemn the water easement. Rubin signed a consent order agreeing that the Town had the right to condemn Rubin's property for the water easement, and accepted the Town's estimation of just compensation. (See Exhibits L, M).

ARGUMENT

A. Rules of Civil Procedure 59 and 60.

The Town moves under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, and the Court's inherent authority, for either reconsideration of and relief from the judgment, an amendment to the judgment, and/or other relief from the judgment. Pursuant to Rule 59, a judgment may be amended where, among other reasons, there is an error of law occurring in the judgment.

See N.C. Gen. Stat. § 1A-1, Rule 59(a)(7-9) and (e). (Subsection (e) of Rule 59 permits the amendment of judgments). In addition, a Rule 59 motion should be granted based upon the new evidence presented herein. See N.C. Gen. Stat. § 1A-1, Rule 59(a)(4).

Our Court of Appeals has “adopted a liberal interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial and has recognized that Rule 59(a) ‘provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law.’” *Baker v. Tucker*, ___ N.C. App. ___, ___, 768 S.E.2d 874, 875 (2015). In *Baker*, for example, the plaintiffs’ motion “alleges that the trial court failed to adequately account for certain facts and, as a result, misapplied the law[.]” *Id.* These grounds to amend a judgment “have been held to be valid pursuant to Rules 59(a)(7), (8), and (9).” *Id.*

Likewise, consideration of a Rule 60(b) motion for relief from a determination under N.C. Gen. Stat. § 136-108 of issues other than damages in a condemnation action is appropriate. See *Dep’t of Transp. v. Jamestown Vill. Associates, LLC*, No. COA 07-381 (filed Jan. 15, 2008) (unpublished) (available at 2008 WL 132065). In *Jamestown*, the Court of Appeals dismissed and remanded a pending appeal of an all other issues hearing after the trial court indicated that it was inclined to grant the Rule 60(b) motion.¹ *Id.* at *1. In that case, there was a misapprehension of facts and additional evidence. Specifically, the trial court in *Jamestown* found, among other things, that: “[s]ufficient questions have been raised and potential evidence presented that [movant] should be given the opportunity to have a rehearing on its counterclaim and have the matter looked into more thoroughly.” *Id.* at *2 (emphasis supplied).

¹ As a matter of appellate procedure and jurisdiction, a party may take an appeal with a Rule 60 motion pending before the trial court. When this occurs, the Court of Appeals, as it did in *Jamestown*, may order the trial court to indicate how it will rule on the Rule 60 motion. Because the trial court indicated that it would grant the appellant’s motion, there was no need for the appeal to proceed, as the relief sought at the Court of Appeals would be granted by the trial court.

The present motion asserts that this Court failed to adequately account for or misapprehended certain facts, and misapplied the law as a result. Therefore, this Court has the authority to reconsider, alter, amend and/or grant relief from the judgment to account for these issues.

B. This sewer project is a public project for a public purpose and benefit.

An error of law occurred when the Court concluded that the Town does not have the authority to condemn the easement at issue herein. It is settled law that when determining whether a taking is for a public, rather than a private, purpose, “[t]he exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not of itself warrant the exercise of a power...” *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988) (quoting *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (quoting 26 Am.Jur.2d *Eminent Domain* §§ 32, 33 (1966))). Further, North Carolina courts have consistently found that projects involving the construction and expansion of sewer infrastructure are for a public purpose — even where a private developer or small number of residents are the primary beneficiaries of the project. (See *City of Charlotte v. Heath*, 226 N.C. 750, 756, 40 S.E.2d 600, 605 (1946); *Stout v. City of Durham*, 121 N.C. App. 716, 468 S.E.2d 254 (1996); *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 582 S.E.2d 697 (2003); *City of Asheville v. Resurgence Development Co. LLC*, 230 N.C. App. 80, 748 S.E.2d 751 (2013)). The courts have consistently found that the incidental private benefit did not convert the project from public to private. See also *Town of Midland v. Morris*, 209 N.C. App. 208, 704 S.E.2d 329 (2011).

Moreover, “it is immaterial that, in the immediate future, only a small segment of the population will be likely to make actual use of it.” *Vance County v. Royster*, 271 N.C. 53, 60, 155 S.E.2d 790, 796 (1967). Rather, “the public’s right to use, not the public’s actual use, is the key factor in making the required determination.” *Carolina Tel. & Tel. Co. v. McLeod* at 430, 364 S.E.2d at 401. The cases cited by Rubin do not change this and does not support Rubin’s position in this

matter. In *Town of Matthews v. Wright*, 771 S.E.2d 328 (NC App 2015), the Town of Matthews attempted to condemn just the portion of a street in front of the Defendant's property, but did not undertake to condemn the entire road. This was one of a number of disputes between the Town of Matthews and the Defendant over this portion of the road. The Court refused to find public benefits were realized by the condemnation of just this one portion of the road, and found that the road was already open to public traffic, such that the condemnation was unnecessary. The *Wright* case is inapplicable to the case at bar.

Further, in *State Highway Comm v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965), the Department of Transportation attempted to condemn a dirt road to construct a paved dead-end road and cul de sac. There was already in existence a road that provided access to these properties, which were essentially dwellings at the end of a dead-end road. The Court found that there was no public use or benefit for condemning the road, that the condemnation was for the private use of one landowner, their relatives, and those that would visit them. As such, the *Batts* case is also inapplicable to the case at bar.

The Town's taking of an easement across the Rubin Property for the installation of a gravity sewer line is for both a public use and the public benefit, and the public use and benefit are primary and paramount. Unlike *Batts*, there is undeniably a public use and benefit regarding the sewer easement – it provides sewer service to a residential subdivision. Every resident of the Riley's Pond subdivision, the properties to the east of the subdivision, and the public at large benefits from the sewer line.

Residential subdivisions are an integral and necessary part of Apex's growth. Municipalities like Apex do not build residential subdivisions. Residential subdivisions inside the Town limits cannot get built without necessary utilities being extended to the properties. Any property that is annexed or rezoned for residential development experiences an increase in property value. Any

property that is crossed by or connected to municipal water and/or sewer service generally experiences an increase in property value. Most property owners would desire and appreciate the corresponding increase in property value. Such property value increase does not outweigh or overshadow the public use and benefit of a sewer line to a property for residential development. *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 582 S.E.2d 697 (2003).

The facts and evidence discussed at the hearing in this matter and the new facts and evidence discussed herein (which are incorporated herein by reference) do not appear to be properly accounted for in the judgment, and may have been obscured by Rubin's speculation and innuendo in her Brief and her arguments to the Court. The evidence clearly establishes that the project serves a public use and benefits the public. Rubin's speculation about the role of the property owner in the Town's actions herein are incorrect, and not determinative of the issue before the Court. Again, the Courts have recognized that projects involving the construction and expansion of sewer infrastructure are for a public purpose — even where a private developer or small number of residents are the primary beneficiaries of the project. These "primary beneficiaries" would certainly experience increased property values, and would presumably be for the project and let the Town know about it. Such effect does not convert this public project into a private project. The Town's obligation to provide sewer service to annexed property and approved subdivisions is primary and paramount, and any benefit to the property owner is incidental and secondary. Rubin has not met her burden to establish otherwise.

Further, much of Rubin's arguments go to the compensation phase of the case, and do not have any bearing or relevance on the Town's right to condemn for the sewer easement. For example, Rubin represents that the easement would: cut her property in half (Rubin Brief p. 4); destroy ability to construct improvements (p. 4); destroy Rubin's property (p. 8); and the terms and conditions of the easement are "alarming" (p. 9). These arguments were advanced by Rubin in support of her

objection to the right to take, but have no place in this analysis.

Based upon the misapplication and/or failure to adequately account for facts and the resulting errors of law, this Court should grant the Town's motion pursuant to Rule 59(a)(4), (7), (8), and (9), and Rule 60(b).

C. Rubin is barred by collateral estoppel to challenge Apex's right to condemn a utility easement.

Under the doctrine of collateral estoppel or issue preclusion, "the determination of an issue in a prior judicial or administrative proceeding precludes re-litigation of that issue in a later action[.]" *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). Collateral estoppel precludes the subsequent adjudication of a previously determined issue even if the subsequent action is based on an entirely different claim. *Id.* Re-litigation of "even...unrelated causes of action" are prohibited by the doctrine of collateral estoppel. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973).

Issues herein as to the Town's right to condemn a utility easement across Rubin's property were adjudicated in the water easement condemnation action. The water easement condemnation action resolved the Town's right to condemn an easement to bring utility infrastructure to vacant or underdeveloped properties which could then be developed, including as residential subdivisions. (See Exhibits L, M). Rubin was a party to the water easement condemnation action, so privity certainly exists. The water easement condemnation action describes the Town's authority to condemn a utility easement across Rubin's property. (See Exhibit L).


Rubin is precluded from re-litigating these same issues by application of the doctrine of collateral estoppel. This is so because Rubin enjoyed a full and fair opportunity to litigate these issues in the water easement condemnation action. *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880. Rubin had actual notice of the pendency of the water easement condemnation action and was party

thereto — and still chose not to contest the Town's right to take an utility easement. As such, Rubin is precluded from challenging the right to take in this action by the doctrine of collateral estoppel.

CONCLUSION

The Town has the power of eminent domain and has condemned property for a proper public purpose. The improvement and expansion of a sewer system to serve an annexed and approved residential subdivision and additional properties is the type of public project typically undertaken by municipalities. The fact that there is an ancillary benefit to the landowner that owns the property in closest proximity to the Town's sewer line does not convert this public project into one for private benefit. The settled case law clearly establishes this point. The Town's gravity sewer project is for a public purpose and for the public benefit, and, consequently, the Town's taking is constitutional and a proper exercise of their statutory authority. Therefore, the Court should reconsider its October 18, 2016 Judgment, and enter an order upholding Apex's right and authority to condemn an easement on the Rubin tract for a sewer easement. This Court should therefore grant the Town's motion pursuant to Rules 59(a)(4), (7), (8), and (9), it's inherent authority, and/or pursuant to Rule 60(b).

Respectfully submitted, this the 28th day of October, 2016.



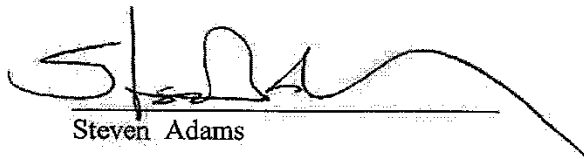
David P. Ferrell
N.C. State Bar No.: 23097
Email: dferrell@vanblacklaw.com
VANDEVENTER BLACK LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Attorney for Plaintiff Town of Apex

NORTH CAROLINA

WAKE COUNTY

VERIFICATION

I, Steven Adams, being first duly sworn, depose and say that I am the Real Estate and Utilities Systems Specialist of the Plaintiff, Town of Apex in the above entitled action; that I have read the foregoing Motion and know the contents thereof; and that the same is true to my own knowledge, except as to those matters and things stated on information and belief, and as to those matters, I believe them to be true.



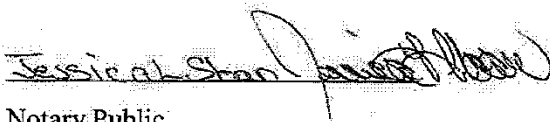
Steven Adams

Real Estate & Utilities System Specialist

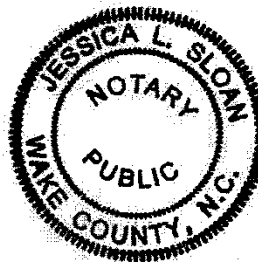
Town of Apex

Sworn and subscribed before me

This the 28th day of October, 2016.



Notary Public



My Commission Expires: 11/1/2020

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing PLAINTIFF'S VERIFIED MOTION FOR RECONSIDERATION, TO ALTER, AMEND, AND/OR SEEK RELIEF FROM JUDGMENT was served by mailing the same, via U.S. Mail, postage prepaid to the following:

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Facsimile: (919) 832-3918
Attorneys for Defendant

This the 28th day of October, 2016.



David P. Ferrell

**Exhibit A: Judgment (filed 18
October 2016).**

Duplicate copy omitted.

**Original set forth in its
entirety at R pp 47-47.**



STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

TOWN OF APEX,

Plaintiff,

Y.

BEVERLY L. RUBIN

Defendant.

2016 OCT 25 P 3:08

1330

JUDGMENT

CERTIFICATE OF SERVICE

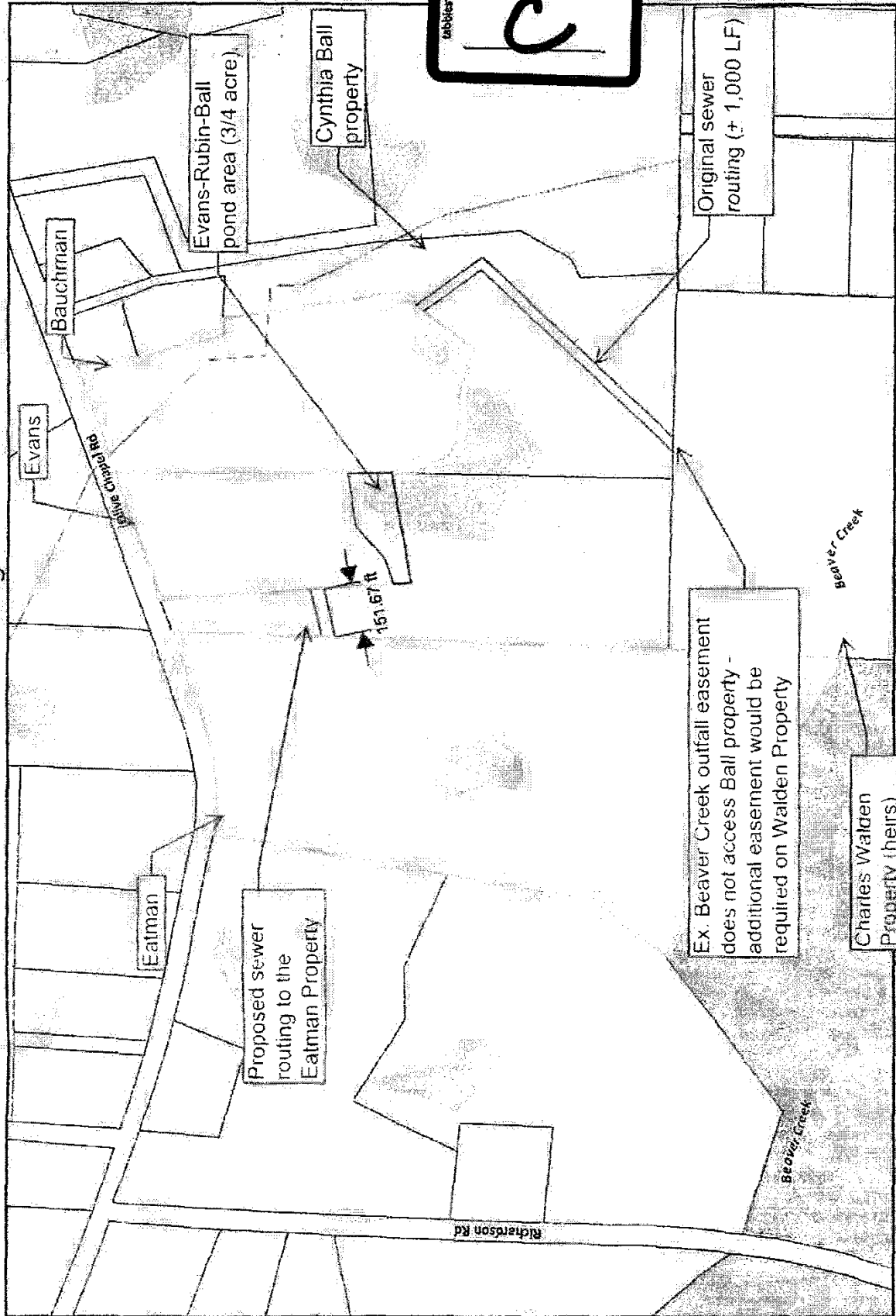
This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19 day of October, 2016.

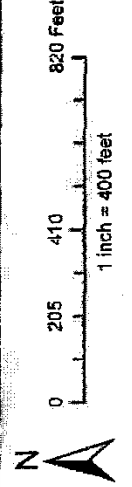
Kenneth C. Haywood

tabbies
- EXHIBIT
C

Aug. 2013



Disclaimer
Map makes every effort to produce and publish the most current and accurate information possible. However, the maps are produced for information purposes, and are NOT surveys. No warranties, expressed or implied, are provided for the date therein, its use or its interpretation.



Evans-Eatman-Bauchman Property



Tammy Moldovan

From: Tim Donnelly
Sent: Tuesday, September 09, 2014 7:43 AM
To: 'Brad.zadell@gmail.com'
Cc: Christina Zadell (christina_zadell@msn.com); Steve Adams
Subject: RE: Purchase of sewer easement for Beverly Rubin

I would keep working on the appraisal and yes, the Council should approve the PUD first. You can keep negotiating with MS Rubin while working through the approval process if the lines of communication are still friendly.

Tim Donnelly
Public Works and Utilities Director
Town of Apex (919) 362-8166

From: Brad.zadell@gmail.com [mailto:brad.zadell@gmail.com]
Sent: Monday, September 08, 2014 6:30 PM
To: Tim Donnelly
Cc: Christina Zadell (christina_zadell@msn.com); Steve Adams
Subject: Re: Purchase of sewer easement for Beverly Rubin

Ok. Thanks Tim

Yes the draft shows the sewer easement and location etc. construction drawings and master subdivision plans are in review. Peter and Stuart are working on the Existing Rubin pond to get storm water approved (part of that crazy rezoning condition that was approved by council to make Beverly and Cynthia happy)

Should we wait until master subdivision approval to take this sewer easement to council or does it matter?

Thanks for any input

Brad

Sent from my iPhone

On Sep 8, 2014, at 4:17 PM, Tim Donnelly <Tim.Donnelly@apexnc.org> wrote:

Yes, but the sewer easement across the Rubin property is not in the right location to serve the Rubin property. The question is not whether the development of Arcadia West makes sewer available, the question is what damage and what enhancement does this easement do to the Rubin property?

I also noticed the PUD for Arcadia East has not been approved, does the draft show this sewer route and when will it be approved?

Tim Donnelly
Public Works and Utilities Director
Town of Apex (919) 362-8166

From: Brad.zadell@gmail.com [mailto:Brad.zadell@gmail.com]
Sent: Monday, September 08, 2014 4:04 PM
To: Tim Donnelly
Cc: Christina Zadell (christina_zadell@msn.com); Steve Adams
Subject: Re: Purchase of sewer easement for Beverly Rubin



- C. PVC Pipe
- D. Fittings
- E. Lining

806 Force Mains - Installation Methods

- A. General Requirements
- B. Sewer Air Valves
- C. Receiving Manholes - Special Requirements
- D. Force Main Identification
- E. Testing of Force Mains

801 General

In situations where gravity flow is not feasible, the TOWN will consider the installation of a wastewater pumping station and a force main. Certain factors must be addressed by the developer for the project for consideration by the Town of Apex. The factors include:

1. Determine the wastewater flow that would be generated by the total natural drainage basin based upon the existing zoning. Design flow factors for this use are found in Section 700 of these Specifications.
2. Evaluate the capacity of the receiving sewer main at the point of discharge and downstream to determine that the line could handle the transferred sewer flow.
3. Perform a cost analysis of the pumping versus gravity alternative to demonstrate that gravity service is not feasible. The estimated installed cost of the gravity alternative must be not less than 3.5 times more costly than the pumping station alternative in order for the Town to allow a pumping station.
4. Adherence to the Town of Apex Policy on Private Pump Stations and Force Mains.

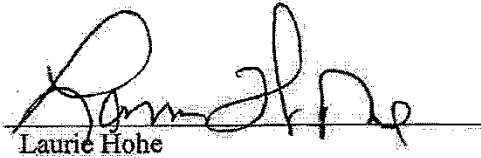
The above information shall be furnished to the DPW for consideration. The DPW, in collaboration with the Town Manager shall determine whether a pumping station will be permitted.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-5836

AFFIDAVIT OF LAURIE HOHE

8. I informed her after the March 3 meeting of the Town Council's decision.

This the 28th day of October, 2016.

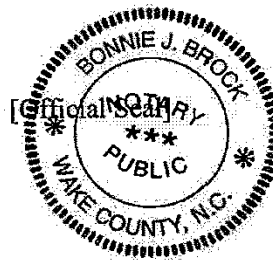

Laurie Hohe

SWORN TO subscribed before me

this the 28th day of October, 2016.


NOTARY PUBLIC

My commission expires: 7/7/2020



CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing AFFIDAVIT OF LAURIE HOHE was served
by mailing the same, via U.S. Mail, postage prepaid to the following:

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Facsimile: (919) 832-3918
Attorney for Defendant

This the 28th day of October, 2016.



David P. Ferrell

Tangie L. Lancaster

From: Laurie Hohe <Laurie.Hohe@apexnc.org>
Sent: Friday, February 06, 2015 12:23 PM
To: 'Brad.zadell@gmail.com'
Cc: Tim Donnelly; Steve Adams; Bruce Radford
Subject: RE: Beverly Rubin easement
Attachments: Unilateral offer re Condemnation Action.doc; Representation and Confidentiality Agreement- Eminent Domain - Arcadia East Sewer Connector.doc

Brad,

I've spoken with Ms. Rubin. She was unwilling to discuss a settlement for the sewer easement. She understands that the next step is to request approval for condemnation for the sewer connection from Town Council. She will be out of the state during the week of February 17th and has asked to wait until the March 3, 2015 Council meeting so that she may be able to address the Town Council. The Manager agreed. We'll prepare the resolution for the March 3, 2015 Town Council meeting.

I've attached the Town's standard Unilateral Offer to Pay Condemnation Award, Expenses and Costs. This agreement requires a cash security deposit or letter of credit to secure payment of condemnation expenses and just compensation.

Also attached is the Town's standard Representation and Confidentiality Agreement. I will forward a copy of the engagement letter for the attorney who will represent the Town in the event that condemnation is approved and filed. The engagement letter is an attachment to the representation and confidentiality agreement.

Both agreements will need to be signed by Parkside Builders in the event that Town Council approves the request for condemnation.

If you have questions, please let me know.

Laurie

Laurie L. Hohe
Town Attorney
Town of Apex
PO Box 250
Apex, NC 27502
919-249-3376
laurie.hohe@apexnc.org

-----Original Message-----

From: Brad.zadell@gmail.com [mailto:brad.zadell@gmail.com]
Sent: Tuesday, February 03, 2015 3:02 PM
To: Laurie Hohe
Cc: Tim Donnelly; Steve Adams
Subject: Re: Beverly Rubin easement

Laurie

Did you get in touch with Beverly yesterday?

Thanks

Brad

Sent from my iPhone

> On Feb 2, 2015, at 8:52 AM, Laurie Hohe <Laurie.Hohe@apexnc.org> wrote:

>

> Thank you Brad. I plan to reach out to Ms. Rubin today.

>

> Laurie

>

> Laurie L. Hohe

> Town Attorney

> Town of Apex

> PO Box 250

> Apex, NC 27502

> 919-249-3376

> laurie.hohe@apexnc.org

>

>

> -----Original Message-----

> From: Brad.zadell@gmail.com [mailto:brad.zadell@gmail.com]

> Sent: Monday, February 02, 2015 8:48 AM

> To: Laurie Hohe

> Cc: Tim Donnelly; Steve Adams

> Subject: Beverly Rubin easement

>

> Laurie

>

> Checking on the status of Beverly Rubin offsite sewer easement. Have you contacted her yet? I think Tim said we had to get this on the council agenda by February 9th in order to make it to town council on Feb 17th

>

> Beverly cell number is 919-523-2917 if you needed it

>

> Let me know what else you may need

>

> Told Tim we would be willing to go up to \$20,000 for the easement purchase

>

> Thanks

>

> Brad Zadell

>

> Sent from my iPhone

Tammy Moldovan

From: Laurie Hohe <Laurie.Hohe@apexnc.org>
Sent: Thursday, March 05, 2015 11:29 AM
To: 'Beverly Rubin'
Subject: RE: Meeting on 3/3

Ms. Rubin,

The Town Council approved the resolution authorizing condemnation of the sewer easement.

Thank you,

Laurie L. Hohe
Town Attorney
Town of Apex
PO Box 250
Apex, NC 27502
919-249-3376
laurie.hohe@apexnc.org

From: Beverly Rubin [<mailto:brubin@merkleinc.com>]
Sent: Thursday, March 05, 2015 10:54 AM
To: Laurie Hohe
Subject: Meeting on 3/3

Hello Laurie,

I was unable to attend the meeting. Did the town vote on condemnation?

Beverly L. Rubin
General Counsel
Senior Vice President
Merkle Inc.
Direct: 443.542.4660
Cell: 919.523.2917
brubin@merkleinc.com



David Ferrell

From: David Ferrell
Sent: Friday, June 12, 2015 5:28 PM
To: Kenneth Haywood
Subject: RE: Town of Apex / Rubin

Kenneth,

We disagree with your characterizations that the condemnation complaint was filed suddenly. To date we have received nothing as a result of your May 19 letter. The Town will need to move forward with the project. Let me know if you would like to discuss.

David

David P. Ferrell
VANDEVENTER BLACK LLP
O: 919.754.1171 | F: 919.754.1317
dferrell@vanblk.com
Bio **vCard**

From: Kenneth Haywood [mailto:KHaywood@bbghlaw.com]
Sent: Wednesday, June 10, 2015 4:24 PM
To: David Ferrell
Subject: RE: Town of Apex / Rubin

David,

We stand by our last letter. Prior to the initiation of the lawsuit we had prepared a public record's request to send to the Town. That was interrupted by the sudden filing of the lawsuit. We therefore have request for production of documents that will need to be responded to in order to bring on our motions. We will be sending these out to you in the next couple days. I am not aware of any urgency in moving forward with the construction and therefore best for all parties to gather the necessary documents and have the hearing.

Kenneth

Kenneth C. Haywood

Boxley, Bolton, Garber & Haywood, L.L.P.
Attorneys at Law
227 West Martin St. Raleigh, NC 27601
Post Office Drawer 1429 Raleigh NC 27602
Phone: (919) 832-3915
Fax: (919) 832-3918
khaywood@bbghlaw.com
www.bbghlaw.com

From: David Ferrell [<mailto:DFerrell@vanblk.com>]
Sent: Wednesday, June 10, 2015 3:49 PM
To: Kenneth Haywood
Subject: RE: Town of Apex / Rubin

Kenneth,

Given that the Town has heard nothing from Ms. Rubin regarding the issues in your May 19, 2015 letter and our exchange of correspondence on May 22, 2015, we will move the construction of the project forward. If you have questions or would like to discuss, please give me a call. Thanks.

David

David P. Ferrell
VANDEVENTER BLACK LLP
O: 919.754.1171 | F: 919.754.1317
dferrell@vanblk.com
Bio vCard

From: Kenneth Haywood [<mailto:KHaywood@bbghlaw.com>]
Sent: Friday, May 22, 2015 5:20 PM
To: David Ferrell
Subject: RE: Town of Apex / Rubin

David,

I have signed the acceptance and it is being mailed back. Given that the Town decided to go under 135 and not issue a 30 day letter and we received the complaint out of the blue we will move this matter along at the required pace.

Kenneth

Kenneth C. Haywood

Boxley, Bolton, Garber & Haywood, L.L.P.
Attorneys at Law
227 West Martin St. Raleigh, NC 27601
Post Office Drawer 1429 Raleigh NC 27602
Phone: (919) 832-3915
Fax: (919) 832-3918
khaywood@bbghlaw.com
www.bbghlaw.com

From: David Ferrell [<mailto:DFerrell@vanblk.com>]
Sent: Friday, May 22, 2015 5:05 PM
To: Kenneth Haywood
Subject: Town of Apex / Rubin

Kenneth

I am in receipt of your letter dated May 19, 2015 in the above referenced matter. Although we disagree with the characterizations in your letter and the basis for your motion, if you plan to file the motion and schedule a hearing,

please do quickly and set the matter on a mutually agreeable hearing date. The Town's project is scheduled to move forward and we cannot put it on hold for an undetermined period of time.

Also, if you do not plan to accept service on behalf of Ms. Rubin, please let me know so we can serve her directly. Thanks.

If you have questions or want to discuss, please give me a call. Thanks.

David

David P. Ferrell
VANDEVENTER BLACK LLP
O: 919.754.1171 | F: 919.754.1317
dferrell@vanblk.com
Bio **vCard**

This email may contain confidential or privileged information. If you are not the intended recipient, please advise by return email and delete immediately without reading or forwarding to others.

BOXLEY, BOLTON, GARBER & HAYWOOD, L.L.P.

ATTORNEYS AT LAW

THE NASH SQUARE BUILDING

227 WEST MARTIN STREET

POST OFFICE DRAWER 1429

RALEIGH, NORTH CAROLINA 27602

TELEPHONE (919) 832-3915

FAX (919) 832-3918

J. MAC BOXLEY
LAWRENCE E. BOLTON
RONALD H. GARBER
KENNETH C. HAYWOOD
EVERETT M. BOLTON
NATHAN G. ZALESKI

May 19, 2015

MAY 22 2015

David P. Ferrell
Vandeventer Black LLP
Post Office Box 2599
Raleigh, North Carolina 27602

VIA FACSIMILE AND
U.S. MAIL

Re: Town of Apex v. Beverly L. Rubin

Dear David:

I am writing in response to the recent complaint you filed on behalf of the Town of Apex. Our client intends to challenge, the right to take, by the Town of Apex in this matter. Therefore, we will be filing a motion to be heard by the Court on an expedited basis.

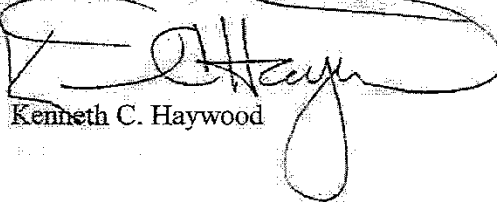
I am writing to alert you to our intent to file such a motion and would encourage your client and its partner, the developer of the tract of land on either side of Ms. Rubin to not commence any construction activities until after the motion is heard. Otherwise, if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for damages. I trust that you appreciate providing advance notice to you of our intention in order to be able to mitigate against any actions caused by premature construction activities.

Once we have a motion hearing date, I will notify you in advance.

With best regards, I am

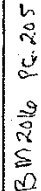
Sincerely yours,

Boxley, Bolton, Garber & Haywood, L.L.P.



Kenneth C. Haywood

KCH/lbf
cc: Beverly Rubin



PROFESSIONAL LAND SURVEYORS
B M 2016 PC-204

**EXHIBIT
RILEY'S POND
HOMES AND LOTS SOLD**

Number of Lots CO'D:	5 (Lots 36 – 38 & 41 – 42)
Number of Active Permits:	7 (Phase 1 - Lots 3, 34, 39, 45 – 46 & 48 and Phase 2 - Lot 25)
Number of Lots Closed & Conveyed:	2 (Phase 1 - Lots 36 & 42)

BK016523PG02326

WAKE COUNTY, NC
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
09-08-2016 AT 13:12:00
STATE OF NC REAL ESTATE
EXCISE TAX: \$963.00
BOOK: 016523 PAGE: 02326 - 02327

NORTH CAROLINA SPECIAL WARRANTY DEED

Excise Tax: \$963.00 Parcel Identifier No. 0435418

Mail after recording to Grantee

This instrument was prepared by James H. Pardue

Brief description for the Index Lot 36, Riley's Pond

THIS DEED made this 19th day of August, 2016 by and between

GRANTOR

ROYAL OAKS BUILDING GROUP, LLC

1210 Trinity Road, Suite 102
Raleigh, NC 27607

GRANTEE

ANDREW W. GRIMES,
married

1501 Braden Overlook Court
Apex, NC 27502

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g. corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in the City of Apex, White Oak Township, Wake County, North Carolina and more particularly described as follows:

Being all of Lot 36

Phase 1

Riley's Pond Subdivision

As shown on map recorded in Book of Maps 2016, Pages 204 and 205,

Wake County Registry

Submitted electronically by "James H. Pardue, Attorney at Law"
in compliance with North Carolina statutes governing recordable documents
and the terms of the submitter agreement with the Wake County Register of Deeds.

BK016523PG02327

Together with the property rights and benefits and subject to the restrictions, conditions and obligations contained in the Declaration(s) recorded in Book 16295, Page 2576 and Book 16480, Page 1293, Wake County Registry.

The property hereinabove described was acquired by Grantor by instrument recorded in Book 16297, Page 394, Wake County Registry.

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantor covenants with the Grantee, that Grantor has done nothing to impair such title as Grantor received, and Grantor will warrant and defend the title against the lawful claims of all persons claiming by, under or through Grantor, other than the following exceptions:

Easements, restrictions of record and ad valorem taxes for the year 2016 and years thereafter.

The property does not include the primary residence of the grantor. NCGS §105-317.2.

IN WITNESS WHEREOF, the Grantor has duly executed the foregoing as of the day and year first above written.

ROYAL OAKS BUILDING GROUP, LLC

By: _____

Manager



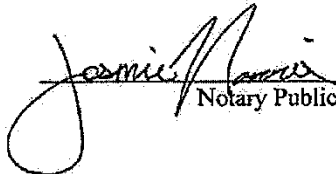
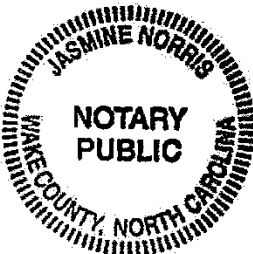
NORTH CAROLINA - WAKE COUNTY

I, the undersigned Notary Public of the County and State aforesaid, do hereby certify that Alix Kunkel personally came before me this day and acknowledged that she is the Manager of Royal Oaks Building Group, LLC, a North Carolina limited liability company and that by authority duly given and as the act of the limited liability company, she signed the foregoing instrument in its name on its behalf as its act and deed.

Witness my hand and Notarial stamp or seal, this 22 day of August, 2016.

My Commission Expires: 2/10/21

(Notary Seal)


Notary Public

BK016506PG00477

WAKE COUNTY, NC
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
08-25-2016 AT 12:49:53
STATE OF NC REAL ESTATE
EXCISE TAX: \$957.00
BOOK: 016506 PAGE: 00477 - 00478

NORTH CAROLINA SPECIAL WARRANTY DEED

Excise Tax: \$957.00 Parcel Identifier No. 0435424
Mail after recording to Grantee
This instrument was prepared by James H. Pardue
Brief description for the Index Lot 42, Riley's Pond

GRANTOR	GRANTEE
ROYAL OAKS BUILDING GROUP, LLC 1210 Trinity Road, Suite 102 Raleigh, NC 27607	DARYL ROBERT SMITH and wife, REBECCA AUGUST SMITH 1528 Braden Overlook Court Apex, NC 27502

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g. corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in the City of Apex, White Oaks Township, Wake County, North Carolina and more particularly described as follows:

Being all of Lot 42
Phase 1
Riley's Pond Subdivision
As shown on map recorded in Book of Maps 2016, Pages 204 and 205,
Wake County Registry

submitted electronically by "James H. Pardue, Attorney at Law"
in compliance with North Carolina statutes governing recordable documents
and the terms of the submitter agreement with the Wake County Register of Deeds.

BK016506PG00478

Together with the property rights and benefits and subject to the restrictions, conditions and obligations contained in the Declaration(s) recorded in Book 16295, Page 2576, Wake County Registry.

The property hereinabove described was acquired by Grantor by instrument recorded in Book 16327, Page 1262, Wake County Registry.

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

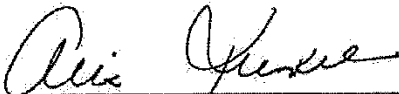
And the Grantor covenants with the Grantee, that Grantor has done nothing to impair such title as Grantor received, and Grantor will warrant and defend the title against the lawful claims of all persons claiming by, under or through Grantor, other than the following exceptions:

Easements, restrictions of record and ad valorem taxes for the year 2016 and years thereafter.

The property does not include the primary residence of the grantor. NCGS §105-317.2.

IN WITNESS WHEREOF, the Grantor has duly executed the foregoing as of the day and year first above written.

ROYAL OAKS BUILDING GROUP, LLC

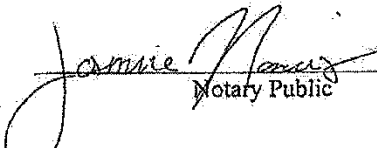
By: 
Manager

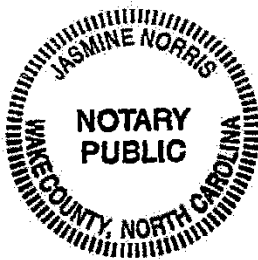
NORTH CAROLINA - WAKE COUNTY

I, the undersigned Notary Public of the County and State aforesaid, do hereby certify that Alix Kunkel personally came before me this day and acknowledged that she is the Manager of Royal Oaks Building Group, LLC, a North Carolina limited liability company and that by authority duly given and as the act of the limited liability company, she signed the foregoing instrument in its name on its behalf as its act and deed.

Witness my hand and Notarial stamp or seal, this 12 day of August, 2016.

My Commission Expires: 2/16/21
(Notary Seal)


Notary Public



**Exhibit I - Deposition of
Nicole L. Dozier**

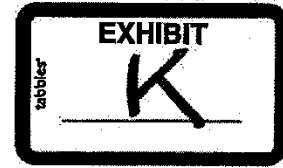
Duplicate copy omitted.

**Original set forth in its
entirety at R S (I) 318-447.**

**Exhibit J - Deposition
Transcript of William S.
Jensen**

Duplicate copy omitted.

**Original set forth in its
entirety at R S (I) 448-530.**



TOWN OF APEX, NORTH CAROLINA

OFFICE OF THE TOWN CLERK
Georgia A. Evangelist, MMC
PO BOX 250, APEX, NC 27502
Phone (919) 249-3303 or Fax (919) 249-3305
E-mail: georgia.evangelist@apexnc.org

CLERK'S CERTIFICATION

STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, Georgia A. Evangelist, MMC, Town Clerk, Town of Apex, North Carolina, Wake County, do hereby certify the attached is a true copy of an original "Resolution No. 2012-0320- _08_ Authorizing Eminent Domain Proceedings Related to the Olive Chapel Water Line and Electric Line Project for the Improvement of the Apex Water and Electric Systems," having been duly adopted by the Town Council of Apex, North Carolina during the March 20, 2012 meeting, with an original having been filed in the permanent minutes in the Town Clerk's Office, Apex Town Campus, 73 Hunter Street, Apex, North Carolina.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official Seal of the Town of Apex, North Carolina, this the 29th. day of March, 2012.


Georgia A. Evangelist, MMC



- Seal -

RESOLUTION: 2012- 0320-08

**RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS RELATED TO
THE OLIVE CHAPEL WATER LINE AND ELECTRIC LINE PROJECT FOR THE
IMPROVEMENT OF THE APEX WATER AND ELECTRIC SYSTEMS**

WHEREAS, the Town of Apex is improving its water and electric systems, and related thereto needs to improve its ability to serve the public including the construction of new water lines and electric lines and related facilities;

WHEREAS, the Town Council of the Town of Apex hereby determines that it is necessary and in the public interest to acquire real property interests in certain properties owned by the below described persons, said interests to be used for one of both of the following public purposes:

To be used for water lines and electric lines and related facilities and all appurtenances necessary or convenient thereto in connection with the Apex Water and Electric Systems to promote the public health, interest and general welfare.

WHEREAS, the Town of Apex is authorized to acquire by eminent domain interests in real property in accordance with Section 6.5 of the Town of Apex Charter which authorizes the Town of Apex to use the eminent domain powers, rights and procedures provided in Article 9 of Chapter 136 of the General Statutes for, among other things, public water and electric infrastructure and related facilities and appurtenances thereto.

NOW, THEREFORE, be it resolved by the Town Council of the Town of Apex as follows:

1. For the purposes stated above under the authority of Section 6.5 of the Apex Town Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, the Town Council does hereby authorize the acquisition through eminent domain or negotiated purchase the real property interests described below:

Water and electric transmission and distribution easements and combination easements as well as temporary construction easements for the purposes described above in, upon, across, over and under the lands listed below all as shown on the surveys attached hereto. The properties subject to eminent domain proceedings are listed as follows:

<u>PROPERTY OWNER</u>	<u>WAKE COUNTY PIN #</u>	<u>EXHIBIT</u>
Beverly L. Rubin	0721-48-2119	A
Marvin L. and Dianne M. Welton	0721-28-6953	B

2. Reasonable eminent domain deposits to the Clerk of Court as determined by the Town Attorney are hereby authorized. The Town Attorney or such attorney as is retained by the Town is hereby authorized to pursue the above acquisitions through eminent domain and/or negotiation.

3. The Town Attorney in consultation with the Town Manager and/or the Director of Public Works or his designee is authorized to make adjustments to the exact location of easements if practical considerations so require.

4. The sending of such notices of entry and/or notices of eminent domain proceedings as are prudent and courteous and the performing of such investigations (including the obtaining of real estate appraisals, land planning studies, engineering studies and tree valuations) as the Town Attorney determine are needed are hereby authorized. Any notices of entry or notices of eminent domain previously sent with respect to the project described above are hereby ratified. Any condemnation actions previously filed are hereby ratified and authorized.

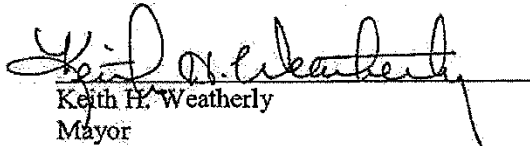
Motion made by Council Member Olive

Motion seconded by Council Member Schulze

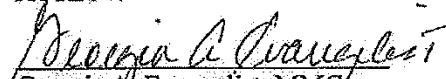
With 6 Council Members voting aye.

With 0 Council Members voting no.

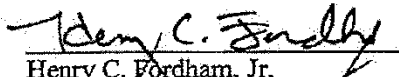
Adopted and effective this the 20th day of March, 2012.

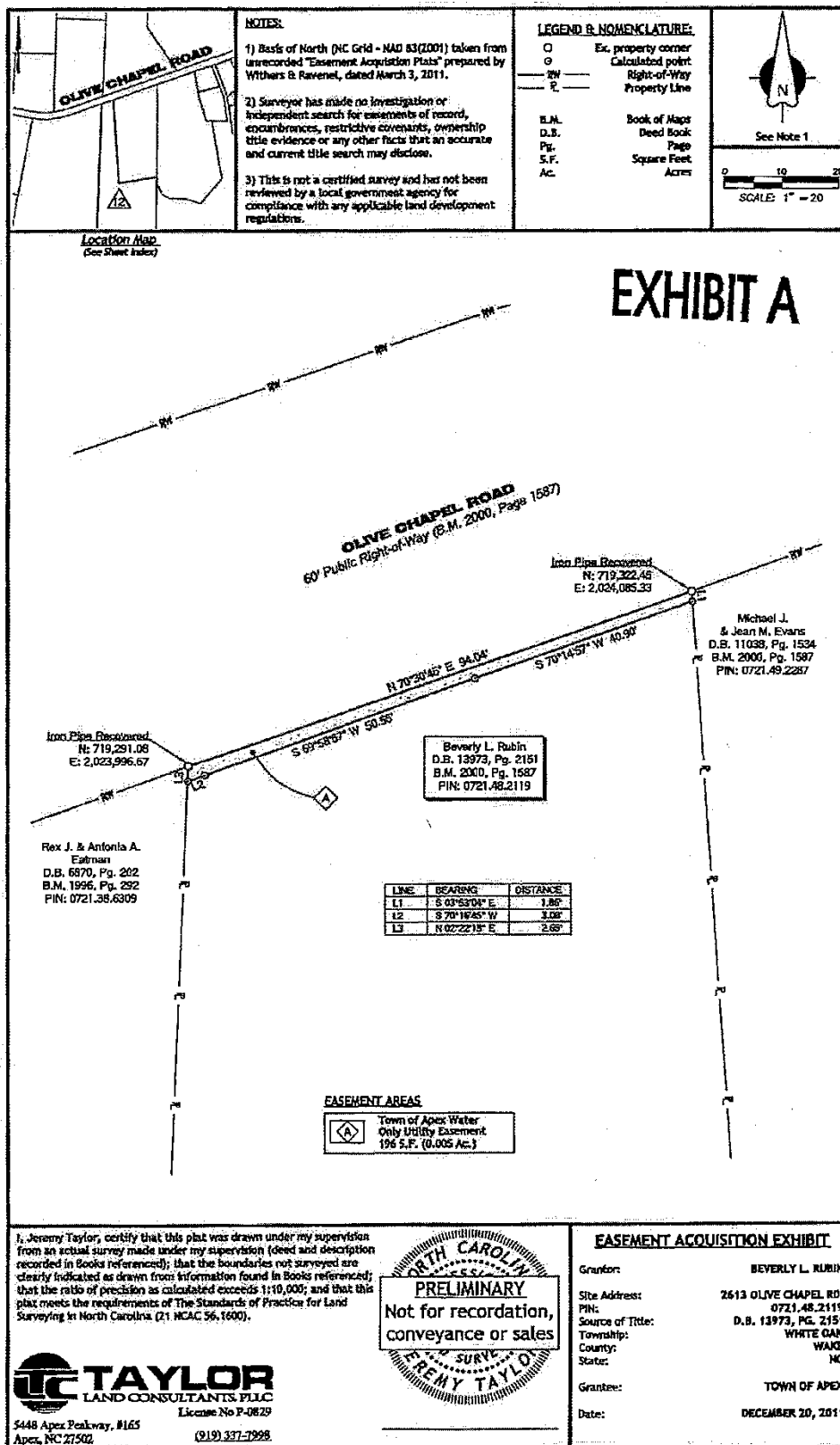

Keith H. Weatherly
Mayor

ATTEST:


Georgia A. Evangelist, MMC
Town Clerk

APPROVED AS TO FORM:


Henry C. Fordham, Jr.
Town Attorney



I, **Jenny Taylor**, certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed and description recorded in Books referenced); that the boundaries not surveyed are clearly indicated as drawn from information found in Books referenced; that the ratio of precision as calculated exceeds 1:10,000; and that this plat meets the requirements of The Standards of Practice for Land Surveying in North Carolina (21 NCAC 56.1600).

TAYLOR
LAND CONSULTANTS, PLLC
License No P-0829

5448 Apex Parkway, #165
Apex, NC 27502 (919) 337-7998

PRELIMINARY
Not for recordation,
conveyance or sales

EASEMENT ACQUISITION EXHIBIT

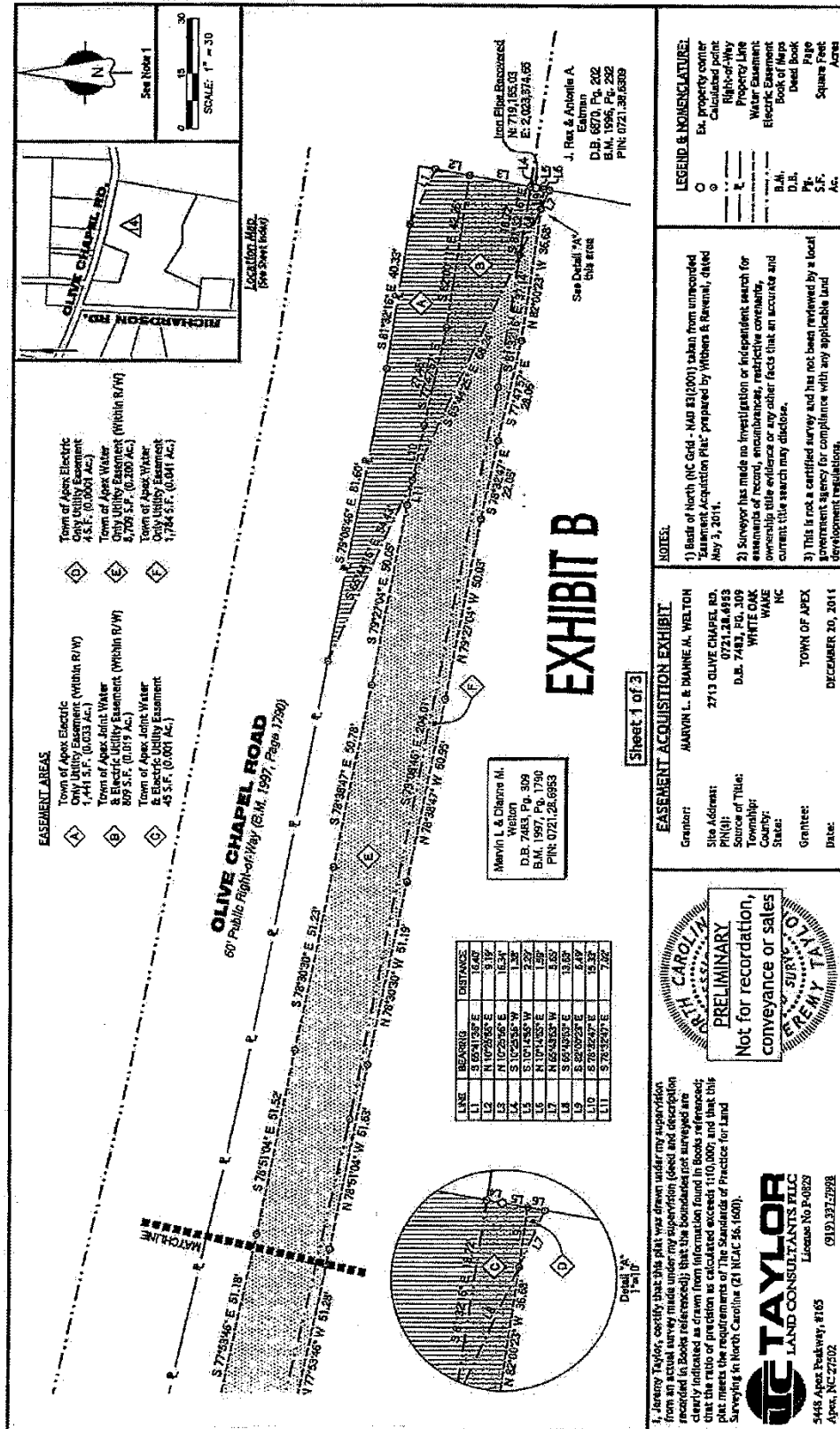
Grantor: **BEVERLY L. RUBIN**

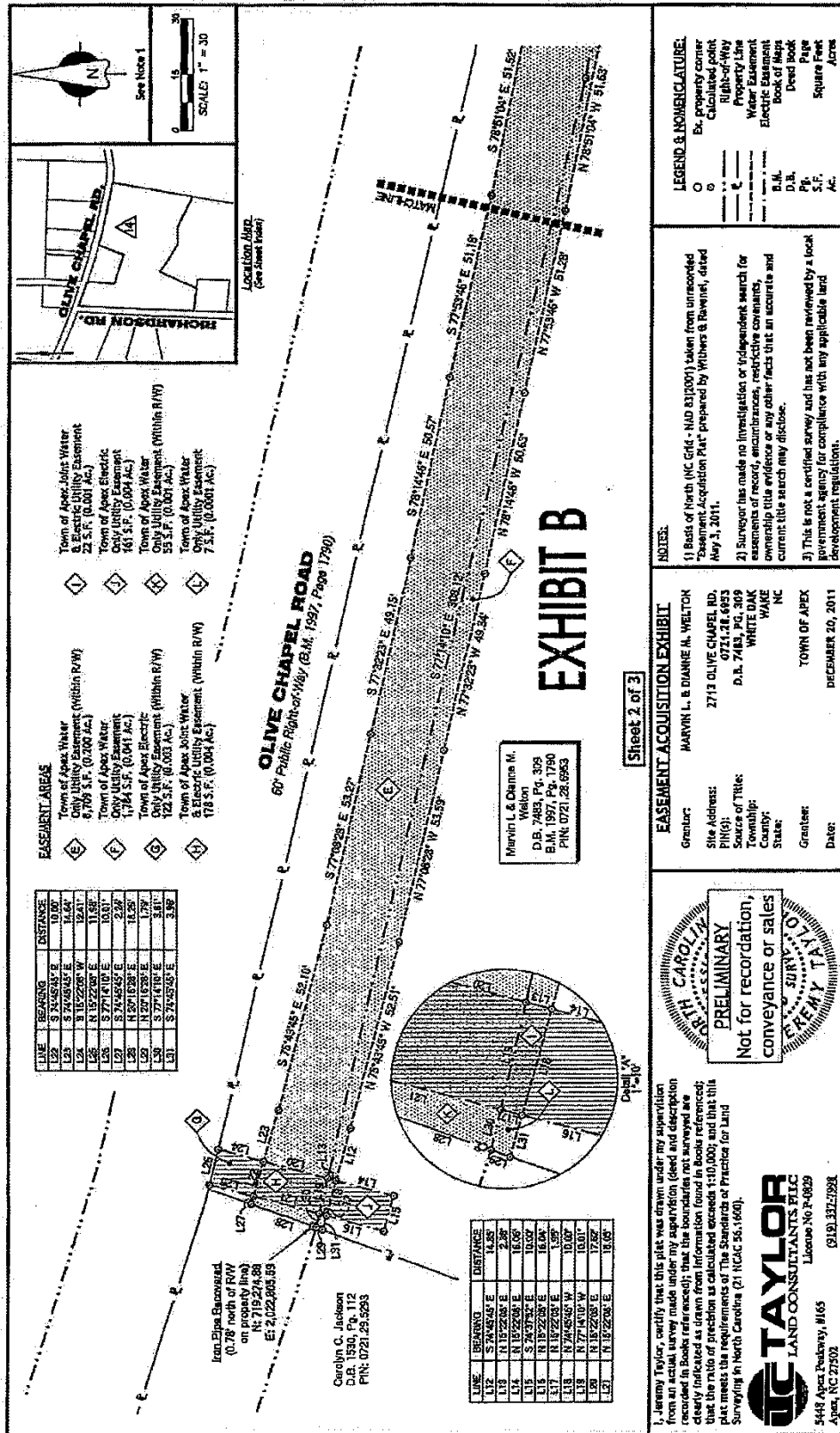
Site Address: 2613 OLIVE CHAPEL RD.
PIN: 0721.48.2119

Source of Title: D.B. 13973, PG. 2151
Township: WHITE OAK
County: WAKE
State: NC

Grantee: **TOWN OF APEX**

Date: **DECEMBER 20, 2011**





12 55333

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2017 APR 12 PM 3:53

Town of Apex,

WAKE COUNTY, C.S.C.)

BY Plaintiff,

v.

Beverly L. Rubin,

Defendant.)

COMPLAINT
(COMP)



Now comes the Town of Apex, Plaintiff herein, and for its cause of action says and alleges:

1. The Town of Apex is a duly chartered Municipal Corporation of the State of North Carolina with its principal offices in Apex, North Carolina [hereinafter "the Town"]. The Town possesses the powers, duties and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. The Plaintiff alleges upon information and belief that those persons whose names and addresses are set forth in **Exhibit A**, attached hereto, are, insofar as the same can be ascertained by reasonable diligence, the only persons who may have or who claim to have an interest or estate in the property subject to this action, which is described in **Exhibit B**, attached hereto. The named interested persons are under no legal disability except as may be stated in said **Exhibit A**.

3. Pursuant to the authority vested in the Plaintiff under the provisions of Section 6.5 of the Charter of the Town of Apex and Article 9 of Chapter 136 of the North Carolina General Statutes, it is necessary to condemn and appropriate certain property described in **Exhibit B** and **Exhibit C** for public use in the construction of a water project to improve the public water system of the Town of Apex.

4. The property which is the subject of this action, the interest or estate acquired, and the areas appropriated are all described in **Exhibit B** and **Exhibit C**.

5. The Plaintiff alleges upon information and belief that the property described in **Exhibit B** is subject only to such liens and encumbrances as are set forth in **Exhibit A**.

6. The Plaintiff and the Defendant have been unable to agree as to the purchase price of the property interests herein appropriated.

WHEREFORE, Plaintiff prays that just compensation for the appropriation herein set forth be determined according to the provisions and procedures contained in Article 9 of Chapter

136 of the North Carolina General Statutes and for such other relief as to the Court may deem just and proper.

This the 10th of April, 2012.

TOWN OF APEX

By:

Henry C. Fordham, Jr.

Henry C. Fordham, Jr.

Town Attorney

P.O. Box 250

Apex, NC 27502

Tel: (919) 249-1127

Fax: (919) 249-1128

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

Town of Apex,

Plaintiff,

v.

Beverly L. Rubin,

Defendant.

**DECLARATION OF TAKING AND
NOTICE OF DEPOSIT**

The Plaintiff, Town of Apex, declares as follows:

1. The Town of Apex is a duly chartered Municipal Corporation of the State of North Carolina with its principal offices in Apex, North Carolina [hereinafter "the Town"]. The Town possesses the powers, duties and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. The Plaintiff alleges upon information and belief, that those persons whose names and addresses are set forth in **Exhibit A**, attached hereto, are, insofar as the same can be ascertained by reasonable diligence, the only persons who may have or who claim to have an interest or estate in the property subject to this action, which is described in **Exhibit B**, attached hereto. The named interested persons are under no legal disability except as may be stated in said **Exhibit A**.

3. Pursuant to the authority vested in the Plaintiff under the provisions Section 6.5 of the Charter of the Town of Apex and of Article 9 Chapter 136 of the North Carolina General Statutes, it is necessary to condemn and appropriate certain property described in **Exhibit B** and **Exhibit C** for public use in the construction of a water project to improve the public water system of the Town of Apex.

4. The property which is the subject of this action, the interest or estate acquired, and the area appropriated are all described in **Exhibit B** and **Exhibit C**.

5. The Plaintiff and the Defendant have been unable to agree as to the purchase price of the property herein appropriated.

6. The Plaintiff has estimated the sum of \$600.00 to be just compensation for said taking; and the Plaintiff has this date deposited said sum with the Clerk of Superior Court of the county in which the action is pending, and the Defendant herein may apply to the Court for disbursement of said money as full compensation, or as credit against just compensation, to be determined in this action.

EXHIBIT B

DESCRIPTION OF SUBJECT PROPERTY AFFECTED BY THIS ACTION:

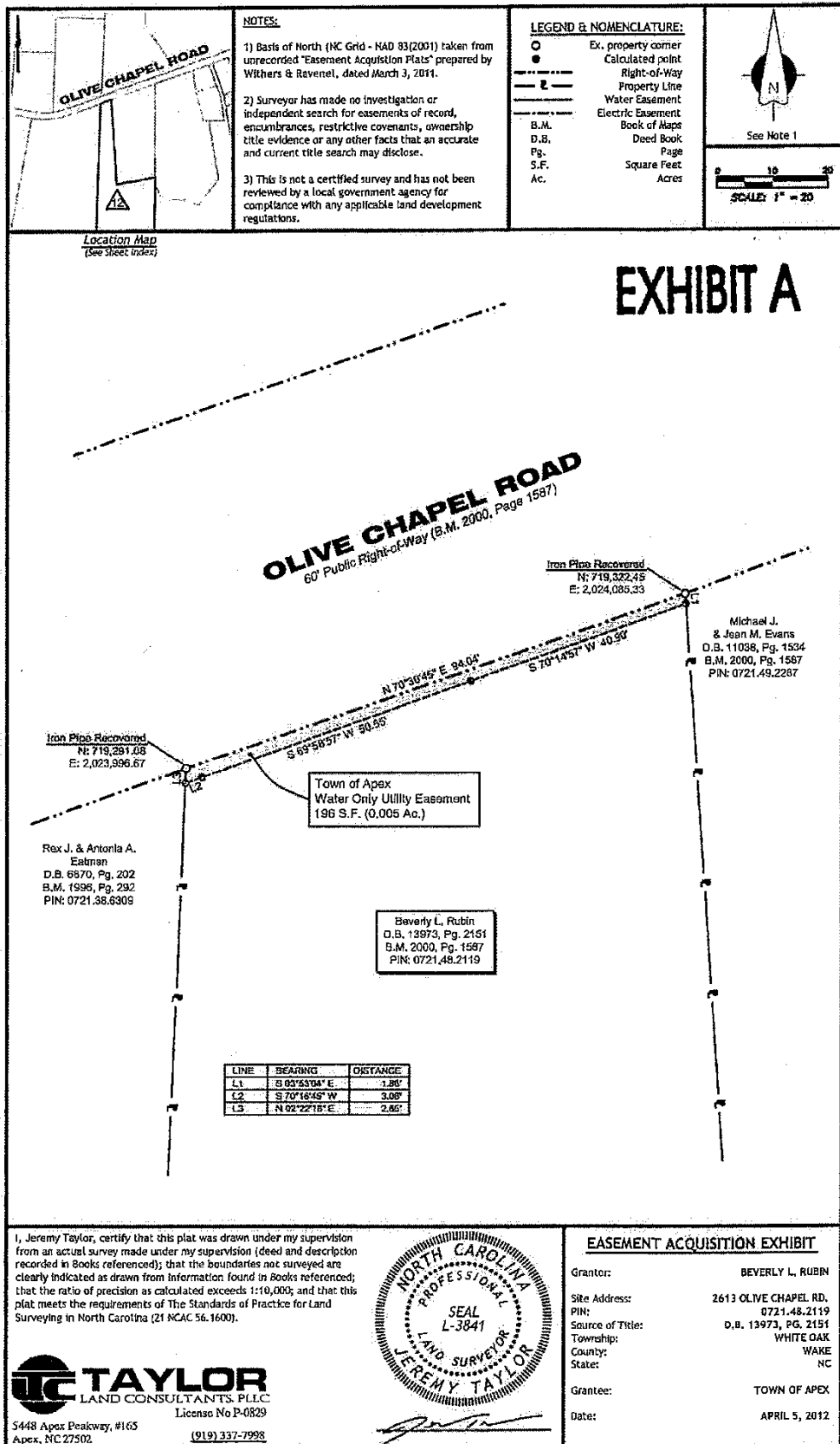
The "Subject Property" affected by this action is that certain parcel lying and being in White Oak Township, Wake County, North Carolina and being more particularly described as follows:

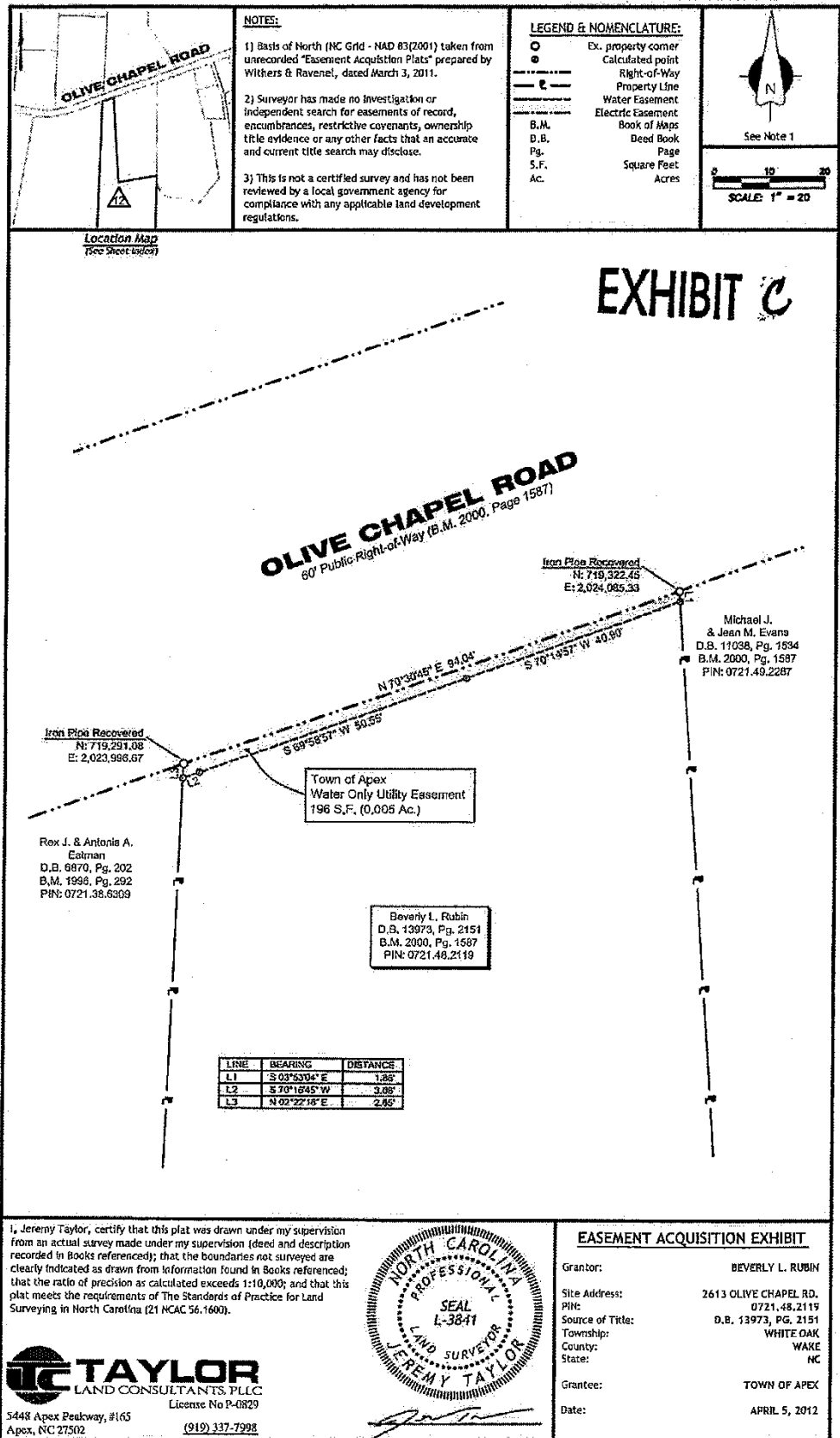
Being all of that land conveyed to Beverly L. Rubin by that certain Deed recorded in Book 13973, Page 2151, Wake County Registry, being Wake County PIN #0721-48-2119, as said land is subject to all matters and items listed in **Exhibit A**.

INTEREST OR ESTATE AND AREAS TAKEN:

Water Only Utility Easement Area:

A permanent water transmission and distribution easement in, on, over, under and across the area on **Exhibit C** designated as "Town of Apex Water Only Utility Easement," said area consisting of 196 S.F. (0.005 Ac.) located outside the existing NCDOT right-of-way for Olive Chapel Road, for the purpose of constructing, installing, improving, upgrading, removing, replacing, inspecting, repairing, maintaining, using and operating a system of lines, pipes, conduits, pipelines or support structures for the purposes of water transmission or distribution, together with all the appurtenant facilities and equipment necessary or convenient thereto.





STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE

WAKE COUNTY

2013 APR -8 PM 3:33

SUPERIOR COURT DIVISION

12 CVS 5333

Town of Apex,

WAKE COUNTY C.S.C.

Plaintiff,

v.

Beverly L. Rubin,

Defendant.

CONSENT JUDGMENT



THIS CAUSE, coming on to be heard before the undersigned Honorable Superior Court Judge Presiding, it having been stipulated by the Parties and the Court finding as a fact the following:

1. This is an eminent domain action filed by a unit of government to acquire a public utility easement across private property. The filing of this action and the entry of this Consent Judgment in no way indicates anything negative about the landowner defendant. The only reason the landowner is a defendant herein is that she happened to own property in the path of a public utility project.

2. This action was duly instituted on the 12th day of April, 2012, by the issuance of Summons and the filing of a Complaint, Declaration of Taking, and Notice of Deposit, along with the deposit of \$600.00, the sum estimated by the Plaintiff to be just compensation for the taking of the property of the Defendant.

3. Summons, together with a copy of the Complaint, Declaration of Taking and Notice of Deposit were duly served upon the Defendant as they appear of record.

4. All persons having or claiming to have an interest in the condemned land are parties hereto and are duly before the Court.

5. The Parties have now settled all matters in controversy between them, and as agreed by the Parties, the sum of \$600.00, which sum includes any claim by the Defendant to interest, is the full and adequate value of, and represents just compensation for, the taking of the Defendant's property.

ON THE FOREGOING STIPULATIONS, THE COURT CONCLUDES AS A MATTER OF LAW THE FOLLOWING:

1. The Plaintiff was entitled to acquire and did acquire on the 12th day of April, 2012, an easement interest in the property of the Defendant as described herein.

After recording mail to:
Henry C. Fordham, Jr.
Town of Apex
P.O. Box 250

2. These proceedings as appears from the Pleadings are regular in every respect and no just cause has been shown against granting the prayer contained in the Complaint, and Declaration and Notice.

3. Except as expressly set forth herein, the Defendant is not entitled to any further relief from the Plaintiff as a result of the taking.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. On the 12th day of April, by the filing of a Complaint, Declaration of Taking, and Notice of Deposit and depositing into court funds estimated to be just compensation, the Plaintiff, Town of Apex, condemned the property, interest or estate described below. Effective April 12, 2012, the Plaintiff Town of Apex, shall be and is permanently vested with the property, interest, or estate described as follows:

DESCRIPTION OF SUBJECT PROPERTY AFFECTED BY THIS ACTION:

The "Subject Property" affected by this action is that certain parcel lying and being in White Oak Township, Wake County, North Carolina and being more particularly described as follows:

Being all of that land conveyed to Beverly L. Rubin by that certain Deed recorded in Book 13973, Page 2151, Wake County Registry, being Wake County PIN #0721-48-2119, as said land is subject to all matters and items of record.

INTEREST OR ESTATE AND AREAS TAKEN:

Water Only Utility Easement Area:

A permanent water transmission and distribution easement in, on, over, under and across the area on **Exhibit A** designated as "Town of Apex Water Only Utility Easement," said area consisting of 196 S.F. (0.005 Ac.) located outside the existing NCDOT right-of-way for Olive Chapel Road, for the purpose of constructing, installing, improving, upgrading, removing, replacing, inspecting, repairing, maintaining, using and operating a system of lines, pipes, conduits, pipelines or support structures for the purposes of water transmission or distribution, together with all the appurtenant facilities and equipment necessary or convenient thereto.

2. The total sum of \$600.00 paid into court shall constitute full just compensation and shall, be disbursed by the Clerk of Court as a check in the amount of \$600.00 made payable to "Beverly L. Rubin, 2613 Olive Chapel Road, Apex, NC, 27502. The Defendant is not entitled to any relief other than that specifically provided herein.

3. A copy of this Judgment shall be certified under seal of the Court to the Register of Deeds of this County, and the Register of Deeds shall record this Judgment among the land records of the County.

4. The Plaintiff, Town of Apex, shall pay the costs of this action.

This the 4 day of April, 2013.


JUDGE PRESIDING

Consented To:

Plaintiff, Town of Apex

By: Henry C. Fordham, Jr.
Henry C. Fordham, Jr.
Town Attorney

Consented To:

By: Beverly L. Rubin
Beverly L. Rubin



Tammy Moldovan

From: Tim Donnelly
Sent: Monday, September 08, 2014 3:02 PM
To: Donna Hosch
Cc: Bruce Radford
Subject: FW: Letter to the Mayor
Attachments: Lettet to Apex re Condemnation Request - Rubin.docx

Thanks for the e-mail, I got copies of everything I need from Brad. We may put on agenda for next week, reviewing with Hank.

Tim Donnelly
Public Works and Utilities Director
Town of Apex (919) 362-8166

-----Original Message-----

From: Brad Zadell [mailto:brad.zadell@gmail.com]
Sent: Monday, September 08, 2014 10:36 AM
To: Tim Donnelly
Subject: Letter to the Mayor

Tim,

Attached is the letter to the Mayor

Thanks,

Brad



> Sent: Monday, February 02, 2015 8:48 AM
> To: Laurie Hohe
> Cc: Tim Donnelly; Steve Adams
> Subject: Beverly Rubin easement
>
> Laurie
>
> Checking on the status of Beverly Rubin offsite sewer easement. Have you contacted her yet? I think Tim said we had to get this on the council agenda by February 9th in order to make it to town council on Feb 17th
>
> Beverly cell number is 919-523-2917 if you needed it
>
> Let me know what else you may need
>
> Told Tim we would be willing to go up to \$20,000 for the easement purchase
>
> Thanks
>
> Brad Zadell
>
> Sent from my iPhone

STATE OF NORTH CAROLINA

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

FILED

2017 JAN 24 AM 10:35

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

15-CVS-5836

WAKE COUNTY, C.S.C.

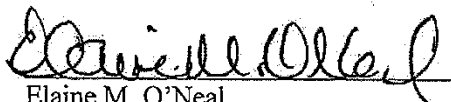
BY

ORDER

THIS CAUSE was heard pursuant to a Commission by the Chief Justice of the Supreme Court of North Carolina by the undersigned Superior Court Judge on January 5, 2017, on the Plaintiff's Verified Motion for Reconsideration, To Alter, Amend and/or Seek Relief from this Court's Judgment entered herein on October 18, 2016, pursuant to Rules 59 and 60 of the Rules of Civil Procedure and the Court's inherent authority, with Plaintiff represented by David P. Ferrell of Vandeventer Black LLP, and Defendant represented by Kenneth C. Haywood of Boxley, Bolton, Garber & Haywood, LLP. The Judgment is incorporated herein by reference. And the Court, having reviewed the verified motion and exhibits, the file in this matter, the arguments of counsel, and the record, hereby finds that Plaintiffs' Motion should be **DENIED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that Plaintiff's Verified Motion for Reconsideration, To Alter, Amend and/or Seek Relief from Judgment is **DENIED**.

This the 12th day of January, 2017.



Elaine M. O'Neal
Superior Court Judge Presiding

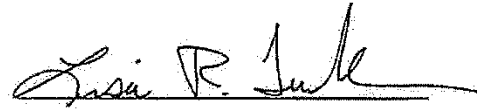
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been served upon counsel for all parties listed below by mailing a copy thereof to each of said parties, addressed, postage prepaid, and deposited with the United States Postal Service as follows:

David P. Ferrell
PO Box 2599
Raleigh, NC 27602
Attorney for Plaintiff

Kenneth C. Haywood
PO Drawer 1429
Raleigh, NC 27602
Attorney for Defendant

This the 24th day of January, 2017.

A handwritten signature in black ink, appearing to read "Lisa R. Tucker", written over a horizontal line.

Lisa R. Tucker
Wake County Trial Court Coordinator
PO Box 1916
Raleigh, NC 27602

STATE OF NORTH CAROLINA

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

15-CVS-5836

2017 JAN 30 P 4:14

FILED C.S.C.

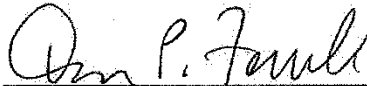
BY

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiff the Town of Apex, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, hereby gives Notice of Appeal to the North Carolina Court of Appeals from (1) the Judgment signed by the Honorable Elaine M. O'Neal on 6 October 2016, filed on 18 October 2016, and served on 19 October 2016 (attached hereto as Exhibit 1) and (2) the Order denying Plaintiff's Verified Motion for Reconsideration, to Alter, Amend, and/or Seek Relief from Judgment pursuant to Rules 59 and 60 of the Rules of Civil Procedure and the court's inherent authority, signed by the Honorable Elaine M. O'Neal on 13 January 2017, filed on 24 January 2017, and served on 24 January 2017 (attached hereto as Exhibit 2).

This the 30th day of January, 2017.



David P. Ferrell

N.C. State Bar No.: 23097

VANDEVENTER BLACK LLP

P.O. Box 2599

Raleigh, NC 27602-2599

Telephone: (919) 754-1171

Facsimile: (919) 754-1317

Email: dferrell@vanblk.com

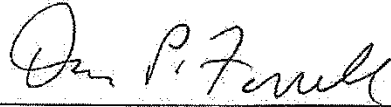
Attorney for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing NOTICE OF APPEAL was served by mailing the same, via U.S. Mail, postage prepaid to the following:

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Facsimile: (919) 832-3918
Attorney for Defendant

This the 30th day of January, 2017.



David P. Ferrell

**Exhibit 1: Judgment (filed 18
October 2016).**

Duplicate copy omitted.

**Original set forth in its
entirety at R pp 41-47.**

**Exhibit 2: Order [denying
Plaintiff's Motion for
Reconsideration] (filed 24
January 2017).**

Duplicate copy omitted.

**Original set forth in its
entirety at R p 109.**

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2017 FEB 13 P 4:00 SUPERIOR COURT DIVISION
15-CVS-5836

TOWN OF APEX,

Plaintiff,

v.


BEVERLY L. RUBIN,

Defendant.

NOTICE OF TRANSCRIPT
ARRANGEMENTS AND REQUEST FOR
FILING

NOW COMES the Plaintiff Town of Apex, by and through counsel, pursuant to Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure, and hereby files copies of its agreements with (1) Susan K. Gugig to contract for the transcription of the proceedings that took place in this action during the 1 August 2016 civil session of Wake County Superior Court (See Exhibit A) and (2) Judith R. Runes, 506 Tonewood Court, Graham, NC 27253, to contract for the transcription of the proceedings that took place in this action during the 5 January 2017 special civil session of Wake County Superior Court (See Exhibit B).

This the 13th day of February, 2017.



David P. Ferrell
N.C. State Bar No.: 23097
VANDEVENTER BLACK LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Email: dferrell@vanblk.com
Attorney for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing NOTICE OF TRANSCRIPT ARRANGEMENTS AND REQUEST FOR FILING was served by mailing the same, via U.S.

Mail, postage prepaid to the following:

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Facsimile: (919) 832-3918
Attorney for Defendant

This the 13th day of February, 2017.



David P. Ferrell

STATE OF NORTH CAROLINA

Case No. 15 CVS 5836

COUNTY OF WAKE

TOWN OF APEX ,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

.....

THIS IS AN AGREEMENT between Susan K. Gugig, Official Court Reporter (Reporter) and Vandeventer Black LLP (Requester) for an original transcript of proceedings in the above-captioned case at the August 1, 2016, session of Wake County Superior Court, a hearing held before Judge Elaine M. O'Neal in Wake County.

The transcript shall be produced in accordance with the guidelines established by the North Carolina Administrative Office of the Courts, and according to the following terms:

1. One copy by e-mail and on compact disc shall be provided to the Requester.
2. Estimated length of the transcript is 130 pages. Fee for the transcript is \$4.00 per page regular (2-4 weeks). Estimated total cost for the transcript is \$520.00.
3. Payment is made prior to delivery of the transcript. Once payment is received, the Reporter will forward the transcript to the Requester.
4. Requester may copy the transcript for use by the Requester and Court only. No copy of the transcript shall be made by the Requester for another party and specifically shall not be provided by the Requester to any opposing party. Requester hereby agrees that the Reporter shall remain the sole source for any other party obtaining a copy, in whole or in part, of the transcript.

VANDEVENTER BLACK LLP

By: _____

SUSAN K. GUGIG
Official Court Reporter

February 10, 2017

Date

2/10/17



STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILE NO. 15CVS5836

TOWN OF APEX,
Plaintiff,

versus

BEVERLY L. RUBIN,
Defendant.

INVOICE

CONTRACT & NOTICE
OF ARRANGEMENT
FOR PRODUCTION OF TRANSCRIPT

THIS IS AN AGREEMENT between Judith R. Runes (Reporter) and Vandeventer Black LLP (Requester) for the production of a transcript of proceedings in the above-captioned case (Transcript). Transcript shall be produced in accordance with the North Carolina Rules of Appellate Procedure and guidelines established by the North Carolina Administrative Office of the Courts and according to the following terms:

One original in PDF format by e-mail shall be provided to Requester.

Preparation of Transcript will commence upon receipt of this signed contract and payment in full.

(Please choose one option)

- 1) ☐ Regular delivery (60 days) - \$616.00 OR ☐ Expedited delivery (five working days) - \$1,232.00

Requester will provide contact information for all other parties in the case and Reporter will provide copies of Transcript to both Requester and all other parties with costs for others parties' copies being included in the fee paid by Requester.


OR

- 2) ☒ Regular delivery (60 days) - \$440.00 OR ☐ Expedited delivery (five working days) - \$880.00

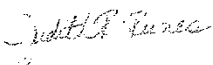
Requester may copy Transcript for use by Requester only. **No copy of Transcript shall be made by Requester for any party and specifically shall not be provided by Requester to any opposing party.** Requester hereby agrees that Reporter shall remain the sole source for any other party obtaining a copy, in whole or in part, of Transcript and that, in keeping with policies regarding copies of transcripts set out in N.C.G.S. Chapter 1A, Rule 30(f)(2), upon payment of reasonable charges therefore, Reporter shall furnish a copy of Transcript to any other parties.

Requester agrees that Transcript shall not be included in the record on appeal in the form specified in Rule 9(c)(1), but rather shall be designated as provided in Rule 9(c)(2) and (c)(3) and, therefore, will not be provided to any other party, opposing or otherwise, as a part of any proposed or final Record on Appeal.

In the event that a court of competent jurisdiction orders Requester to provide Transcript to another person or opposing party, Requester shall buy an additional copy from Reporter to provide to that other person or opposing party.


Vandeventer Black LLP

2/13/17
Date


Judith R. Runes, CRR, RPR
Official Court Reporter
506 Tonewood Court, Graham, NC 27253

February 8, 2017

Date



STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

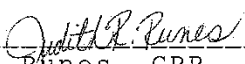
CERTIFICATE OF DELIVERY

(Pages 1 - 89)

(Volume I of I)

This is to certify that the transcript of proceedings at the January 5, 2017, session of Durham County Superior Court was ordered on the Contract & Notice of Arrangement for Production of Transcript on February 13, 2017, comprises 90 pages, and was delivered electronically to counsel listed below on March 3, 2017.

VANDEVENTER BLACK LLP
David P. Ferrell, Esq.
434 Fayetteville Street, Suite 2000
Raleigh, North Carolina 27601



Judy Rines, CRR, CA CSR
Official Court Reporter

CERTIFICATE

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, Susan K. Gugig, RPR, the officer before whom the foregoing proceedings was taken, do hereby certify that said hearing, pages 1 through 110, is a true, correct, and verbatim transcript of said proceeding.


I further certify that I am neither counsel for, related to, nor employed by any of the parties in the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This date of 6th day of April, 2017.

Susan K. Gugig

Susan K. Gugig, RPR
Official Court Reporter
Tenth Judicial District

Susan K. Gugig, RPR
Official Court Reporter

STATE OF NORTH CAROLINA	FILED	IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE	2017 JUN -9 A 10:21	SUPERIOR COURT DIVISION
TOWN OF APEX,	WAKE CO., N.C.	15-CVS-5836
Plaintiff,	BY 	
v.		DEFENDANT'S MOTION TO DISMISS
BEVERLY L. RUBIN,		PLAINTIFF'S APPEAL
Defendant.		

Defendant Beverly L. Rubin moves this Court through counsel to dismiss the appeal filed by Plaintiff on January 30, 2017.

1. On April 30, 2015, the Town of Apex sued Beverly L. Rubin to “condemn and appropriate” a portion of her land.

2. On July 7, 2015, Ms. Rubin answered, opposing the taking on the ground that the condemnation was actually the work of a private developer, using the Town’s powers of eminent domain.

3. On April 8, 2016, Ms. Rubin moved this court to conduct a hearing, under N.C. Gen. Stat. § 136-108, to consider whether the Town’s proposed taking was for a public purpose.

4. After the hearing, this Court entered a Judgment on October 18, 2016, concluding that the Town’s proposed taking was instituted to serve the private interests of another landowner and, accordingly, dismissed the Town’s condemnation case.

5. Under Appellate Rule 3(c)(1), the Town was required to notice appeal, if at all, by November 17, 2016. However, the Town did not notice appeal until January 30, 2017—more than two months late.

6. This Court may determine the timeliness of Plaintiff's filing and dismiss Plaintiff's appeal for failure to timely file the Notice of Appeal. *See* N.C. R. App. P. 25(a); *Landingham Plumbing & Heating of N.C., Inc. v. Funnell*, 102 N.C. App. 814, 815, 403 S.E.2d 604, 605 (1991) ("Rule 25 of the North Carolina Rules of Appellate Procedure allows the trial court to dismiss an appeal if the appellant failed to give notice of appeal within the time allowed by the Appellate Rules."). If the appeal is untimely, dismissal is required. *See Currin-Dillehay Building Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 684 (1990) ("[I]f the requirements of [Rule 3] are not complied with, the appeal must be dismissed.").

7. Indeed, until Plaintiff's appeal is docketed in the appellate court, defendants may seek to dismiss Plaintiff's appeal *only* in this Court. *See* N.C. R. App. P. 25 ("Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court . . . from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court."). In other words, this Court retains jurisdiction over this action until the appeal is "perfected," which requires more than merely filing a notice of appeal. *See Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247, 258 (1981) (noting that merely filing a notice of appeal does not "perfect" an appeal). Instead, an appeal is perfected only when "it is docketed in the appellate court." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011). Only when the record on appeal is submitted and the appeal docketed in the appellate court—which may not happen for several more weeks—is the appeal perfected and the trial court divested of jurisdiction. *See id.*; *see also* N.C. Gen. Stat. § 1-294.

8. A record on appeal has not been filed and Plaintiff's appeal has not been docketed in the appellate court. As a result, this Court is the only court that may consider and may dismiss Plaintiff's appeal for failure to timely file its Notice of Appeal. *See* N.C. R. App. P. 25; *Farm*

Credit Bank of Columbia v. Edwards, 121 N.C. App. 72, 75-76, 464 S.E.2d 305, 306-07 (1995) (holding motion to dismiss appeal filed in trial court prior to appeal being docketed was proper); *Landingham Plumbing*, 102 N.C. App. at 815, 403 S.E.2d at 605 (“Rule 25 of the North Carolina Rules of Appellate Procedure allows the trial court to dismiss an appeal if the appellant failed to give notice of appeal within the time allowed by the Appellate Rules.”).

9. Plaintiff’s untimely filing of its purported Notice of Appeal mandates dismissal by this Court. Much like a statute of limitations, “[t]he provisions of Rule 3 [of Appellate Procedure] are *jurisdictional*, and failure to follow the rule’s prerequisites *mandates* dismissal of an appeal.” *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (emphasis supplied); *Currin-Dillehay Building Supply, Inc.*, 100 N.C. App. at 189, 394 S.E.2d at 684 (“[I]f the requirements of [Rule 3] are not complied with, the appeal *must be dismissed*.” (emphasis added)); *Giannitrapani v. Duke University*, 30 N.C. App. 667, 670, 228 S.E.2d 46, 48 (1976) (“[T]imely filing and service of notice of appeal are *jurisdictional* matters *requiring* dismissal for noncompliance.” (emphasis added)).

10. Thus, a purported notice of appeal filed beyond the time proscribed by Rule 3—even by one day—*requires* dismissal of the appeal. *See Mahbuba v. Washington*, No. COA12-949, 738 S.E.2d 453 (2013) (dismissing defendant’s appeal where the notice of appeal was filed one day beyond permissible deadline and therefore Court had no jurisdiction) (unpublished); *Herring v. Branch Banking & Trust Co.*, 108 N.C. App. 780, 782, 424 S.E.2d 925, 926 (1993) (affirming trial court’s dismissal of appeal where notice of appeal filed one day late); *see also Farm Credit Bank of Columbia*, 121 N.C. App. at 75-76, 464 S.E.2d at 306-07 (1995) (affirming trial court’s dismissal of appeal for untimely notice); *Saieed v. Bradshaw*, 110 N.C. App. 855, 861, 431 S.E.2d 233, 236 (1993) (same).

11. “Courts may not extend the time for taking an appeal.” N.C. R. App. P. 27(c) (emphasis added); *see Copper ex rel. Copper v. Denlinger*, 193 N.C. App. 249, 260, 667 S.E.2d 470, 479 (2008), *reversed in part on other grounds*, 688 S.E.2d 426 (2010) (“[I]n contrast to the filing of the record on appeal, the deadline for filing a notice of appeal in a civil case under Rule 3 cannot be extended by any North Carolina court as the rule is jurisdictional.”); *Herring*, 108 N.C. App. at 782, 424 S.E.2d 925 at 926 (recognizing the prohibition against enlarging the time for taking an appeal as stated in N.C. R. App. P. 27). The requirements of Rule 3, including the time to file a notice of appeal, *cannot be waived* by a court or a party, even for good cause shown. *See Church v. Decker*, 214 N.C. App. 193, 714 S.E.2d 529 (2011).

12. To be sure, on or about October 28, 2016, the Town filed a “Verified Motion for Reconsideration, to Alter, Amend, and/or Seek Relief From Judgment” (the “Motion for Reconsideration”), citing Rules 59 and 60 of the North Carolina Rules of Civil Procedure, which this Court denied by Order entered on January 24, 2017.

13. The Town’s Motion for Reconsideration *did not*, however, extend the time in which the Town could notice appeal from the Judgment, for two independent reasons.

14. First, the Motion for Reconsideration was not a proper Rule 59 motion because such motions are only allowed after a *trial*, and there was no trial here. *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 794 S.E.2d 535, 538 (N.C. Ct. App. 2016) (“[T]here are strong policy reasons for interpreting Rule 59 according to its plain text.”); *Bodie Island Beach Club Ass’n, Inc. v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 76 (2011) (motion seeking relief from final judgment entered at summary-judgment phase was not proper under Rule 59, which is only available “post-trial”).

15. Second, the Motion for Reconsideration was nothing more than a request that this Court change its mind, and merely repeated the same arguments the Town made at the § 136-108 hearing. Such a motion is not properly made under Rule 59. *Smith v. Johnson*, 125 N.C. App. 603, 606, 418 S.E.2d 415, 417 (1997) (“A request that the trial court reconsider its earlier decision . . . cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made.”); *Curry v. First Fed. Sav. & Loan Ass’n of Charlotte*, 125 N.C. App. 108, 112, 479 S.E.2d 286, 289 (1997). The title of a motion and its mere recitation of the rule number does not make it a proper Rule 59 motion. *Smith*, 125 N.C. App. at 606, 418 S.E.2d at 417.

16. An improper Rule 59 motion does not toll the time to appeal. *Tetra Tech Tesoro, Inc.*, 794 S.E.2d at 538; *Bodie Island Beach Club Ass’n, Inc.*, 215 N.C. App. at 294, 716 S.E.2d at 76; *Smith*, 125 N.C. App. at 606, 418 S.E.2d at 417; *Curry*, 125 N.C. App. at 112, 479 S.E.2d at 289 (holding that the tolling provisions of Appellate Rule 3(c)(3) do not apply to a motion for reconsideration purportedly filed under Rule 59).

17. At most, the Town’s Motion for Reconsideration sounded under Rule 60. Rule 60 motions, however, do not toll the time to appeal. See N.C. R. App. P. 3(c)(3); *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008) (“Motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.”); *Mitchell Cty. Dep’t of Soc. Servs. v. Carpenter*, 127 N.C. App. 353, 356, 489 S.E.2d 437, 439 (1997), *aff’d*, 347 N.C. 569, 494 S.E.2d 763 (1998); *Parrish v. Cole*, 38 N.C. App. 691, 695, 248 S.E.2d 878, 880 (1978); *Wiggins v. Bunch*, 280 N.C. 106, 111, 184 S.E.2d 879, 881 (1971).

18. Therefore, the Town's failure to file its purported Notice of Appeal within the thirty-day time period required by the Appellate Rules is fatal to its appeal. This Court is required to dismiss the Town's purported appeal.

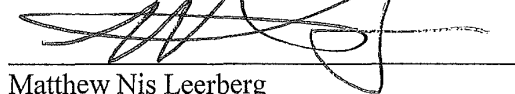
19. Ms. Rubin is entitled to an award of additional costs and attorney's fees in connection with defending against the Town's appeal, including the instant motion to dismiss. *See* N.C. Gen. Stat. § 136-119.

WHEREFORE, Defendant Beverly L. Rubin prays:

- (a) that this Court enter an order dismissing the Town of Apex's appeal;
- (b) that this Court award Defendant Beverly L. Rubin her costs and attorney's fees for defending against the Town's appeal, including pursuing this motion to dismiss; and
- (c) that Defendant Beverly L. Rubin be afforded such other and further relief as may be just and proper.

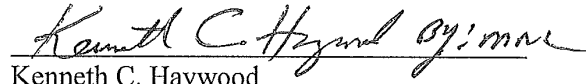
This the 9th day of June 2017.

SMITH MOORE LEATHERWOOD LLP



Matthew Nis Leerberg
NC State Bar No. 35406
Smith Moore Leatherwood LLP
434 Fayetteville Street, Suite 2800
Post Office Box 27525 (27611)
Raleigh, NC 27601
Telephone: (919) 755-8700
Facsimile: (919) 755-8800

BOXLEY, BOLTON, GARBER &
HAYWOOD, LLP

A handwritten signature in cursive script, reading "Kenneth C. Haywood", is written over a horizontal line.

Kenneth C. Haywood
NC State Bar No. 19066
227 West Martin Street
P.O. Box 1429
Raleigh, NC 27602
Telephone: (919) 832-3915
Facsimile: (919) 832-3918
Email: khaywood@bbghlaw.com


Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 9, 2017, the foregoing document was served upon all parties to this action by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following counsel of record:

David P. Ferrell
Vandeventer Black LLP
P.O. Box 2599
Raleigh, NC 27602-2599

This the 9th day of June 2017.



Matthew Nis Leerberg

STATE OF NORTH CAROLINA
WAKE COUNTY

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-5836

TOWN OF APEX,
Plaintiff,
v.
BEVERLY L. RUBIN,
Defendant.

2017 AUG 18 11:46
WAKE COUNTY, C.S.C.

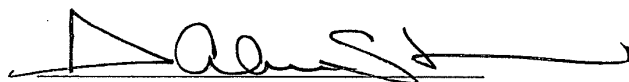
BY

ORDER

THIS CAUSE was heard by the Honorable A. G. Shirley on July 13, 2017, on the Defendant's Motion to Dismiss Plaintiff's Appeal, with Plaintiff represented by David P. Ferrell of Vandeventer Black LLP, and Defendant represented by Kenneth C. Haywood of Boxley, Bolton, Garber & Haywood, LLP and Matthew Nis Leerberg of Smith Moore Leatherwood LLP. And the Court, having reviewed the motion and exhibits, the file in this matter, the arguments of counsel, and the record, hereby finds that Defendant's Motion including Defendant's request for attorney's fees should be **DENIED** without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, Defendant's Motion to Dismiss Plaintiff's Appeal, including Defendant's request for attorney's fees, is **DENIED** without prejudice.

This the 16 day of August, 2017.



A. Graham Shirley
Superior Court Judge Presiding

STATE OF NORTH CAROLINA
COUNTY OF WAKE

TOWN OF APEX,
Plaintiff,
vs.
BEVERLY L. RUBIN,
Defendant.

FILED
2019 APR 10 P 3:02
WAKE CO., C.L.K.
EX-18

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

MOTION TO ENFORCE JUDGMENT AND
ALTERNATIVE PETITION FOR WRIT OF
MANDAMUS

Pursuant to Rule 70 of the North Carolina Rules of Civil Procedure, sections 1-259, 1-298, and 1-302 of the North Carolina General Statutes, and this Court's inherent authority, defendant Beverly Rubin moves to enforce the judgment awarded to her by this Court. In the alternative, Ms. Rubin petitions this Court for a writ of mandamus, directing the Town of Apex to remove the sewer line currently bisecting Ms. Rubin's property.

In support of this motion and petition, Ms. Rubin shows the following:

1. This case involved an effort by a private real-estate developer—Bradley Zadell and his corporate entities—to use the Town's condemnation power for his personal enrichment.
2. Mr. Zadell entered into a contract with the Town whereby the Town would install sewer across Ms. Rubin's property so long as Mr. Zadell paid for all of the costs—including litigation costs.
3. At the insistence of Mr. Zadell, the Town commenced this lawsuit to install sewer lines across Ms. Rubin's homestead. Rather than await the outcome of the condemnation action, the Town used its statutory "quick-take" powers to immediately take possession of Ms. Rubin's property and install sewer lines on it before final judgment.

4. The condemnation action did not go as planned for the Town and the developer. This Court determined that the Town had violated Ms. Rubin’s rights by taking her property for a private purpose—enriching Mr. Zadell.

5. As Judge O’Neal explained in her final judgment, the reason that the Town took the sewer easement was “for a private interest and the public’s interest [was] merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town’s infrastructure or public need.” Judgment at 5 ¶ 6 [Exhibit A (certified copy of judgment)].

6. Thus, the final judgment ordered that the Town’s “claim to [Ms. Rubin’s property] is null and void.” Judgment at 6 ¶ 1.

7. After the Town lost, it appealed to the North Carolina Court of Appeals. That Court unanimously dismissed the appeal as untimely. *Town of Apex v. Rubin*, 821 S.E.2d 613, 617 (N.C. Ct. App. 2018).

8. The Town then petitioned the North Carolina Supreme Court for discretionary review. On April 9, 2019, the Supreme Court filed its order denying the petition. Exhibit B.

9. After the Town’s third loss, the Court of Appeals certified the case back to this Court on April 10. Exhibit C.

10. Ms. Rubin now seeks to enforce this Court’s judgment and have the Town remove the sewer lines that it installed on her property illegally.

11. This Court has the power to enforce its own judgments. Such power is inherent, and is also confirmed by a number of rules and statutes.

12. For example, N.C. Gen. Stat. § 1-298 provides that after a case is remanded to the trial court by an appellate court, the trial court “shall direct the execution [of the judgment] to

proceed” at the “first session of the superior . . . court after a certificate of the determination of an appeal is received.” N.C. Gen. Stat. § 1-298. The certification of the appeal to this Court has been received and is attached to this motion. Ex. C. Therefore, Ms. Rubin is now requesting that this Court order that the judgment be executed against the Town.

13. Second, this Court also has contempt power for enforcement of its judgment through section 1-302 of the General Statutes.¹ Therefore, this Court may hold the Town in civil contempt until it removes the sewer lines.

14. Third, this Court may also grant supplemental relief through the Uniform Declaratory Judgment Act. That Act provides, “Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.” N.C. Gen. Stat. § 1-259. The judgment entered by this Court declared and decreed that the Town’s claim to Ms. Rubin’s property was “null and void.” Judgment at 6 ¶ 1. Because the Town has refused to comply with the judgment, Ms. Rubin now requires further relief ordering the Town to remove the illegally placed sewer lines.

15. Fourth, this Court has authority to enforce its judgment under Rule 70. Under that rule, because the Town has failed to comply with the judgment by removing the sewer lines, this Court can order the Town or a third-party to remove the sewer lines, or this Court can hold the Town in contempt until the sewer lines are removed.

16. Fifth, this Court has the inherent authority to enter any order to make its judgment against the Town effective. As the North Carolina Supreme Court recently reaffirmed, “[i]t is well

¹ Section 1-302 of the General Statutes provides, “Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt.”

settled that, consistent with their inherent authority to enforce their own orders, North Carolina trial courts have jurisdiction to find new facts and determine whether a party has been ‘disobedient’ under a previous order that required the party to perform a ‘specific act.’” *Pachas ex rel. Pachas v. N.C. Dep’t of Health & Human Servs.*, 822 S.E.2d 847, 854 (N.C. 2019); *see also Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) (“Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment.”). Because the Town has failed to comply with the judgment, this Court has the inherent authority to order the Town to remove the sewer lines.

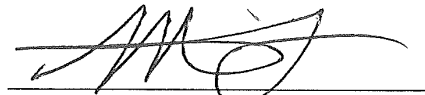
17. Finally, should the Court deem each of these grounds insufficient to enforce the final judgment, this Court may issue a writ of mandamus to the Town or its officers commanding them to remove the sewer lines. *See In re T.H.T.*, 362 N.C. 446, 453–54, 665 S.E.2d 54, 59 (2008). Mandamus would be appropriate because:

- (a) Ms. Rubin has a clear right to the full possession of her property, free of the sewer lines;
- (b) the Town has a legal duty to comply with the judgment and remove the sewer lines;
- (c) the Town’s duty is ministerial and does not involve an exercise of discretion;
- (d) the Town has failed to remove the sewer lines, and the deadline for the Town to remove the lines has now passed; and
- (e) unless the Court grants Ms. Rubin relief under some other authority, Ms. Rubin has no other legally adequate remedies.

WHEREFORE, Ms. Rubin respectfully requests that this Court enforce its judgment and order the Town of Apex to remove the sewer lines on Ms. Rubin's property within thirty days of entry of its order on this motion.²

This the 10th day of April, 2019.

FOX ROTHSCHILD LLP



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mleerberg@foxrothschild.com

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HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A.

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Telephone: (919) 821-7700
Facsimile: (919) 821-7703

² As noted in the Judgment, Ms. Rubin is entitled to payment of her attorneys' fees and costs incurred in connection with this litigation. For efficiency, Ms. Rubin will wait to seek payment of those fees until after the Town has fully complied with the Judgment.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ms. Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus was served by United States mail, first-class postage pre-paid, and addressed as follows:

David P. Ferrell
Nexsen Pruet PLLC
4141 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612

This the 10th day of April, 2019.



Matthew Nis Leerberg

EXHIBIT A

FILED

STATE OF NORTH CAROLINA

2016 OCT 18 PM 1:41

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

WAKE COUNTY, C.S.C.

15 CVS 5836

TOWN OF APEX,

BY _____

Plaintiff,

v.

BEVERLY L. RUBIN

Defendant.

JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.

2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

3. Within the Answer filed by Beverly L. Rubin, she asserted as a defense to the Complaint, that the Town of Apex did not have the right to take any of her property interests under the General Statutes in North Carolina and the North Carolina Constitution or the United States Constitution.

4. As early as May 19, 2015, less than a month after the condemnation lawsuit was filed, a letter was sent to counsel for the Town of Apex, informing the Town that Ms. Rubin intended to challenge the right to take the sanitary sewer easement by the Town of Apex.

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action ..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970)

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S Constitution, Art. V; N.C. Constitution, Art 1 §19; *accord, Hogan v. Alabama Power Company*, 351 So.2d 1378 (Al.Ct.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later adjudication upon Defendant's submitting a Motion in Support of such request.

Signed This the 6th day of Oct., 2016.

Elaine M. O'Neal
Superior Court Judge Elaine M. O'Neal

Gregory D. [Signature]
Clerk of Superior Court of Superior Court
Date 4-3-19

EXHIBIT B

Supreme Court of North Carolina

TOWN OF APEX

v

BEVERLY L. RUBIN

From N.C. Court of Appeals
(17-955)
From Wake
(15CV5836)

ORDER

The following order has been entered on the motion filed on the 20th of November 2018 by Plaintiff for Temporary Stay:

"Motion Dissolved by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

Upon consideration of the petition filed by Plaintiff on the 20th of November 2018 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of March 2019."

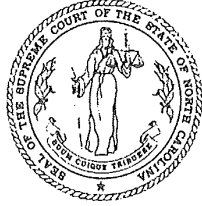
s/ Earls, J.
For the Court

Upon consideration of the petition filed on the 20th of November 2018 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of April 2019.



Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. David P. Ferrell, Attorney at Law, For Town of Apex - (By Email)

Mr. Matthew Nis Leerberg, Attorney at Law, For Rubin, Beverly L. - (By Email)

Mr. Kenneth Haywood, For Rubin, Beverly L. - (By Email)

Mr. Troy D. Shelton, Attorney at Law, For Rubin, Beverly L. - (By Email)

West Publishing - (By Email)

Lexis-Nexis - (By Email)

EXHIBIT C



North Carolina Court of Appeals

Fax: (919) 831-3615
Web: <https://www.nccourts.gov>

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. COA17-955-1

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

From Wake
15CVS5836

ORDER

PETITION FOR DISCRETIONARY REVIEW to review the decision of the North Carolina Court of Appeals filed on the 20th of November 2018 was denied by order of the North Carolina Supreme Court on the 9th day of April 2019, and same has been certified to the North Carolina Court of Appeals.

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court, Wake County, North Carolina that the North Carolina Supreme Court has denied the PETITION FOR DISCRETIONARY REVIEW filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 10th day of April 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. David P. Ferrell, Attorney at Law, For Town of Apex
Mr. Matthew Nis Leerberg, Attorney at Law, For Rubin, Beverly L.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836


TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

2019 MAY 16 P 4:45
WAKE CO., C.S.C.
BY 

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus will be heard during the May '20, 2019 session of Civil Superior Court with the specific time and date to be selected by the Court during calendar call at 10:00 a.m. on Monday, May 20, 2019, at the Wake County Courthouse, 316 Fayetteville Street, Courtroom 10-C Raleigh, North Carolina, 27602.

This the 16th day of May, 2019.

FOX ROTHSCHILD LLP



Matthew Nis Leerberg

N.C. Bar No. 35406

mleerberg@foxrothschild.com

Troy D. Shelton

N.C. Bar No. 48070

tshelton@foxrothschild.com

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Raleigh, NC 27601

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HOWARD, STALLINGS, FROM,
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Raleigh, NC 27607
Telephone: (919) 821-7700
Facsimile: (919) 821-7703

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Hearing was served by e-mail and United States mail, first-class postage pre-paid, and addressed as follows:

David P. Ferrell
Nexsen Pruet PLLC
4141 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
DFerrell@nexsenpruet.com

This the 16th day of May, 2019.



Matthew Nis Leerberg

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

WAKE COUNTY

SUPERIOR COURT DIVISION

19-CVS-6295

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

WAKE COUNTY

SUPERIOR COURT DIVISION

15-CVS-5836

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

ORDER

THESE CAUSES coming on for hearing and being heard by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the May 20, 2019 Civil Session of Superior Court in Wake County, North Carolina, in the above-referenced caption matters; upon the Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss in Case No. 19-CVS-6295, and Defendant's Motion to Enforce Judgment and Alternative Petition For Writ Of Mandamus in Case No. 15-CVS-5836 (referred to collectively as "Motions"). Plaintiff was represented by David P. Ferrell and Norman W. Shearin and Defendant was represented by

Kenneth C. Haywood and Matthew Nis Leerberg. The Court, having reviewed the pleadings, the Motions and exhibits, and the arguments of counsel, hereby takes the Motions under advisement; and enters the following interim Order pursuant to the Court's inherent authority and pursuant to N.C. Gen. Stat. § 136-114:

1. All litigation in Case Nos. 19-CVS-6295 and 15-CVS-5836 and the cases themselves are hereby stayed through and including July 15, 2019;
2. Although the Court expressly reserves any ruling and has not ruled on Plaintiff's request for an injunction, the Court orders Defendant, her attorneys, and agents not to take any action to remove, disturb, or stop the use of the Plaintiff's existing underground sewer line and casing which crosses the Property through and including July 15, 2019;
3. The parties are required to hold a mediation in accordance with the Rules of Mediated Settlement Conferences in Superior Court Civil Actions on or before July 15, 2019. The mediation shall cover all issues in dispute between the parties in the two cases referenced herein. The parties inform the Court that they have selected Bob Beason as their mediator and that Mr. Beason is available to conduct the mediation on or before July 15, 2019;
4. The parties are required to inform the Court on or before July 15, 2019 as to whether the matter settled at mediation. The parties and their attorneys are not to inform the Court of any offers or counteroffers that were made during the mediation.

SO ORDERED.

This the 13th day of June, 2019.



G. Bryan Collins
Superior Court Judge Presiding

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STATE OF NORTH CAROLINA
2019 AUG 30 PM 1:13 IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY WAKE COUNTY, S.C. SUPERIOR COURT DIVISION
15-CVS-5836

TOWN OF APEX,
Plaintiff,
v.
BEVERLY L. RUBIN,
Defendant.

**MOTION FOR RELIEF FROM
JUDGMENT**
[OTHR]

NOW COMES Plaintiff Town of Apex ("Town") and hereby moves the court pursuant to Rule 60 of the Rules of Civil Procedure to grant it relief from the final judgment entered herein on 18 October 2016 ("Judgment"). In support thereof, Town shows unto the court as follows:

1. The Judgment adjudicated as null and void and dismissed the Town's eminent domain claim for acquisition of a sewer easement across property owned by the Defendant Beverly L. Rubin ("Rubin"). The legal basis for the Judgment dismissing the condemnation was that the primary purpose for the taking was to benefit a private interest and therefore no sufficient public purpose existed for the taking.

2. Prior to the entry of the Judgment the Town had constructed, using the bore method, an underground sewer line across Rubin's property. The eight (8) inch, 151 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing ("Project"). The casing was inserted and physically invaded Rubin's property on 27 July 2015.

3. The Project constituted a physical invasion and inverse condemnation of a sewer line easement on Rubin's property. The Town acquired ownership of the sewer line easement on 27 July 2015.

4. The Project remains in place, is in use, and serves approximately 50 residential homes and/or lots located in subdivisions in the Town. The Project was designed and constructed with the capacity to serve yet to be developed properties in the Town. Rubin did not attempt to enjoin the Town at any point, but stood by and observed while the Town constructed the Project and further obligated itself to provide and provided sewer service to its citizens.

5. The inverse taking of an easement for the sewer line occurred approximately 15 months BEFORE the Judgment was entered. The acquisition of the easement by inverse condemnation rendered the Judgment moot. The sewer easement had already been inversely taken on 27 July 2015. The dismissal of the condemnation proceeding had no effect on the rights inversely taken. *Nicholson v Thom*, 236 N.C. App. 308, 317, 763 S.E.2d. 772, 779 (2014) (Issue is moot when question in controversy is no longer at issue).

6. Since the Judgment was entered, the North Carolina Supreme Court has held that public use or purpose is not an element of an inverse condemnation claim. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). The sole remedy for an inverse taking is compensation. *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (2001). The sole inverse condemnation statutory remedy available to Rubin is not dependent upon taking or using for a public purpose. *Wilkie v. City of Boiling Spring Lakes, supra*. As a result of the *Wilkie* holding by the Supreme Court coupled with the inverse taking of the sewer easement by the installation of the underground sewer line on 27 July 2015, the legal basis for the Judgment no longer exists. Rule 60(b)(6) may be properly employed to grant relief from a judgment affected

by a subsequent change in the law. *McNeil v. Hicks*, 119 N.C. App. 579, 580-81, 459 S.E.2d. 47, 48 (1995).

7. The sewer easement is the subject of the captioned condemnation. The inverse condemnation of the sewer easement on 27 July 2015 transferred title to the easement to the Town. On and after 27 July 2015 the Town owned the sewer easement. The transfer of easement rights and the Town's ownership thereof occurred prior to the entry of the Judgment on 18 October 2016. Consequently, the trial court had no jurisdiction over the subject matter of the condemnation at the time of the entry of the Judgment. The absence of jurisdiction means the Judgment is void. A void judgment is a legal nullity. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E.2d 20 (1925); *Woodleif, Shuford NC Civil Practice and Procedure* § 60:7 (2017). Therefore, the Town is entitled to relief from the Judgment pursuant to Rule 60(b)(4).

8. A condemnor cannot exercise its power of eminent domain to condemn property rights that it already owns. *VEPCO v. S. D. King*, 259 N.C. 219, 130 S.E.2d 318 (1963). No jurisdiction is afforded the court to allow the taking by a condemnor of its own property rights. *Id.*; *In re Simmons*, 5 N.C. App 81, 167 S.E.2d 857 (1969).

9. By motion filed herein on 10 April 2019, Rubin seeks, *inter alia*, removal of the Town's sewer line. (Motion is incorporated by reference.). Rubin asserts in her motion that the Judgment entitles her to such mandatory injunctive relief. However, the Town's power of eminent domain insulates it from Rubin's claim that she is entitled to mandatory injunctive relief to remove the sewer pipe. *McAdoo v. City of Greensboro, supra*. The exclusive remedy to which Rubin is entitled for inverse condemnation is compensation. *Id.*, *Wilkie v. City of Boiling Lakes, supra*.

10. Inverse condemnation provides Rubin an adequate remedy for obtaining just compensation due to the Town's limited waiver of its defense of statute of limitations solely as a

bar to Rubin's claim for just compensation for the easement acquired by inverse condemnation, as described and asserted in the Town's First Amended Complaint filed on 30 August 2019 in 19-CVS-6295.

WHEREFORE, the Town respectfully requests the Court to grant it relief from the prospective application of the 18 October 2017 Judgment, and specifically that the sewer line and easement not be removed from Rubin's property.

Respectfully submitted, this the 30th day of August, 2019.



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Telephone: (919) 755-1800
Facsimile: (919) 890-4540
Attorney for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **MOTION FOR RELIEF FROM JUDGMENT** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Matthew Nis Leerberg
Fox Rothschild LLP
PO Box 27525
Raleigh, North Carolina 27611
Fax: 919-755-8800

Kenneth C. Haywood
Howard Stalling, From, Atkins, Angell & Davis,
P.A.
PO Box 12347
Raleigh, NC 27605
Fax: 919-821-7703

This the 30th day of August, 2019.



David P. Ferrell

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-5836

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

NOTICE OF HEARING

NOW COMES Plaintiff the Town of Apex, by and through Counsel, and hereby gives notice to all parties that Plaintiff's Motion for Relief from Judgment will be heard at the Wake County Courthouse, 316 Fayetteville Street, Raleigh, North Carolina, 27601, on Monday, December 16, 2019 at 10:00 a.m., or as soon thereafter as the matter may be heard. Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus which was previously heard by the Court and which the Court has under advisement may also be discussed at this hearing.

This the 17th day of October, 2019.



David P. Ferrell
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DFerrell@nexsenpruet.com
Norman W. Shearin
N.C. State Bar No. 3956
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4141 Parklake Ave., Ste 200
Raleigh, NC 27612
Telephone: (919) 573-7421
Facsimile: (919) 890-4540
Attorneys for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **NOTICE OF HEARING** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Matthew Nis Leerberg
Fox Rothschild LLP
PO Box 27525
Raleigh, North Carolina 27611
Fax: 919-755-8800

Kenneth C. Haywood
Howard Stalling, From, Atkins, Angell &
Davis, P.A.
PO Box 12347
Raleigh, NC 27605
Fax: 919-821-7703

This the 17th day of October, 2019.



David P. Ferrell

STATE OF NORTH CAROLINA

COUNTY OF WAKE

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

FILED

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WAKE CO., C.S.C.

BY

R&P

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus will be heard during the December 16, 2019 session of Civil Superior Court with the specific time and date to be selected by the Court during calendar call at 10:00 a.m. on Monday, December 16, 2019, at the Wake County Courthouse, 316 Fayetteville Street, Raleigh, North Carolina, 27602.

This the 4th day of December, 2019.

FOX ROTHSCHILD LLP



Matthew Nis Leerberg

N.C. Bar No. 35406

mleerberg@foxrothschild.com

Troy D. Shelton

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Raleigh, NC 27601

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A.

Kenneth C. Haywood
N.C. Bar. No. 19066
KHaywood@hsfh.com
5410 Trinity Road, Suite 210
Post Office Box 12347 (27605)
Raleigh, NC 27607
Telephone: (919) 821-7700
Facsimile: (919) 821-7703

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Hearing was served by e-mail and United States mail, first-class postage pre-paid, and addressed as follows:

David P. Ferrell
Nexsen Pruet PLLC
4141 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
DFerrell@nexsenpruet.com

This the 2nd day of December, 2019.


Matthew Nis Leerberg

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WAKE CO., C.S.C.

15-CVS-5836

Defendant.

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2. The only relief granted to Defendant by the Judgment filed herein on 18 October 2016 (“Judgment”) is the dismissal of the Town’s condemnation claim as null and void on the grounds that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public’s interest was merely incidental. The Judgment rendered the complaint and declaration of taking herein a nullity.

3. The Judgment does not order the Town to perform any specific act, including but not limited to removal of the underground sewer line.

4. Defendant did not plead any claim for relief entitling her to the relief requested in the Motion. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. Defendant did not request injunctive relief from the Court prior to the installation of the sewer line to prevent construction, did not request injunctive relief to close or remove the sewer line in her answer, and did not request injunctive relief to close or remove the sewer pipe at the all other issues hearing before the Court.

5. Although the sewer pipe had been installed for approximately one year prior to the all other issues hearing and the Court received testimony and evidence regarding the installation of the sewer pipe at the all other issues hearing, the Judgment does not address the actual installation, maintenance and use of the sewer pipe under Defendant’s property and does not require removal.

6. The captioned action is not a declaratory judgment action.

7. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure.

8. The Judgment does not require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.

9. Defendant has failed to establish that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it.

10. Defendant's request for enforcement of the Judgment is not procedural in nature and does not relate to the mode or manner of conducting this action as contemplated in N.C. Gen. Stat. § 136-114, but is essentially a request for mandatory injunctive relief.

11. On or about 27 July 2015 the Town constructed an underground sewer line 18 feet under the entire width of a narrow portion of Rubin's property. The bore method was employed so as not to disturb the surface of Defendant's property, and to eliminate the necessity to access the surface of her property to install or maintain the sewer pipe. The eight (8) inch, 156 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. During construction, bore pits were dug on each side of Defendant's property, the casing was inserted then the sewer pipe was installed. No manholes were dug or are currently on the Defendant's property. A 10-foot wide Town underground sanitary sewer easement was sufficient given the use of the bore method by the Town.

12. Given the Court's dismissal of the original condemnation complaint as null and void, the installation of the underground sewer line was a physical invasion and taking of Defendant's property by the Town not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement.

13. A determination of the extent of the Town's rights in its inversely condemned easement would be determined in a separate proceeding.

14. The sewer line was installed prior to the entry of the Judgment, remains in place and in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond

Subdivision, a duly annexed, rezoned, and approved single-family residential subdivision within the Town's limits.

Based upon the foregoing FINDINGS OF FACT, the Court draws the following:

CONCLUSIONS OF LAW

1. The Judgment does not afford to Defendant any of the relief which she seeks in the Motion. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

2. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure.

3. The Judgment does not require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.

4. A declaratory judgment action may not be commenced by a motion in the cause. Supplemental relief under N.C. Gen. Stat. § 1-259 is unavailable to Defendant in this action. *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C.App. 257, 362 S.E.2d 870 (1987)

5. The Town cannot be held in contempt for failing to remove the underground sewer line. The Judgment does not expressly or specifically order removal. In addition, the Motion fails to satisfy the statutory requirement that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).

6. N.C. Gen. Stat. § 136-114 is not a valid basis for the Court to order removal of the sewer pipe under the facts and circumstances of this case. Defendant's request for enforcement of the Judgment is not procedural in nature and does not relate to the mode or manner of conducting this action, but is essentially a request for mandatory injunctive relief.

7. A writ of mandamus is inappropriate because Defendant has failed to show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly

defined, positive legal duty to remove it. Mandamus is appropriate to compel the performance of a ministerial act but not to establish a legal right. *Meares v. Town of Beaufort*, 193 N.C. App. 49, 667 S.E.2d 224 (2008); *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938).

8. The Court has the inherent authority to enforce its own orders. However, the Court is not authorized to and refuses to expand this Judgment beyond its terms, read in additional terms, and/or order mandatory injunctive relief that Defendant did not request or plead. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

9. Regardless of the Court's authority, the Court does not read the Judgment the way Defendant suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. The Court will not now require the Town to remove the sewer line.

10. " '[I]nverse condemnation []' [is] a term often used to designate 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *Wilkie v City of Boiling Springs*, 370 N.C. 540, 552, 809 S.E.2d 853, 861-862 (2018)(quoting *City of Charlotte v. Spratt*, 263 N.C. 656, 662-663, 140 S.E. 2d 341,346 (1965)).

11. Given the Court's dismissal of the condemnation complaint as null and void, the installation of the underground sewer line by the Town on 27 July 2015 was a taking of Defendant's property by the Town that was not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement. N.C. Gen. Stat. Section 136-111;

N.C. Gen. Stat. Section 40A-51; *Wilkie v City of Boiling Springs*, 370 N.C. 540, 809 S.E.2d 853 (2018); *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

12. As our North Carolina Supreme Court held, public use or purpose is not an element of an inverse condemnation claim. The inverse condemnation remedy is not dependent upon taking or using for a public use. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018).

13. Defendant's allegations that the condemnation complaint resulted in a constitutional violation and Defendant's comments about fairness do not support or provide a basis for the granting of the Motion. Further, the Supreme Court in *Wilkie*, in spite of addressing constitutional issues with condemnations, held that a landowner has a claim for just compensation regardless of whether a taking is for a public or private purpose. The Supreme Court did not state that the landowner had a claim for permanent injunctive relief. Where there is an adequate remedy at law, injunctive relief, which is what Defendant seeks, will not be granted.


14. Defendant has an adequate remedy at law—i.e. compensation for inverse condemnation. N.C. Gen. Stat. Section 136-111; N.C. Gen. Stat. Section 40A-51; *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). The Town's pending declaratory judgment action with case number 19 CVS 6295 provides Defendant an avenue to pursue her remedy at law for the inverse condemnation of the sewer easement – compensation.

15. As such, the Court declines to enforce the Judgment as Defendant requests and declines to issue a writ of mandamus.

IT IS THEREFORE ORDERED that the Defendant's Motion to Enforce Judgment and

Alternative Petition for Writ of Mandamus be and is hereby DENIED.

This the 17th day of January, 2020.



G. Bryan Collins
Superior Court Judge Presiding

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2020 JAN 21 AM 11:33 SUPERIOR COURT DIVISION
WAKE COUNTY WAKE CO., C.S.C. 15-CVS-5836

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR
RELIEF FROM JUDGMENT**

THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon the motion of the Plaintiff Town of Apex ("Plaintiff" or "Town") for relief from judgment pursuant to Rule 60 of the Rules of Civil Procedure, specifically to grant the Town relief from the prospective application of the Judgment as it relates to a challenge or objection to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property, including Defendant's request for removal of the underground sewer pipe ("Motion"). Plaintiff was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from a review of the motion, the pleadings, and legal memoranda and arguments of counsel for the parties, that, in the Court's discretion, the Motion should be GRANTED. The Court makes the following:

FINDINGS OF FACT

1. Defendant asks the Court to rely on the 18 October 2016 Judgment and require the Town to permanently remove the sewer line the Town installed under Defendant's property.

2. The only relief granted to Defendant by the Judgment filed herein on 18 October 2016 ("Judgment") is the dismissal of the Town's condemnation claim as null and void on the grounds that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public's interest was merely incidental. The Judgment rendered the complaint and declaration of taking herein a nullity.

3. The Judgment does not order the Town to perform any specific act, including but not limited to removal of the underground sewer line.

4. Defendant did not seek injunctive relief in the original condemnation action, did not seek an injunction before the sewer pipe was installed, did not request injunctive relief at the all other issues hearing, and the Judgment did not include an award of injunctive relief.

5. Prior to the entry of the Judgment the Town had constructed, using the bore method, an underground sewer line across Defendant's property. The eight (8) inch, 156 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing ("Project"). The casing was inserted and physically invaded Rubin's property on 27 July 2015. By the installation of the underground sewer line on or about 27 July 2015, the Town physically invaded Defendant's property and thereby inversely condemned an underground sewer easement.

6. Although the sewer pipe had been installed for approximately one year prior to the all other issues hearing and the Court received testimony and evidence regarding the installation of the sewer pipe at the all other issues hearing, the Judgment does not address the actual

installation, maintenance and use of the sewer pipe under Defendant's property and does not require removal.

7. The sewer line was installed prior to the entry of the Judgment, remains in place and in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond Subdivision, a duly annexed, rezoned, and approved single-family residential subdivision within the Town's limits.

8. The Town is not seeking relief from the Judgment as it relates to the application of the Judgment to the original condemnation complaint. The Town requests the Court exercise its discretion under Rule 60 and grant the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property.

9. When the trial court entered the Judgment, the Town had already constructed the sewer pipe and taken the sewer easement by inverse condemnation. When the easement was taken on 27 July 2015, all rights therein were acquired by the Town.

10. The issue of whether the Town could maintain a sewer line across Defendant's property no longer existed at the time that Judgment was entered. Defendant did not seek an injunction prior to construction and the Town had already constructed the sewer easement.

11. Further, the Judgment found the original condemnation complaint null and void and dismissed it; it is as if it was never filed. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking.

12. Defendant alleges that the Town took the sewer easement on her property for a private purpose and thus lacked authority to take her property. However, public purpose is not an

element of inverse condemnation. Moreover, Town acquired ownership of the sewer easement on 27 July 2015 prior to entry of the Judgment.

Based upon the foregoing FINDINGS OF FACT, the Court draws the following:

CONCLUSIONS OF LAW

1. “Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order ‘[o]n motion and upon such terms as are just[.]’” *N.C. Dept. of Trans. v. Laxmi Hotels of Spring Lake, Inc.*, 817 S.E.2d 62, 69 (2018) (citing N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017)).

2. Rule 60(b) provides that “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) [t]he judgment is void...(6) [a]ny other reason justifying relief from the operation of the judgment.” “The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.” *Id.* at 71 (citing *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971)).

3. It is just and equitable to allow the Town relief from the prospective application of the Judgment as it relates to the underground sewer pipe and corresponding easement.

4. Defendant’s failure to seek and obtain injunctive relief prior to the construction of the sewer pipe and the Town’s acquisition of the sewer easement by inverse condemnation renders the Judgment moot as to the installation of the sewer pipe and corresponding easement. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

5. The Judgment’s dismissal of the condemnation proceeding had no effect on the rights inversely taken. *Nicholson v. Thom*, 236 N.C.App. 308, 317, 763 S.E.2d 772, 779 (2014) (Issue is moot when question in controversy is no longer at issue).

6. At the time of entry of the Judgment, the question of whether the Town had the authority to condemn the sewer easement described in the original condemnation action was moot – specifically as to the installation of the sewer pipe and inversely condemned easement.

7. Since the Judgment against the Town is moot, the Court grants the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding easement on Defendant's property.

8. The Judgment is void as it relates to the installed sewer pipe and corresponding easement because the trial court did not have jurisdiction over these issues at the time of the entry of the Judgment. The issue of whether the Town could maintain a sewer line across Defendant's property no longer existed at the time that Judgment was entered. Defendant did not seek an injunction prior to construction and the Town had already constructed the sewer easement. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

9. Further, the Judgment found the original condemnation complaint null and void and dismissed it; it is as if it was never filed. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking.

10. Prior to the entry of the Judgment on 18 October 2016, the Town had already inversely taken and owned the sewer easement across Defendant's property on 27 July 2015. Since the sewer easement had been inversely taken prior to the entry of the Judgment, the court lacked subject matter jurisdiction to enter the Judgment to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement.

11. The absence of jurisdiction means the Judgment is void. A void judgment is a legal nullity. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E.2d 20 (1925); *Woodleif, Shuford NC*

Civil Practice and Procedure § 60:7 (2017). “A lack of jurisdiction or power in the court entering the judgment always avoids the judgment.” *Clark v. Carolina Homes, supra.* at 23.

12. Since the Judgment against the Town is void as to Defendant’s challenge to the installed sewer pipe and corresponding easement, the Town should be granted the prospective relief from the Judgment pursuant to Rule 60(b)(4).

13. In addition, the Town is given prospective relief from the judgment pursuant to Rule 60(b)(6), as Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. *McNeil v. Hicks*, 119 N.C. App. 579, 580-81, 459 S.E.2d. 47, 48 (1995).

14. In the Judgment, the Court stated that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public’s interest was merely incidental. However, prior to entry of judgment, the Town had already constructed the sewer pipe and acquired the sewer easement by inverse condemnation.

15. In 2018, the North Carolina Supreme Court reversed the Court of Appeals and ruled that public use or purpose is not an element of an inverse condemnation claim. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. *McNeil v. Hicks*, 119 N.C.App. 579, 580-81, 459 S.E.2d 47, 48 (1995); *Hamby v. Profile Products, LLC*, 197 N.C.App 99, 676 S.E.2d 594 (2009)).

16. As a result of the *Wilkie* decision from the Supreme Court, the legal basis for the Judgment no longer exists to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement. Defendant alleges that the Town took the sewer easement on her property for a private purpose and thus lacked authority to take her property. However,


public purpose is not an element of inverse condemnation. Moreover, Town acquired ownership of the sewer easement on 27 July 2015 prior to entry of the Judgment. All easement rights in the property transferred to the Town and were owned by it prior to entry of Judgment. Consequently, Town should be granted relief from Judgment.

17. Further, *Thornton* provides that no injunctive relief is available to Defendant. Defendant's only remedy is provided for at law. *Id.* at 236, 240. Before the Supreme Court reversed the Court of Appeals in *Wilkie*, it appeared Defendant may not have an avenue to receive compensation for the inverse taking. But the Supreme Court reversal and ruling clarified that Defendant has a remedy at law – compensation for the inverse condemnation of the sewer easement, as public use or benefit is not a requirement to maintain an inverse condemnation claim. *Wilkie*. Defendant has an adequate remedy at law—i.e. compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

IT IS THEREFORE ORDERED that, in the Court's discretion, the Plaintiff's Motion for Relief from Judgment is hereby GRANTED, and

IT IS FURTHER ORDERED that the Judgment shall not have any prospective application as it relates to a challenge or objection to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property, including Defendant's request for removal of the underground sewer pipe.

This the 17th day of January, 2020.




G. Bryan Collins
Superior Court Judge Presiding

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE SUPERIOR COURT DIVISION

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

FILED
2020 JAN 29 P 2:17
WAKE CO., C.S.C.
BY 

Case Number 15-CVS-5836

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

Case Number 19-CVS-6295

NOTICE OF APPEAL
IN CASE NO. 15-CVS-5836

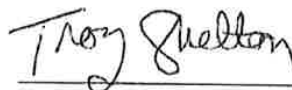
TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, Plaintiff Beverly L. Rubin ("Appellant") hereby gives Notice of Appeal to the North Carolina Court of Appeals that she will seek appellate review of the following orders of the Superior Court of Wake County:

- (1) "Order Denying Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus," which was signed on 17 January 2020 by the Honorable G. Bryan Collins and filed on 21 January 2020 in Wake County File No. 15-CVS-5836;
- (2) "Order Granting Plaintiff's Motion for Relief from Judgment," which was signed on 17 January 2020 by the Honorable G. Bryan Collins and filed on 21 January 2020 in Wake County File No. 15-CVS-5836;
- (3) "Order Denying Defendant's Motion to Dismiss," which was signed on 17 January 2020 by the Honorable G. Bryan Collins and filed on 21 January 2020 in Wake County File No. 19-CVS-6295; and
- (4) "Preliminary Injunction," which was signed on 17 January 2020 by the Honorable G. Bryan Collins and filed on 21 January 2020 in Wake County File No. 19-CVS-6295.

Respectfully submitted this the 29th day of January, 2020.

FOX ROTHSCHILD LLP



Matthew Nis Leerberg
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mleerberg@foxrothschild.com
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HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A

Kenneth C. Haywood
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khaywood@hsfh.com
5410 Trinity Road, Suite 210
Raleigh, NC 27607
Telephone: 919.821.7700
Facsimile: 919.821.7703

Counsel for Defendant Beverly L. Rubin

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Notice of Appeal in Case No. 15-CVS-5836" was served via U.S. Mail, postage prepaid, on the 29th day of January, 2020, upon the following counsel of record:

David P. Ferrell
Norman W. Shearin
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

Counsel for Plaintiff Town of Apex

A handwritten signature in cursive script that reads "Troy Shelton". The signature is written in dark ink and is positioned above a horizontal line.

Troy D. Shelton

STATE OF NORTH CAROLINA - IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE SUPERIOR COURT DIVISION

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

2020 FEB 10 P 3:21

WAKE CO. C.S.C.

BY

Case Number 15-CVS-5836

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

Case Number 19-CVS-6295

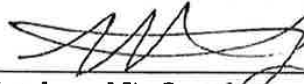
TRANSCRIPT DOCUMENTATION
IN CASE NO. 15-CVS-5836

Pursuant to Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure, Defendant Beverly L. Rubin hereby files a copy of her agreement with Meredith Taylor, Advantage Court Reporting, P.O. Box 61429, Raleigh, North Carolina 27661 to contract for the transcription of the 9 January 2020 proceedings in this action before the Honorable G. Bryan Collins. Attached hereto as Exhibit A is the letter agreement with Ms. Taylor.

Appellant further gives notice that the Town of Apex previously contracted for the production of the transcript of the 23 May 2019 hearing before the Honorable G. Bryan Collins. Ms. Rubin obtained a copy for the appeal from Angela M. Eisenhardt, Noteworthy Reporting Services, LLC, Post Office Box 10328, Raleigh, North Carolina 27605.

Respectfully submitted this the 10th day of February, 2020.

FOX ROTHSCHILD LLP



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Facsimile: 919.821.7703

Counsel for Defendant Beverly L. Rubin

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Transcript Documentation in Case No. 15-CVS-5836" was served via U.S. Mail, postage prepaid, on the 5th day of February, 2020, upon the following:

David P. Ferrell
Norman W. Shearin
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

Counsel for Plaintiff Town of Apex

Meredith Taylor
Advantage Court Reporting
P.O. Box 61429
Raleigh, NC 27661

Court Reporter/Transcriptionist

Angela M. Eisenhardt
Noteworthy Reporting Services, LLC
P.O. Box 10328
Raleigh, NC 27605

NC AOC Approved Transcriptionist



Matthew Nis Leerberg



Exhibit A

434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

MATT LEERBERG
Direct No: 919.755.8759
Email: Mf.leerberg@foxrothschild.com

January 28, 2020

VIA EMAIL: meredith@acr-nc.com

Meredith Taylor
Advantage Court Reporting
P.O. Box 61429
Raleigh, NC 27661

**Re: Town of Apex v. Beverly Rubin; Wake County File No. 15-CVS-5836 and
Town of Apex v. Beverly Rubin; Wake County File No. 19-CVS-6295**

Dear Meredith:

Per your email communications with Tammy Brogan, this letter confirms our contract on behalf of Beverly Rubin for the transcript for the appeal in the above-referenced case. We have agreed that you will prepare a complete transcript of the proceedings that took place in this case as follows:

9 January 2020 – Proceedings before the Honorable G. Bryan
Collins

We have further agreed that we will pay your usual and customary fee for the expedited transcript at the rate of \$5.00 per page and that we may serve a copy of the transcript with our proposed record on appeal.

Rule 7(b) of the North Carolina Rules of Appellate Procedure makes this transcript due in electronic "PDF" format sixty days after service of this contract. However, you have agreed to provide the transcript on an expedited two-week turnaround time and will provide the transcript to us by Monday, February 10, 2020.

Please e-mail the completed transcript to mleerberg@foxrothschild.com.

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota Nevada
New Jersey New York North Carolina Pennsylvania South Carolina Texas Virginia Washington



Fox Rothschild LLP
ATTORNEYS AT LAW

January 28, 2020

Page 2

Once the appeal is docketed in the Court of Appeals, we will provide you with a docketing number so that you may electronically file the transcript with the North Carolina Court of Appeals.

If I can answer any questions, please feel free to call me at 919.755.8759. Thank you for your help with this appeal. We appreciate your cooperation.

Sincerely,

A handwritten signature in dark ink, appearing to read 'ML', with a stylized flourish at the end.

Matt Leerberg

ML:tb

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15-CVS-5836
19-CVS-6295

TOWN OF APEX,

PLAINTIFF,

V.

BEVERLY RUBIN,

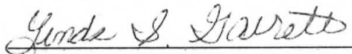
DEFENDANT.

CERTIFICATE OF DELIVERY

I, Linda S. Garrett, on behalf of Advantage Court Reporting, do hereby certify that on this date of February 10, 2020, the hearing transcript heard on January 9, 2020, in the above-referenced matter was delivered to the following parties:

Delivered/Emailed to:

Matt Leerberg
Fox Rothschild, LLP
mleerberg@foxrothschild.com



Linda S. Garrett
Advantage Court Reporting

STATEMENT OF TRANSCRIPT OPTION

Per Rules 7(b) and 9(c) of the North Carolina Rules of Appellate Procedure, the transcript of the 1 August 2016 hearing will be filed electronically by Susan Gugig, Official Court Reporter. The transcript consists of one volume and is numbered consecutively pages 1 through 110. The parties may cite to the hearing transcript as (Aug. 2016 T p ____). Page and line references may be cited as p:ll-p:ll.

The transcript of the 5 January 2017 hearing will be filed electronically by Judy Runes, Official Court Reporter. The transcript consists of one volume and is numbered consecutively pages 1 through 89. The parties may cite to the hearing transcript as (Jan. 2017 T p ____). Page and line references may be cited as p:ll-p:ll.

The transcript of the 23 May 2019 hearing will be filed electronically by Angela Eisenhardt, Transcriptionist. The transcript consists of one volume and is numbered consecutively pages 1 through 84. The parties may cite to the hearing transcript as (May 2019 T p ____). Page and line references may be cited as p:ll-p:ll.

The transcript of the 9 January 2020 hearing will be filed electronically by Meredith Taylor, Official Court Reporter and Transcriptionist. The transcript consists of one volume and is numbered consecutively pages 1 through 126. The parties may cite to the hearing transcript as (Jan. 2020 T p ____). Page and line references may be cited as p:ll-p:ll.

STATEMENT OF RULE 9(d) DOCUMENTARY EXHIBITS

Pursuant to Rule 9(d) of the North Carolina Rules of Appellate Procedure, relevant briefs submitted by the parties to the trial tribunal are submitted separately in a set of “Rule 9(d) Documentary Exhibits.” The Rule 9(d) Documentary Exhibits consist of one volume, numbered Doc. Ex. 1 to Doc. Ex. 61 and will be filed electronically upon receipt of the docket number for the appeal.

STATEMENT OF RULE 11(c) SUPPLEMENT

In accordance with Rules 9(a) and 11(c) of the North Carolina Rules of Appellate Procedure, a Rule 11(c) Supplement to the Printed Record on Appeal, consisting of two volumes, numbered R S (I) 188 to R S (II) 530, will be filed electronically upon receipt of the docket number for the appeal.

The Rule 11(c) Supplement consists of documents that the parties had differences of opinion on regarding relevance, but which the parties agreed did not satisfy the Appellate Rule 11 criteria for judicial settlement.

STIPULATIONS OF SERVICE AND SETTLEMENT OF RECORD

Counsel for the Plaintiff-Appellee and the Defendant-Appellant stipulate as follows:

1. The Notice of Appeal was timely filed and served on 29 January 2020.
2. Defendant-Appellant timely ordered the 9 January 2020 Transcript and filed her Transcript Documentation on 10 February 2020.
3. The proposed record on appeal was timely served on 16 March 2020.
4. On 15 April 2020, Appellee timely served objections and amendments to the proposed record by facsimile, electronic, and U.S. Mail. Because neither party filed a request for judicial settlement by the 27 April 2020 deadline, the record on appeal was deemed settled by operation of law on 27 April 2020.
5. Complete copies of the hearing transcripts were served with the proposed record on appeal. The parties stipulate that Defendant-Appellant need not re-serve copies of these transcripts with the final record on appeal.
6. All captions, signatures, headings of papers, certificates of service and the documents filed with the trial court that are not necessary for an understanding of the appeal may be omitted from the Record, except as required by Rule 9 of the Rules of Appellate Procedure.
7. The parties stipulate that the following documents constitute the agreed-upon record on appeal to be filed with the Clerk of the Court of Appeals.
 - a. This printed record on appeal, consisting of pages 1 to 187;
 - b. The Rule 9(d) Documentary Exhibits, consisting of one volumes, numbered Doc. Ex. 1 through Doc. Ex. 61 (an

electronic copy will be uploaded upon receipt of the docket number for the appeal);

- c. The Rule 11(c) Supplement to the Printed Record on Appeal, consisting of two volumes, numbered R S (I) 188 to R S (II) 530 (an electronic copy will be uploaded upon receipt of the docket number for the appeal); and
- d. The hearing transcripts described in the Statement of Transcript option, (R p 179) (electronic copies of which will be uploaded after this appeal is docketed).

This 14th day of May 2020.

For the Defendant-Appellant:

FOX ROTHSCHILD LLP

Matthew Nis Leerberg
Troy D. Shelton


HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A.



Kenneth C. Haywood
B. Joan Davis

For the Plaintiff-Appellee:

NEXSEN PRUET, PLLC



David P. Ferrell

DEFENDANT-APPELLANT'S
PROPOSED ISSUES ON APPEAL

Pursuant to Appellate Rule 10, Defendant-Appellant intends to present the following proposed issues on appeal.

1. Did the trial court err by granting Plaintiff's Rule 60(b) motion in case number 15-CVS-5836?

2. Did the trial court err by denying Defendant's motion to enforce the judgment in case number 15-CVS-5836?

STATEMENT OF DEPOSIT OF APPEAL BOND

I, Matthew Nis Leerberg, state that contemporaneously with the filing of this Record on Appeal, I am depositing with the Clerk of the Supreme Court of North Carolina a check for \$250.00 on behalf of Defendant-Appellant. This sum is deposited as an appeal bond, satisfying the requirements of N.C. Gen. Stat. § 1-285.

This the 14th day of May 2020.

Matthew Nis Leerberg

IDENTIFICATION OF COUNSEL FOR THE APPEAL

For the Defendant-Appellant: Matthew Nis Leerberg
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Facsimile: (919) 890-4540

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Proposed Record on Appeal* was served on the opposing party by placing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this **16th** day of March 2020, addressed as follows:

David P. Ferrell
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612



Matthew Nis Leerberg

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing final *Record on Appeal* was served on the opposing party by placing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this **14th** day of May 2020, addressed as follows:

David P. Ferrell
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

Matthew Nis Leerberg