

NORTH CAROLINA COURT OF APPEALS

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

PRINTED RECORD ON APPEAL

(Cited as R pp–pp)

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STATEMENT OF ORGANIZATION OF TRIAL COURT

Defendant Beverly L. Rubin appeals from the (1) Order Denying Defendant's Motion to Dismiss; and (2) Preliminary Injunction, both filed on 21 January 2020, 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 112).

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

STATEMENT OF JURISDICTION

The 19-CVS-6295 action was commenced by the filing of a Complaint on 13 May 2019 and issuance of a summons.

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

19 CV 006295

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2019 MAY 13 P 3:39

19-CVS-

TOWN OF APEX,

WAKE CO., N.C.

Plaintiff,

COMPLAINT

v.

[COMP]

BEVERLY L. RUBIN,

Defendant.

NOW COMES Plaintiff, Town of Apex ("Town"), by and through their undersigned counsel, complaining of Beverly L. Rubin ("Rubin"), alleges, avers and says:

1. Town is a municipal corporation organized and existing under the laws of the State of North Carolina. Town possesses the powers, duties and authority, including the power of eminent domain, delegated to it by the General Assembly of North Carolina.

2. Rubin is a citizen and resident of Wake County.

3. Town and Rubin are parties to a condemnation action commenced by the filing of a complaint on 30 April 2015 in Wake County Superior Court in Town of Apex v Rubin, 15 CVS 5836, ("Complaint"). A final judgment was entered on 18 October 2016 ("Judgment"). A copy of the Judgment is attached hereto as **Exhibit A** and incorporated herein by reference.

4. Rubin did not assert a counterclaim for inverse condemnation in her responsive pleading in 15-CVS-5836.

5. The Judgment dismissed the Town's claim for acquisition of a sewer easement across Rubin's property as null and void.

6. The Judgment rendered the Complaint and Declaration of Taking a nullity.

7. The Town had constructed an underground sewer line ("Project") across the entire width of a narrow portion of Rubin's property, more particularly described in paragraph 19 hereof ("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. No manholes are on the Property.

8. Rubin had actual knowledge of the Project on 30 April 2015.

9. Bore pits were dug on each side of Rubin's property but not on her property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015.

10. The taking occurred on or about 27 July 2015.

11. On 22 February 2016, the Town accepted as complete the sewer line and Project, and it became a part of the Town's public sanitary sewer system.

12. Although the taking beneath the surface of the Property occurred on or about 27 July 2015, the completion of the Project occurred, at the latest, on 22 February 2016.

13. The Town has not abandoned the Project.

14. Rubin did not seek or obtain injunctive relief to halt the Project.

15. The Project was completed more than two (2) years ago.

16. The Town-owned sewer line remains in place, is in use, and serves approximately 50 residential homes and/or lots located in subdivision in the Town. The Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision.

17. By the installation of the underground sewer line, the Town physically invaded the Property and thereby inversely condemned a sewer easement which is more particularly described as follows:

“New 10’ Town of Apex Sanitary Sewer Easement,” said area containing 1,559 square feet (0.036 acres) more or less, all as shown on that certain survey plat entitled “EASEMENT ACQUISITION EXHIBIT” by Taylor Land Consultants, PLLC, said survey plat being attached hereto as **Exhibit B**.

18. The 10 foot wide Town underground sanitary sewer easement ultimately was a sufficient easement given the change in the way the Town chose to install the pipe (bore method).

19. The Property which is affected by the inverse taking of a sewer easement is 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.

20. Inverse condemnation is Rubin's sole remedy for the physical invasion and inverse taking by the Town.

21. Rubin's inverse condemnation claim is now time barred.

22. Public use or purpose is not an element of an inverse condemnation claim.

Inverse condemnation statutory 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).

23. By motion filed on 10 April 2019 in 15-CVS-5636, Rubin seeks, *inter alia*, removal of the sewer line ("Motion"). The Motion is incorporated herein by reference.

24. Town is entitled to preliminary and permanent injunctive relief enjoining Rubin, her agents, attorneys, and those persons acting in concert with her, from removing or disturbing the sewer line and easement on the Property.

25. A genuine controversy exists between the Town and Rubin as to their respective rights and duties regarding the underground sewer line installed across the Property on 27 July 2015.

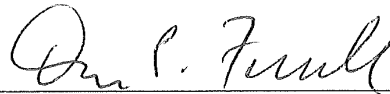
26. Town is entitled pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and Rule 57 of the Rules of Civil Procedure to (1) a declaration of rights that the installation of the sewer line on 27

July 2015 was an inverse taking, (2) that inverse condemnation is Rubin's sole remedy for the installation of the sewer pipe on her property, (3) that the remedy of inverse condemnation is time barred, (4) that the Judgment is *res judicata* as to any claims for injunctive relief or an extraordinary writ, or, alternatively, (5) that the Judgment does not preclude another direct condemnation by the Town of a sewer easement across the Property as described in paragraph 17 herein.

WHEREFORE, Town requests judgment against Rubin as follows:

1. An order declaring the rights of the parties as requested herein,
2. An order enjoining Rubin, her attorneys, and agents, from taking any action to remove or disturb the sewer line and easement on the Property, and
3. Such other and further relief as this Court may deem just and proper.

This the 13th day of May, 2019.



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Attorneys for Plaintiff Town of Apex

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. I §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 judication upon Defendant's submitting a Motion in Support of such request.

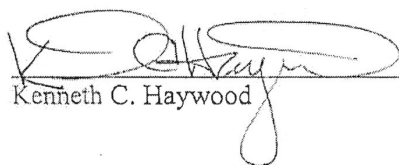
Signed This the 6th day of Oct., 2016.

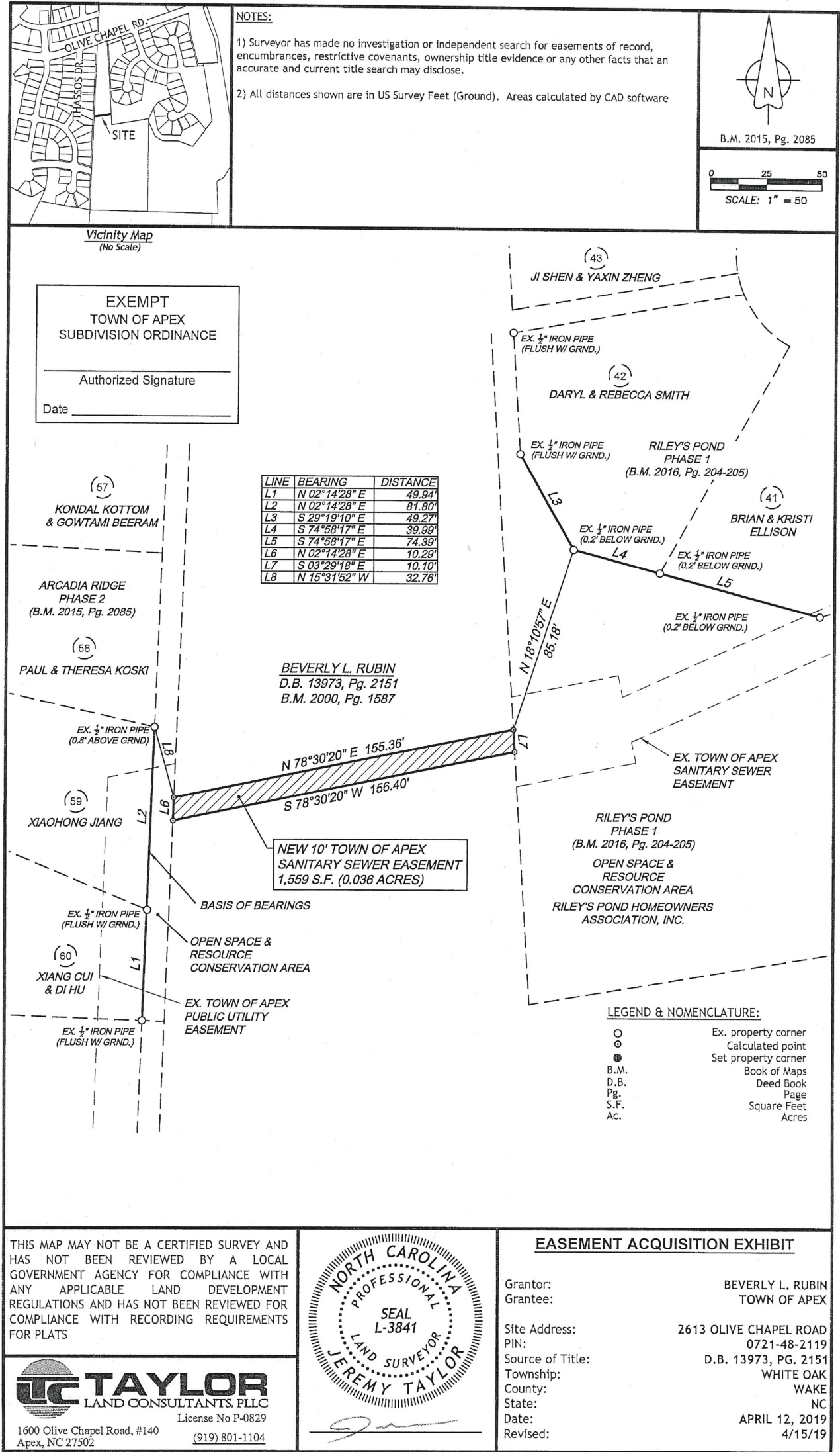
Elaine M. O'Neal
Superior Court Judge Elaine M. O'Neal

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



09 CV 006295

STATE OF NORTH CAROLINA		File No.	
WAKE County		In The General Court Of Justice <input type="checkbox"/> District <input checked="" type="checkbox"/> Superior Court Division	
Name Of Plaintiff TOWN OF APEX		CIVIL SUMMONS <input type="checkbox"/> ALIAS AND PLURIES SUMMONS (ASSESS FEE) G.S. 1A-1, Rules 3 and 4	
Address			
City, State, Zip			
VERSUS			
Name Of Defendant(s) BEVERLY L. RUBIN		Date Original Summons Issued	
		Date(s) Subsequent Summons(es) Issued	
To Each Of The Defendant(s) Named Below:			
Name And Address Of Defendant 1 BEVERLY L. RUBIN 2613 Olive Chapel Road Apex, NC 27502		Name And Address Of Defendant 2	
<div style="display: flex; align-items: center;"><div style="text-align: center; margin-right: 10px;"></div><div><p>IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!</p><p>¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles! Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!</p></div></div>			
A Civil Action Has Been Commenced Against You! You are notified to appear and answer the complaint of the plaintiff as follows:			
<ol style="list-style-type: none">1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and2. File the original of the written answer with the Clerk of Superior Court of the county named above.			
If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.			
Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff) David P. Ferrell Nexsen Pruet PLLC 4141 Parklake Ave., Ste 200 Raleigh NC 27612		Date Issued 5-13-19	Time 3 <input type="checkbox"/> AM <input checked="" type="checkbox"/> PM
		Signature 	
		<input checked="" type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court	
<input type="checkbox"/> ENDORSEMENT (ASSESS FEE) 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 sixty (60) days.		Date Of Endorsement	Time <input type="checkbox"/> AM <input type="checkbox"/> PM
		Signature	
		<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court	
NOTE TO PARTIES: Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is \$25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.			
(Over)			
AOC-CV-100, Rev. 4/18 © 2018 Administrative Office of the Courts			

RETURN OF SERVICE		
I certify that this Summons and a copy of the complaint were received and served as follows:		
DEFENDANT 1		
<i>Date Served</i>	<i>Time Served</i> <div style="text-align: center;"><input type="checkbox"/> AM <input type="checkbox"/> PM</div>	<i>Name Of Defendant</i>
<div style="margin-top: 10px;"><input type="checkbox"/> By delivering to the defendant named above a copy of the summons and complaint.</div> <div style="margin-top: 5px;"><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.</div> <div style="margin-top: 5px;"><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.</div> <div style="border: 1px solid black; height: 60px; margin-top: 5px; padding: 5px;"><i>Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)</i></div> <div style="margin-top: 10px;"><input type="checkbox"/> Other manner of service (specify)</div>		
<div style="margin-top: 20px;"><input type="checkbox"/> Defendant WAS NOT served for the following reason:</div>		
DEFENDANT 2		
<i>Date Served</i>	<i>Time Served</i> <div style="text-align: center;"><input type="checkbox"/> AM <input type="checkbox"/> PM</div>	<i>Name Of Defendant</i>
<div style="margin-top: 10px;"><input type="checkbox"/> By delivering to the defendant named above a copy of the summons and complaint.</div> <div style="margin-top: 5px;"><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.</div> <div style="margin-top: 5px;"><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.</div> <div style="border: 1px solid black; height: 60px; margin-top: 5px; padding: 5px;"><i>Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)</i></div> <div style="margin-top: 10px;"><input type="checkbox"/> Other manner of service (specify)</div>		
<div style="margin-top: 20px;"><input type="checkbox"/> Defendant WAS NOT served for the following reason:</div>		
<i>Service Fee Paid</i> \$	<i>Signature Of Deputy Sheriff Making Return</i>	
<i>Date Received</i>	<i>Name Of Sheriff (type or print)</i>	
<i>Date Of Return</i>	<i>County Of Sheriff</i>	

19 CV 006295

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2019 MAY 13 P 3:39

19-CVS-

TOWN OF APEX,

WAKE CO., D.S.C.

Plaintiff,

W

**VERIFIED MOTION FOR
PRELIMINARY INJUNCTION**

v.

BEVERLY L. RUBIN,

[PREL]

Defendant.

NOW COMES Plaintiff Town of Apex ("Town") by and through their undersigned counsel, and moves the Court pursuant to N.C. Gen. Stat. § 1-485 and Rule 65 (a) of the Rules of Civil Procedure for a preliminary injunction *pendente lite*, and in support thereof, shows unto the Court as follows:

1. Town is a municipal corporation organized and existing under the laws of the State of North Carolina. Town possesses the powers, duties and authority, including the power of eminent domain, delegated to it by the General Assembly of North Carolina.
2. Rubin is a citizen and resident of Wake County.
3. Town and Rubin are parties to a condemnation action commenced by the filing of a complaint on 30 April 2015 in Wake County Superior Court in Town of Apex v Rubin, 15 CVS 5836, ("Complaint"). A final judgment was entered on 18 October 2016 ("Judgment"). A copy of the Judgment is attached to the Complaint and attached hereto as **Exhibit A** and incorporated herein by reference.
4. Rubin did not assert a counterclaim for inverse condemnation in her responsive pleading in 15-CVS-5836.

5. The Judgment dismissed the Town's claim for acquisition of a sewer easement across Rubin's property as null and void.

6. The Judgment rendered the Complaint and Declaration of Taking a nullity.

7. The Town had constructed an underground sewer line ("Project") across the entire width of a narrow portion of Rubin's property, more particularly described in paragraph 19 hereof ("Property"); also illustrated on the attached as **Exhibit B**. 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. No manholes are on the Property.

8. Rubin had actual knowledge of the Project on 30 April 2015.

9. Bore pits were dug on each side of Rubin's property but not on her property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015.

10. The taking occurred on or about 27 July 2015.

11. On 22 February 2016, the Town accepted as complete the sewer line and Project, and it became a part of the Town's public sanitary sewer system.

12. Although the taking beneath the surface of the Property occurred on or about 27 July 2015, the completion of the Project occurred, at the latest, on 22 February 2016.

13. The Town has not abandoned the Project.

14. Rubin did not seek or obtain injunctive relief to halt the Project.

15. The Project was completed more than two (2) years ago.

16. The Town-owned sewer line remains in place, is in use, and serves approximately 50 residential homes and/or lots located in a subdivision in the Town. The Town-owned sewer

line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision.

17. By commencement of the installation of the underground sewer line, the Town physically invaded the Property and inversely condemned on underground sewer easement which is more particularly described as follows:

“New 10’ Town of Apex Sanitary Sewer Easement,” said area containing 1,559 square feet (0.036 acres) more or less, all as shown on that certain survey plat entitled “EASEMENT ACQUISITION EXHIBIT GRANTOR: BEVERLY L. RUBIN” by Taylor Land Consultants, PLLC, said survey plat being attached hereto as **Exhibit C**.

18. The 10 foot wide Town underground sanitary sewer easement ultimately was a sufficient easement given the change in the way the Town chose to install the sewer pipe (bore method).

19. The Property which is affected by the inverse taking of a sewer easement is 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.

20. Inverse condemnation is Rubin's sole remedy for the physical invasion and inverse taking by the Town.

21. Rubin's inverse condemnation claim is now time barred.

22. Public use or purpose is not an element of an inverse condemnation claim. Inverse condemnation statutory 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).

23. By motion filed on 10 April 2019 in 15-CVS-5636, Rubin seeks, *inter alia*, removal of the sewer line ("Motion"). The Motion is incorporated herein by reference.

24. On 10 May 2019, the Town filed a complaint for declaratory judgment regarding the inverse taking issue, which is incorporated herein by reference.

25. Town is entitled to preliminary and permanent injunctive relief enjoining Rubin, her agents, attorneys, and those persons acting in concert with her, from removing or interfering with the sewer line from the Property.

26. The Town is likely to prevail on the merits.

27. Town has acquired and is the owner of an easement and the gravity sewer pipe and casing situated underground within the easement at a depth of eighteen feet (18 ft).

28. The sewer pipe, casing and easement in which located are owned by the Town. The easement was inversely condemned by the Town on 27 July 2015 when the casing was installed in the easement, and/or on 22 February 2016 when the Project was accepted as complete.

29. Alternatively, the Town can file a condemnation action for a gravity sewer pipe and easement across Rubin's property to serve the approximately 50 homes and/or lots in the Town.

30. The exercise of the power of eminent domain by the Town is not precluded by the Judgment; or by the doctrine of *res judicata* because the facts and circumstances surrounding the taking have changed. *City of Charlotte v. Rouso*, 82 N.C.App. 588, 346 S.E.2d. 693 (1986). These new facts alter the legal rights of the parties as to the public purpose or use for which the easement was acquired and the physical invasion by the construction of the sewer line. Moreover, the width of the easement has been substantially reduced from 40 feet to 10 feet. The easement acquired was for underground installation to serve the approximately 50 existing homes and/or lots in the Riley's Pond Subdivision within the Town. Further, the Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision.

31. To assure condemnation in the unlikely event that it becomes necessary, Town has authorized by resolution, a copy of which is attached hereto as **Exhibit D** and incorporated by reference, the acquisition of the easement described in paragraph 17 of the Complaint.

32. Failure to grant the injunction would result in irreparable harm to the Town and the citizens of the Town.

33. Rubin has sought by motion described in paragraph 23 of the Complaint filed herein to remove the sewer pipe and casing owned by Town and lying within the easement.

34. Removal of the sewer pipe and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm.

35. If the sewer pipe is disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system.

36. The existing sewer pipe is the only sewer pipe or facility touching or connecting the subdivision to Town sewer service.

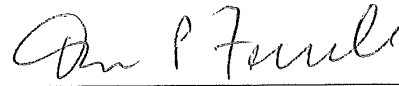
37. There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots during the pendency of this action.

38. Given that the gravity sewer pipe and casting have been beneath the narrow portion of Rubin's property since 29 July 2015, and the Town has not and does not need to access any portion of the surface of the Property to maintain the sewer pipe, there is no irreparable harm to Rubin to enjoin Rubin's interference with this public sewer pipe during the pending of this action.

39. Maintaining the status quo will ensure residents of the Town continue to receive sewer service to their homes.

WHEREFORE, Town requests the Court to enjoin Rubin, her attorneys and agents, during the pendency of the captioned action from taking any action to remove, disturb, or stop the use of the existing underground sewer line and casing which crosses the Property.

Respectfully submitted, this the 13th day of May, 2019.



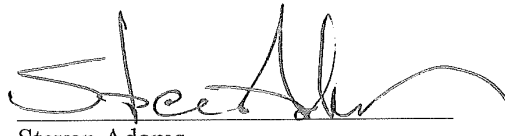
David P. Ferrell
N.C. State Bar No. 23097
DFerrell@nexsenpruet.com
Norman W. Shearin
N.C. State Bar No. 3956
NShearin@nexsenpruet.com
Nexsen Pruet PLLC
4141 Parklake Ave., Ste 200
Raleigh, NC 27612
Telephone: (919) 573-7421
Facsimile: (919) 890-4540
Attorneys for Plaintiff Town of Apex

NORTH CAROLINA

WAKE COUNTY

VERIFICATION

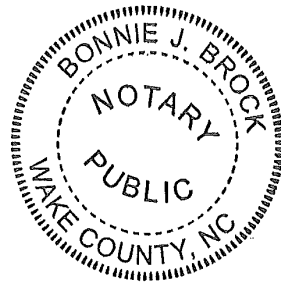
I, Steven Adams, being first duly sworn, depose and say that I am the Real Estate and Utilities Systems Specialist of the Plaintiff, Town of Apex in the above entitled action; that I have read the foregoing Motion and know the contents thereof; and that the same is true to my own knowledge, except as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


Steven Adams

Sworn and subscribed before me
This the 10th day of May, 2019.


Notary Public

My Commission Expires: 7/7/2020



CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **VERIFIED MOTION FOR PRELIMINARY INJUNCTION** upon the parties by depositing the same in the United States mail, first class postage prepaid, and by UPS Next Day Air addressed as follows:

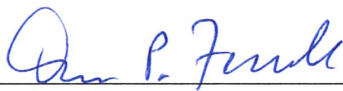
Beverly L. Rubin
2613 Olive Chapel Road
Apex, NC 27502
Defendant

As well as by facsimile and electronic mail to:

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

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood, LLP
P.O. Box 1429
Raleigh, NC 27602
Fax: 919-832-3918

This the 13th day of May, 2019.




David P. Ferrell

**Exhibit A: Judgment (15-
CVS-5836).**

Duplicate copy omitted.

**Original set forth in its
entirety at R pp 8 - 14.**

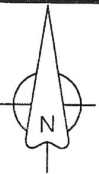




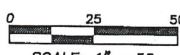
NOTES:

1) Surveyor has made no investigation or independent search for easements of record, encumbrances, restrictive covenants, ownership title evidence or any other facts that an accurate and current title search may disclose.

2) All distances shown are in US Survey Feet (Ground). Areas calculated by CAD software



B.M. 2015, Pg. 2085



SCALE: 1" = 50

Vicinity Map
(No Scale)

EXEMPT
TOWN OF APEX
SUBDIVISION ORDINANCE

Authorized Signature _____

Date _____

LINE	BEARING	DISTANCE
L1	N 02°14'28" E	49.94'
L2	N 02°14'28" E	81.80'
L3	S 29°19'10" E	49.27'
L4	S 74°58'17" E	39.99'
L5	S 74°58'17" E	74.39'
L6	N 02°14'28" E	10.29'
L7	S 03°29'18" E	10.10'
L8	N 15°31'52" W	32.78'


BEVERLY L. RUBIN
D.B. 13973, Pg. 2151
B.M. 2000, Pg. 1587

NEW 10' TOWN OF APEX
SANITARY SEWER EASEMENT
1,559 S.F. (0.036 ACRES)

LEGEND & NOMENCLATURE:


○	Ex. property corner
⊙	Calculated point
●	Set property corner
B.M.	Book of Maps
D.B.	Deed Book
Pg.	Page
S.F.	Square Feet
Ac.	Acres

THIS MAP MAY NOT BE A CERTIFIED SURVEY AND HAS NOT BEEN REVIEWED BY A LOCAL GOVERNMENT AGENCY FOR COMPLIANCE WITH ANY APPLICABLE LAND DEVELOPMENT REGULATIONS AND HAS NOT BEEN REVIEWED FOR COMPLIANCE WITH RECORDING REQUIREMENTS FOR PLATS



1600 Olive Chapel Road, #140
Apex, NC 27502

License No P-0829
(919) 801-1104



SEAL
L-3841
JEREMY TAYLOR

EASEMENT ACQUISITION EXHIBIT

Grantor:	BEVERLY L. RUBIN
Grantee:	TOWN OF APEX
Site Address:	2613 OLIVE CHAPEL ROAD
PIN:	0721-48-2119
Source of Title:	D.B. 13973, PG. 2151
Township:	WHITE OAK
County:	WAKE
State:	NC
Date:	APRIL 12, 2019
Revised:	4/15/19

EXHIBIT

C

tabbles



"The Peak of Good Living"

Office of the Town Clerk
Donna B. Hosch, MMC, NCCMC

TOWN OF APEX NORTH CAROLINA

COPY

CLERK'S CERTIFICATION

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, Donna B. Hosch, MMC, NCCMC, Town Clerk, Town of Apex, North Carolina, do hereby certify that the attached is a true copy of the of RESOLUTION 19-0416-14, RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS TO ACQUIRE AN UNDERGROUND SEWER EASEMENT, adopted at the Town of Apex Regular Council Meeting held on April 16, 2019 at 7:00 p.m., in the Council Chamber, on the second floor of Town Hall, 73 Hunter Street.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official Seal of the Town of Apex, North Carolina, this the 17th day of April 17, 2019.

Donna B. Hosch, MMC, NCCMC
Town Clerk



EXHIBIT

D

tabbles®

RESOLUTION: 19- 04116-14

**RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS
TO ACQUIRE AN UNDERGROUND SEWER EASEMENT**

WHEREAS, the Town Council of the Town of Apex approved the rezoning and annexation for Riley's Pond (formerly known as Arcadia Ridge East) on December 17, 2013; and

WHEREAS, the Town Council of the Town of Apex approved the master subdivision plan for Riley's Pond on January 20, 2015; and

WHEREAS, on March 3, 2015, the Town Council of the Town of Apex approved Resolution 2015-0303-11 ("2015 Resolution") to acquire a 40 foot wide sewer easement across the property owned by Beverly Rubin, Wake County PIN 0721-48-2119 ("Rubin Property"), by use of eminent domain to provide sewer service to the then-undeveloped but proposed residential subdivision; and

WHEREAS, on April 30, 2015, attorneys for the Town of Apex filed eminent domain proceedings in Wake County Superior Court consistent with the 2015 Resolution and using its authority under Chapter 136, Article 9 of the North Carolina General Statutes; and

WHEREAS, on July 20, 2015 construction of the sewer pipe under the Rubin Property began; and

WHEREAS, the construction of the sewer pipe was performed using bore and jack method resulting in the sewer pipe being wholly encased in a welded steel pipe at a depth of approximately 18 feet, such that the surface of the Rubin Property was not disturbed during construction and installation of the sewer pipe and steel casing/pipe; and

WHEREAS, on February 22, 2016 construction of the sewer pipe was completed while the residential subdivision property remained undeveloped; and

WHEREAS, on October 18, 2016, Superior Court Judge Elaine M. O'Neal entered a judgment against the Town dismissing that particular eminent domain proceeding, where she found that public use and benefit of a sewer project were outweighed by the private interests of the original, prior developer who owned the property at the time the 2015 resolution was adopted and April 30, 2015 eminent domain action was filed; and

WHEREAS, the Town disagreed and appealed this ruling, and the appellate courts disposed of the case on procedural grounds not based on a review of Judge O'Neal's ruling on the merits; and

WHEREAS, the Town has exhausted its appeals in this matter; and

WHEREAS, since the filing of the April 30, 2015 condemnation action described above, a new company unrelated to the original, prior developer (company) developed the subdivision,

this company constructed and installed the sewer pipes and system within the subdivision, residential lots were purchased by third parties from this company for single family homes to be built, single family homes were built, and now the construction and build-out of the Riley's Pond subdivision is complete; and

WHEREAS, a residential subdivision like Riley's Pond must be connected to the Town sewer system pursuant to Unified Development Ordinance § 7.5.3; and

WHEREAS, there are approximately 50 homes located in the Riley's Pond subdivision that will need to be connected to the Town's sewer system; and

WHEREAS, this resolution and eminent domain action arise to address the public need for sewer service for the approximately 50 homes located in the Riley's Pond subdivision; and

WHEREAS, according to Town engineers, after considering various factors including but not limited to engineering, environmental, topography, construction, impact, timing, and other possible sewer service methods and/or routes, providing sewer service to the 50 homes within the Riley's Pond subdivision will require crossing the Rubin Property with a sewer pipe at either the same location of the existing sewer pipe or another location in close proximity to the existing sewer pipe; in other words, there is no practicable way to provide sewer service to these 50 properties without crossing the Rubin property with a sewer pipe; and

WHEREAS, if the sewer crossing occurs at a different location in close proximity to the existing sewer pipe across the Rubin Property, the existing sewer pipe and encasing will have to be removed from the Rubin Property with an open cut method, creating damages to the property which did not occur when the pipe was originally installed using the bore and jack method; and

WHEREAS, under these circumstances, the easement that would cause the least impact to the Rubin Property to provide sewer to the 50 homes in the Riley's Pond subdivision is the acquisition of a 10-foot underground sewer utility easement over the "footprint" of the existing sewer pipe and encasing; and

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

To be used for the operation and maintenance of gravity sewer lines and related facilities and all appurtenances necessary or convenient thereto in connection with the Apex Sewer System 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 Chapter 40A of the General Statutes and 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, water lines, sewer lines, and appurtenances thereto.

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

1. Resolution 2015-0303-11 is hereby rescinded; and

2. For the statements and purposes stated above, under the authority of Chapter 40A of the North Carolina General Statutes, Section 6.5 of the Apex Town Charter, and Article 9 of Chapter 136 of the North Carolina General Statutes, and because it is necessary, it is for the public use or benefit, and it is in the public interest, the Town Council does hereby authorize the acquisition through eminent domain or negotiated purchase property interests described below:

A 10-foot wide underground Gravity Sewer easement for the purposes described above under and through the lands listed below, more particularly described in the legal description attached hereto as Exhibit A. The property subject to eminent domain proceedings is listed as follows:

<u>PROPERTY OWNER</u>	<u>WAKE COUNTY PIN #</u>	<u>EXHIBIT</u>
Beverly Rubin	0721-48-2119	A

3. Reasonable eminent domain deposits to the Clerk of Court as determined by the Town Manager, his designee or 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 and to determine which eminent domain authority to use to acquire the above described property interests.

4. The Water Resources Director or his designee is authorized to make adjustments to the exact location of easements if practical considerations so require taking into consideration the statements and purposes contained herein.

5. The sending of notices of entry and/or notices of eminent domain proceedings may be sent as a courtesy or may be sent required by law depending on which power of eminent domain is utilized. The performing of investigations (including the obtaining of real estate appraisals, land planning studies, engineering studies and tree valuations) as the Town Attorney determines are needed are hereby authorized and/or ratified.

Motion made by Council Member

Andra Killingsworth

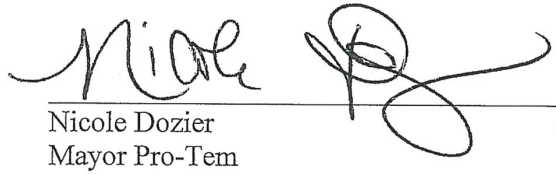
Motion seconded by Council Member

Mayer, Pres

With 5 Council Members voting aye.

With 0 Council Members voting no.

Adopted and effective this the 16 day of April, 2019.



Nicole Dozier
Mayor Pro-Tem

ATTEST:



Donna B. Hosch, MMC
Town Clerk

To a condemnation beaver creek sewer extension (2018-037) resolution authorizing condemnation



NOTES:

1) Surveyor has made no investigation or independent search for easements of record, encumbrances, restrictive covenants, ownership title evidence or any other facts that an accurate and current title search may disclose.

2) All distances shown are in US Survey Feet (Ground). Areas calculated by CAD software

EXHIBIT A

North arrow pointing up, labeled 'N'.

B.M. 2015, Pg. 2085

Scale bar: 0, 25, 50 feet.

SCALE: 1" = 50'

EXEMPT
TOWN OF APEX
SUBDIVISION ORDINANCE

Authorized Signature _____

Date _____

LINE	BEARING	DISTANCE
L1	N 02°14'28" E	49.94'
L2	N 02°14'28" E	81.80'
L3	S 29°19'10" E	49.27'
L4	S 74°58'17" E	39.99'
L5	S 74°58'17" E	74.39'
L6	N 02°14'28" E	10.29'
L7	S 03°29'18" E	10.10'
L8	N 15°31'52" W	32.76'

BEVERLY L. RUBIN
D.B. 13973, Pg. 2151
B.M. 2000, Pg. 1587

NEW 10' TOWN OF APEX
SANITARY SEWER EASEMENT
1,559 S.F. (0.036 ACRES)

BASIS OF BEARINGS

OPEN SPACE &
RESOURCE
CONSERVATION AREA

EX. TOWN OF APEX
PUBLIC UTILITY
EASEMENT

JI SHEN & YAXIN ZHENG (43)

DARYL & REBECCA SMITH (42)

RILEY'S POND PHASE 1 (B.M. 2016, Pg. 204-205)

BRIAN & KRISTI ELLISON (41)

EX. 1/2" IRON PIPE (FLUSH W/ GRND.)

EX. 1/2" IRON PIPE (0.2' BELOW GRND.)

EX. 1/2" IRON PIPE (0.2' BELOW GRND.)

EX. 1/2" IRON PIPE (0.2' BELOW GRND.)

EX. 1/2" IRON PIPE (0.2' BELOW GRND.)

EX. TOWN OF APEX SANITARY SEWER EASEMENT

RILEY'S POND PHASE 1 (B.M. 2016, Pg. 204-205)

OPEN SPACE & RESOURCE CONSERVATION AREA

RILEY'S POND HOMEOWNERS ASSOCIATION, INC.

LEGEND & NOMENCLATURE:

○ Ex. property corner

● Calculated point

● Set property corner

B.M. Book of Maps

D.B. Deed Book

Pg. Page

S.F. Square Feet

Ac. Acres

THIS MAP MAY NOT BE A CERTIFIED SURVEY AND HAS NOT BEEN REVIEWED BY A LOCAL GOVERNMENT AGENCY FOR COMPLIANCE WITH ANY APPLICABLE LAND DEVELOPMENT REGULATIONS AND HAS NOT BEEN REVIEWED FOR COMPLIANCE WITH RECORDING REQUIREMENTS FOR PLATS

TAYLOR
LAND CONSULTANTS, PLLC

1600 Olive Chapel Road, #140
Apex, NC 27502

License No P-0829
(919) 801-1104

NORTH CAROLINA
PROFESSIONAL
LAND SURVEYOR
JEREMY TAYLOR

SEAL
L-3841

EASEMENT ACQUISITION EXHIBIT

Grantor: BEVERLY L. RUBIN
Grantee: TOWN OF APEX

Site Address: 2613 OLIVE CHAPEL ROAD
PIN: 0721-48-2119

Source of Title: D.B. 13973, PG. 2151

Township: WHITE OAK

County: WAKE

State: NC

Date: APRIL 12, 2019

Revised: 4/15/19

STATE OF NORTH CAROLINA
WAKE COUNTY
TOWN OF APEX,
BY _____
Plaintiff,

FILED
2019 MAY 16 PM 3:07
WAKE COUNTY, C.S.C.
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19-CVS-6295

v.

BEVERLY L. RUBIN,
Defendant.

AFFIDAVIT OF SERVICE

Undersigned counsel for the Plaintiff, being first duly sworn says as follows:

1. Service of process upon Defendant by serving Defendant Beverly L. Rubin as provided in Rule 4 of the Rules of Civil Procedure is appropriate in this action.
2. The Summons and Complaint in the above-entitled action were properly addressed, enclosed in a UPS Next Day Air envelope with a UPS US Airbill with tracking number 1Z 0F3 Y13 24 9912 231 3 and placed in an official depository under the exclusive care and custody of United Parcel Service, a designated delivery service pursuant to 26 U.S.C. §7502(f)(2).
3. The Summons and Complaint were in fact received by the Defendant Beverly L. Rubin on May 14, 2019 as evidenced by the genuine delivery receipt which is attached hereto indicating the proof of delivery of the envelope with Airbill tracking number 1Z 0F3 Y13 24 9912 231 3.

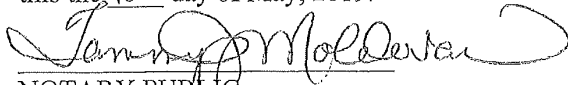
This the 15th day of May, 2019.



David P. Ferrell
N.C. State Bar No. 23097
DFerrell@nexsenpruet.com
Nexsen Pruet PLLC

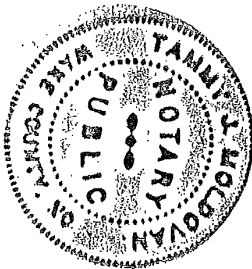
4141 Parklake Ave., Ste 200
Raleigh, NC 27612
Telephone: (919) 573-7421
Facsimile: (919) 890-4540
Attorneys for Plaintiff Town of Apex

SWORN TO subscribed before me
this the 15th day of May, 2019.



NOTARY PUBLIC

My commission expires: 10/9/2023



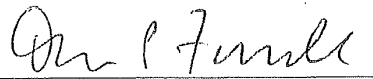
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **AFFIDAVIT OF SERVICE** 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, Stallings, From, Atkins, Angell
& Davis, P.A.
PO Box 12347
Raleigh, NC 27605
Fax: 919-821-7703

This the 15th day of May, 2019.



David P. Ferrell

UPS Package Tracking

Page 1 of 1



Proof of Delivery

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number: 1Z 0F3 Y13 24 9912 231 3
Reference Number(s): 049433.00027.2753,
049433.00027.2753

Service Type: UPS NEXT DAY AIR
Special Instruction: SIGNATURE REQUIRED
Package Weight: 0.00 LBS
Shipped or Billed on: May 13, 2019

Delivered on: May 14, 2019 9:53 A.M.
Delivered to: 2613 OLIVE CHAPEL RD
APEX, NC, US, 27502

Signed By: RUBIN

Attest:

Location: Residential

Thank you for giving us this opportunity to serve you.

Sincerely,
UPS

Tracking results provided by UPS: May 14, 2019 9:25 A.M. Eastern Time (USA)

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

19-CVS-6295

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

MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, Defendant Beverly L. Rubin moves to dismiss with prejudice the Town of Apex's complaint. The Town's complaint in this case is barred by the doctrines of res judicata and prior action pending.

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

1. The underlying dispute between Ms. Rubin and the Town involves 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. On April 30, 2015, the Town filed a condemnation complaint against Ms. Rubin. A copy of the complaint is attached to this motion as Exhibit A.

3. 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. On July 8, 2015, Ms. Rubin answered the complaint, denying that the taking was for a public purpose and raising as an affirmative defense that she was entitled to just compensation for the taking. A copy of the answer is attached to this motion as Exhibit B.

5. The parties asked for what is referred to as a “Section 108” or “other issues” hearing. There, Ms. Rubin introduced evidence that the Town lacked a public purpose to take her property. The superior court agreed with Ms. Rubin and entered a final judgment in her favor. A copy of that final judgment is attached to this motion as Exhibit C.

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

7. The Town appealed from the final judgment, but the Court of Appeals unanimously dismissed the appeal as untimely. *Town of Apex v. Rubin*, 821 S.E.2d 613, 617 (N.C. Ct. App. 2018). The Town then petitioned the Supreme Court for discretionary review, but that petition was denied on April 9, 2019. The case has now been remanded back to the trial court.

8. The day after remand, on April 10, Ms. Rubin filed a motion in the underlying condemnation action to enforce the final judgment. A copy of that motion is attached as Exhibit D to this motion. In the motion, Ms. Rubin asked that the superior court in the underlying condemnation action order the Town to remove the sewer lines installed on Ms. Rubin’s property since the Town’s taking had been finally determined to be illegal.

9. Ms. Rubin’s motion to enforce judgment is being set for hearing at the same time as this motion and the Town’s motion for a preliminary injunction in this case.

10. After Ms. Rubin filed the motion to enforce the judgment in the primary case, the Town responded by filing this new, duplicative case against Ms. Rubin. The Town’s complaint seeks the mirror-image of the relief requested in Ms. Rubin’s pending motion in the original case. The Town now claims that Ms. Rubin should have instituted an inverse-condemnation proceeding while the prior condemnation proceeding was ongoing and, since she failed to do so, the Town is entitled to the benefit of its illegal taking.

11. This action is, at best, wholly duplicative of Ms. Rubin's pending motion in the original case and, at worst, an impermissible, wasteful, and frivolous collateral attack on the judgment that the Town has already tied up in its flawed appeal for years.

12. The Town's new complaint is barred by the final judgment entered in Ms. Rubin's favor in the underlying condemnation action. Res judicata bars this new lawsuit because it seeks to litigate issues that were already litigated—or could have been litigated—in the underlying condemnation action.

13. In addition, the Town's new complaint is also barred by the prior action pending doctrine. The prior action pending doctrine abates a later-filed complaint that raises substantially the same issues between the same parties as a pending case. Ms. Rubin's prior action is still pending because of her pending claim for post-judgment relief—the very same relief that the Town's new complaint attempts to collaterally forestall.

WHEREFORE, Ms. Rubin respectfully requests that the Town's complaint be dismissed with prejudice.

This the 16th day of May, 2019.

FOX ROTHSCHILD LLP



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

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Facsimile: (919) 821-7703

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Dismiss was served by email and by United States mail, first-class postage pre-paid, and addressed as follows:

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

This the 16th day of May, 2019.


Matthew Nis Leerberg

EXHIBIT A

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, HALL COUNTY, C.S.C. 15-CVS-
BY Plaintiff,)
)
) COMPLAINT
v.)
) [COMP]
BEVERLY L. RUBIN,)
)
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 30th day of April, 2015.



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Ashley P. Holmes
N.C. State Bar No. 42911
Vandeventer Black LLP
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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.

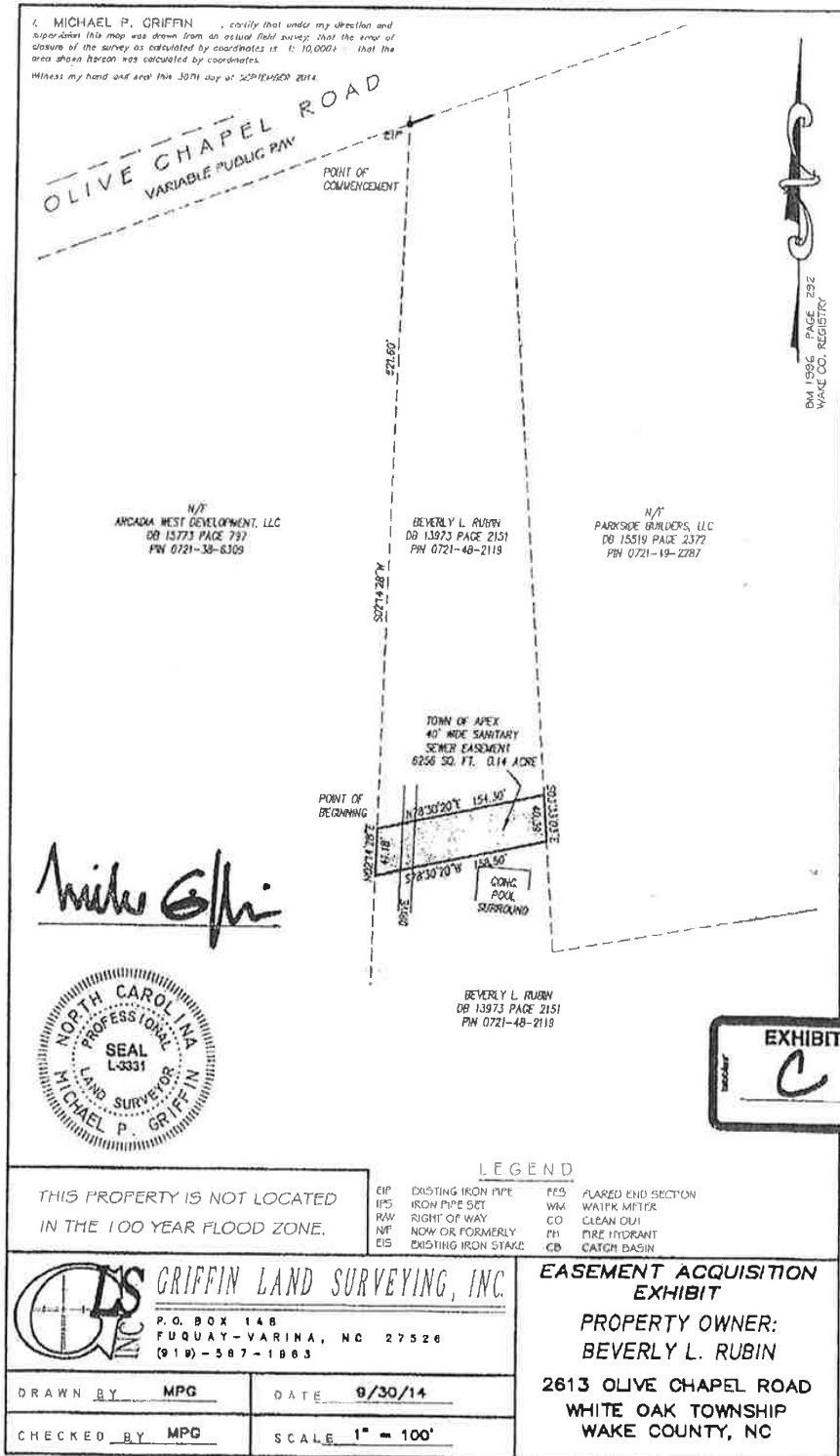


EXHIBIT B

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
CLERK OF SUPERIOR COURT
WAKE COUNTY, N.C.

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

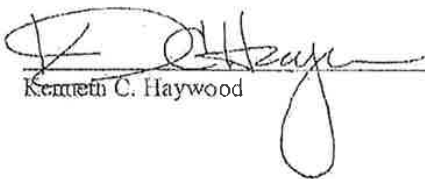


Kenneth C. Haywood
State Bar Number 19066
Post Office Drawer 1429
Raleigh, North Carolina 27602
Telephone: (919) 832-3915
khaywood@bbghlaw.com

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

**Exhibit C: Judgment (15-
CVS-5836).**

Duplicate copy omitted.

**Original set forth in its entirety
at R pp 8 - 14.**

EXHIBIT D

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE SUPERIOR COURT DIVISION
15 CVS 5836

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

2015 APR 10 10:22

15

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. Brinsoh*, 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).

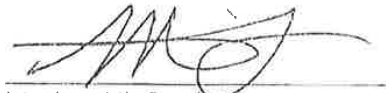
Mandamus would be appropriate because:

- (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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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. Balts*, 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 (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. Zedell 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

42349

EXHIBIT B

No. 410P18

TENTH DISTRICT

Supreme Court of North Carolina

TOWN OF APEX

v

BEVERLY L. RUBIN

From N.C. Court of Appeals
(17-955)
From Wake
(15CV55836)

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 Leorberg, Attorney at Law, For Rubin, Beverly L.

STATE OF NORTH CAROLINA
COUNTY OF WAKE
TOWN OF APEX,
Plaintiff,
vs.
BEVERLY L. RUBIN,
Defendant.

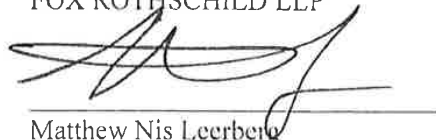
FILED
2019 MAY 16 P 4:45
WAKE CO., C.S.C.
BY 

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19-CVS-6295
NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant's Motion to Dismiss Complaint 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
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HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A.

Kenneth C. Haywood
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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 16th day of May, 2019.

A handwritten signature in black ink, appearing to read 'Matthew Nis Leerberg', written over a horizontal line.

Matthew Nis Leerberg

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

WAKE COUNTY

2019 JUL 19 AM 10:27

SUPERIOR COURT DIVISION

19-CVS-6295

TOWN OF APEX,

WAKE CO., N.C.

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

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2019 AUG 30 PM 1:19 SUPERIOR COURT DIVISION

WAKE COUNTY

WAKE COUNTY, C.S.C.

19-CVS-6295

TOWN OF APEX,

BY

Plaintiff,

FIRST AMENDED COMPLAINT

V.

[AMND]

BEVERLY L. RUBIN,

Defendant.

NOW COMES Plaintiff, Town of Apex (“Town”), by and through their undersigned counsel, and as a matter of right pursuant to Rule 15 of the Rules of Civil Procedure, amends its complaint against Beverly L. Rubin (“Rubin”); and alleges, avers and says:

1. Town is a municipal corporation organized and existing under the laws of the State of North Carolina. Town possesses the powers, duties and authority, including the power of eminent domain, delegated to it by the General Assembly of North Carolina.

2. Rubin is a citizen and resident of Wake County.

3. Town and Rubin are parties to a condemnation action commenced by the filing of a complaint on 30 April 2015 in Wake County Superior Court in *Town of Apex v Rubin*, 15 CVS 5836, (“Complaint”), where the Town appraised and estimated just compensation for a sewer easement at \$10,771, and deposited same with the Clerk of Superior Court. Upon information and belief, said amount remains with the Clerk of Superior Court for the benefit of Rubin.

4. Rubin did not assert a counterclaim for inverse condemnation or any other perceived claim in her responsive pleading in 15-CVS-5836.

5. A final judgment was entered on 18 October 2016 ("Judgment"). A copy of the Judgment is attached to the Complaint as Exhibit A and incorporated herein by reference.

6. The Judgment dismissed the Town's claim for acquisition of a sewer easement across Rubin's property as null and void.

7. The Judgment rendered the Complaint and Declaration of Taking a nullity.

8. The Town had constructed an underground sewer line ("Project") across the entire width of a narrow portion of Rubin's property, more particularly described in paragraph 19 hereof ("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. No manholes are on the Property.

9. Rubin had actual knowledge of the Project on 30 April 2015.

10. Bore pits were dug on each side of Rubin's property but not on her property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015.

11. The inverse taking occurred on or about 27 July 2015. A claim for compensation for the inverse taking has been available to Rubin since at least 27 July 2015.

12. On 22 February 2016, the Town accepted as complete the sewer line and Project, and it became a part of the Town's public sanitary sewer system.

13. Although the taking beneath the surface of the Property occurred on or about 27 July 2015, the completion of the Project occurred, at the latest, on 22 February 2016.

14. The Town has not abandoned the Project.

15. Rubin did not seek or obtain injunctive relief at any point to halt the Project, nor did the Court require the Town in the 18 October 2016 Judgment to alter or remove the previously installed sewer pipe.

16. The Project was completed more than two (2) years ago.

17. The Town-owned sewer line remains in place, is in use, and serves approximately 50 residential homes and/or lots located in subdivision in the Town. The Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision.

18. By the installation of the underground sewer line, the Town physically invaded the Property and thereby inversely condemned a sewer easement which is more particularly described as follows:

“New 10’ Town of Apex Sanitary Sewer Easement,” said area containing 1,559 square feet (0.036 acres) more or less, all as shown on that certain survey plat entitled “EASEMENT ACQUISITION EXHIBIT” by Taylor Land Consultants, PLLC, said survey plat being attached to the Complaint as Exhibit B, and incorporated herein by reference.

19. The 10 foot wide Town underground sanitary sewer easement ultimately was a sufficient easement given the change in the way the Town chose to install the pipe (bore method).

20. The Property which is affected by the inverse taking of a sewer easement is 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.

21. Inverse condemnation is Rubin's sole remedy for the physical invasion and inverse taking by the Town.

22. Rubin's inverse condemnation claim is now time barred since Rubin failed to timely assert the claim. However, the Town hereby waives its defense of the statute of limitations solely as a bar to Rubin's claim for just compensation for the easement acquired by inverse condemnation as referenced in 19-CVS-6295. The Town does not waive and specifically preserves the statute of limitations defense as to any claim by Rubin for attorney's fees incurred in in the prosecution of her inverse condemnation claim for compensation or any other claim.

23. Public use or purpose is not an element of an inverse condemnation claim. Inverse condemnation statutory 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).

24. By motion filed on 10 April 2019 in 15-CVS-5636, Rubin seeks, *inter alia*, removal of the sewer line ("Motion"). The Motion is incorporated herein by reference.

25. Town is entitled to preliminary and permanent injunctive relief enjoining Rubin, her agents, attorneys, and those persons acting in concert with her, from removing or disturbing the sewer line and easement on the Property. Given the Town's limited waiver of its defense of the statute of limitations, Rubin is entitled to a jury trial on the issue of the amount of compensation due for the inverse taking described in this complaint.

26. A genuine controversy exists between the Town and Rubin as to their respective rights and duties regarding the underground sewer line installed across the Property on 27 July 2015.

27. Town is entitled pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and Rule 57 of the Rules of Civil Procedure to (1) a declaration of rights that the installation of the sewer line on 27 July 2015 was an inverse taking, (2) that inverse condemnation is Rubin's sole remedy for the installation of the sewer pipe on her property, (3) that the remedy of inverse condemnation is time barred, (4) that given the Town's limited waiver of its defense of the statute of limitations, Rubin is entitled to a jury trial on the issue of the amount of compensation due for the inverse taking described in this complaint, (5) that pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, supplemental relief be granted to order a jury trial to be held on the issue of the amount of compensation due for the inverse taking described in this complaint, (6) that pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, supplemental relief be granted to order the amount deposited

by the Town that is being held by the Clerk of Superior Court for the benefit of Rubin be deemed to be the Town's deposit of its estimate of just compensation for the inverse taking described in this complaint, (7) that the Judgment is *res judicata* as to any claims by Rubin for injunctive relief or an extraordinary writ, and/or should not be applied prospectively given the recent Supreme Court of North Carolina opinion in *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), and (8) the doctrines of laches, economic waste, and other similar equitable doctrines bar Defendant from causing the removal of the sewer pipe.

WHEREFORE, Town requests judgment against Rubin as follows:

1. An order declaring the rights of the parties as requested herein,
2. An order enjoining Rubin, her attorneys, and agents, *pendente lite* and permanently, from taking any action to remove or disturb the sewer line and easement on the Property,
3. An order granting supplemental relief pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, that a jury trial be held on the issue of the amount of compensation due for the inverse taking described in this complaint, and
4. Such other and further relief as this Court may deem just and proper.

This the 30th day of August, 2019.



David P. Ferrell
N.C. State Bar No. 23097
DFerrell@nexsenpruet.com
Norman W. Shearin
N.C. State Bar No. 3956
NShearin@nexsenpruet.com
Nexsen Pruet PLLC
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 **FIRST AMENDED COMPLAINT** 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
Attorneys for Defendant Beverly L. Rubin

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

This the 30th day of August, 2019.



David P. Ferrell

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
2019 SEP 25 PM 3:46
WAKE COUNTY, NC

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

TOWN OF APEX,
Plaintiff,

vs.

BEVERLY L. RUBIN,
Defendant.

BY _____

MOTION TO DISMISS
AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, Defendant Beverly L. Rubin moves to dismiss with prejudice the Town of Apex's amended complaint. The Town's amended complaint in this case is barred by the doctrines of res judicata and prior action pending.

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

1. The underlying dispute between Ms. Rubin and the Town involves 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. On April 30, 2015, the Town filed a condemnation complaint against Ms. Rubin. A copy of the complaint is attached to this motion as Exhibit A.
3. 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. On July 8, 2015, Ms. Rubin answered the complaint, denying that the taking was for a public purpose and raising as an affirmative defense that she was entitled to just compensation for the taking. A copy of the answer is attached to this motion as Exhibit B.

5. The parties asked for what is referred to as a “Section 108” or “other issues” hearing. There, Ms. Rubin introduced evidence that the Town lacked a public purpose to take her property. The superior court agreed with Ms. Rubin and entered a final judgment in her favor. A copy of that final judgment is attached to this motion as Exhibit C.

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

7. The Town appealed from the final judgment, but the Court of Appeals unanimously dismissed the appeal as untimely. *Town of Apex v. Rubin*, 821 S.E.2d 613, 617 (N.C. Ct. App. 2018). The Town then petitioned the Supreme Court for discretionary review, but that petition was denied on April 9, 2019. The case has now been remanded back to the trial court.

8. The day after remand, on April 10, Ms. Rubin filed a motion in the underlying condemnation action to enforce the final judgment. A copy of that motion is attached as Exhibit D to this motion. In the motion, Ms. Rubin asked that the superior court in the underlying condemnation action order the Town to remove the sewer lines installed on Ms. Rubin’s property since the Town’s taking had been finally determined to be illegal.

9. Ms. Rubin’s motion to enforce judgment has already been heard and has been taken under advisement by the Honorable Bryan Collins.

10. *After* Ms. Rubin filed the motion to enforce the judgment in the primary case, the Town responded by filing this new, duplicative case against Ms. Rubin. The Town’s amended complaint seeks the mirror-image of the relief requested in Ms. Rubin’s pending motion in the original case. The Town now claims that Ms. Rubin should have instituted an inverse-condemnation proceeding while the prior condemnation proceeding was ongoing and, since she failed to do so, the Town is entitled to the benefit of its illegal taking.

11. This action is, at best, wholly duplicative of Ms. Rubin's pending motion in the original case and, at worst, an impermissible, wasteful, and frivolous collateral attack on the judgment that the Town has already tied up in its flawed appeal for years.

12. The Town's new action is barred by the final judgment entered in Ms. Rubin's favor in the underlying condemnation action. Res judicata bars this new lawsuit because it seeks to litigate issues that were already litigated—or could have been litigated—in the underlying condemnation action.

13. In addition, the Town's new action is also barred by the prior action pending doctrine. The prior action pending doctrine abates a later-filed complaint that raises substantially the same issues between the same parties as a pending case. Ms. Rubin's prior action is still pending because of her pending claim for post-judgment relief—the very same relief that the Town's new action attempts to collaterally forestall.

WHEREFORE, Ms. Rubin respectfully requests that the Town's amended complaint be dismissed with prejudice.

This the 29 day of September, 2019.

FOX ROTHSCHILD LLP

Troy Shelton

Matthew Nis Leerberg

N.C. Bar No. 35406

mleerberg@foxrothschild.com

Troy D. Shelton

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

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B. Joan Davis

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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 foregoing Motion to Dismiss was served by email and by United States mail, first-class postage pre-paid, and addressed as follows:

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

This the 25 day of September, 2019.



Troy D. Shelton

Exhibits A - D

Duplicate copies omitted.

**Originals set forth in their
entirety at R pp 45 to 77.**

STATE OF NORTH CAROLINA

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

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.


BEVERLY L. RUBIN,

Defendant.

AMENDED NOTICE OF HEARING

NOW COMES Plaintiff the Town of Apex, by and through Counsel, and hereby gives notice to all parties that Defendant's Motion to Dismiss 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. Plaintiff's Motion for Preliminary Injunction which was previously heard by the Court and which the Court has under advisement may also be discussed at this hearing,

This the 5th day of November, 2019.


David P. Ferrell

N.C. State Bar No. 23097

DFerrell@nexsenpruet.com

Norman W. Shearin

N.C. State Bar No. 3956

NShearin@nexsenpruet.com

Nexsen Pruet PLLC

4141 Parklake Ave., Ste 200

Raleigh, NC 27612

Telephone: (919) 573-7421

Facsimile: (919) 890-4540

Attorneys for Plaintiff Town of Apex

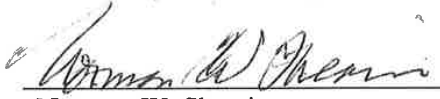
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **AMENDED 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 5th day of November, 2019.


Norman W. Shearin

STATE OF NORTH CAROLINA

COUNTY OF WAKE

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

FILED

2019 DEC -4 P 4: 38

WAKE CO., C.S.C.

BY

RSP

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

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant's Motion to Dismiss Amended Complaint 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

N.C. Bar No. 48070

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Raleigh, NC 27601

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

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

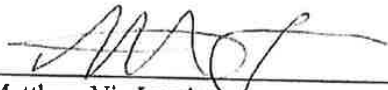
Kenneth C. Haywood
N.C. Bar. No. 19066
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5410 Trinity Road, Suite 210
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Raleigh, NC 27607
Telephone: (919) 821-7700
Facsimile: (919) 821-7703

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 4th day of December, 2019.


Matthew Nis Leerberg

FILED

STATE OF NORTH CAROLINA
WAKE COUNTY
TOWN OF APEX,

2020 JAN 21 AM 11:33
WAKE CO., C.S.C.
BY _____
Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

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


**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

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 motion of the Defendant Beverly L. Rubin (“Defendant”), to dismiss Plaintiff’s first amended complaint (“complaint”) and all claims alleged therein pursuant to Rule 12 (b)(6) on the grounds that the complaint and claims are barred or precluded by the doctrines of *res judicata* and/or prior action pending, and that the claims and issues were resolved or precluded by the original condemnation action having case number 15-CVS-5836. Plaintiff, Town of Apex, 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 arguments of counsel, a review of the first amended complaint, consideration of the prior condemnation action having case number 15-CVS-5836, and the legal authorities provided to the Court by counsel for the parties, that the Motion to Dismiss should be DENIED;

IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss be and is hereby DENIED. IT IS FURTHER ORDERED that Defendant file an answer to the complaint herein

within twenty (20) days of the entry of this order.

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 JUN 21 AM 11:33 SUPERIOR COURT DIVISION
WAKE COUNTY 19-CVS-6295
WAKE CO., C.S.C.
TOWN OF APEX,)
Plaintiff,)
v.) **PRELIMINARY INJUNCTION**
BEVERLY L. RUBIN,)
Defendant.)

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 verified motion of the Plaintiff Town of Apex (“Plaintiff” or “Town”) for a preliminary injunction to enjoin and restrain the Defendant Beverly L. Rubin (“Defendant” or “Rubin”) *pendente lite* from taking any action to remove, disturb, or impair the use of the existing underground sewer line which crosses Defendant’s Property. 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 verified motion, the complaint and first amended complaint filed herein, the pleadings, Defendant’s motion to enforce judgment and alternative petition for a writ of mandamus and the parties’ memoranda related thereto in the prior condemnation action bearing case number 15 CVS 5836, and legal memoranda and arguments of counsel for the parties, that the Motion should be GRANTED. The Court makes the following:

FINDINGS OF FACT

1. The Town is a municipal corporation organized and existing under the laws of the State of North Carolina. The Town possesses the powers, duties and authority, including the power of eminent domain, delegated to it by the General Assembly of North Carolina.

2. The Town constructed, owns, maintains, and operates a sewer line under Defendant's property. The sewer line 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. The Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision.

3. The sewer line under Defendant's property is the only connection for the homes and lots in the Riley's Pond Subdivision to the Town's public municipal sewer system.

4. The sewer line crosses a narrow portion of Defendant's Property, approximately 156 feet wide. The eight (8) inch gravity flow sewer line was installed at a depth of eighteen (18) feet using the bore method, and placed inside an eighteen (18) inch steel casing. Bore pits were dug on each side of the Property (but not thereon) on 20 July 2015. The casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015. The Project was accepted as complete by the Town on 22 February 2016 and it became a part of the Town's public sanitary sewer system. A 10-foot wide Town underground sanitary sewer easement (approximately .036 acre easement) was sufficient given the use of the bore method by the Town.

5. The Town believes the sewer line properly exists on Defendant's property, and should remain. Defendant believes the sewer line should be removed from under her property and the Town should not be allowed to cross her property with a sewer line.

6. The Town's Complaint filed herein on 13 May 2019, which was subsequently amended on 30 August 2019 (referred to collectively as "Complaint"), alleges a declaratory judgment action to determine the rights of the parties regarding the above described easement for an underground sewer line under Defendant's property.

7. The principal relief sought by the Town in its Complaint is that Rubin be permanently enjoined from disturbing or removing the existing underground sewer line and casing crossing the Property. The Town requests an injunction to prevent threatened and irreparable injury to or destruction of its property rights in the easement during the pendency of the action.

8. The Town is likely to succeed on the merits of its claims for declaratory and injunctive relief.

9. The Town alleges that sewer easement was acquired by inverse condemnation. By the installation of the underground sewer line, the Town physically invaded Defendant's property and inversely condemned an underground sewer easement. Thus, Defendant's sole remedy is a remedy at law – payment of compensation for the easement inversely condemned.

10. The Town's Declaratory Judgment Complaint alleges an actual controversy between the parties regarding rights in and to the easement and sewer pipe inversely condemned by the Town.

11. By the construction of the sewer line in July 2015, the Town physically invaded Defendant's Property and inversely condemned a sewer easement more particularly described in paragraph 14 of the Complaint. Town contends that it has thereby acquired a sewer easement and is therefore entitled to maintain the underground sewer pipe in place.

12. Defendant asserts that she is entitled to an order requiring the Town to remove the sewer pipe. Defendant has formally sought such an order by written motion filed on 10 April 2019 in the original condemnation action having case number 15-CVS-5636.

13. Consequently, a genuine controversy exists between the Town and Defendant as to their respective rights and duties in and to the sewer easement and existing sewer pipe.

14. The prior condemnation action does not negatively affect the Town's likelihood to succeed on the merits of its claims in the Complaint.

15. The Town and Defendant are parties to a condemnation action commenced by the filing of a complaint and declaration of taking on 30 April 2015 in Wake County Superior Court in *Town of Apex v Rubin*, 15 CVS 5836 ("Complaint"). A final judgment was entered on 18 October 2016 ("Judgment").

16. The only relief granted to Defendant by the Judgment is the dismissal of the Town's condemnation claim in the original condemnation action 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.

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

18. 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 in the original

condemnation action, and did not request injunctive relief to close or remove the sewer pipe at the all other issues hearing before the Court.

19. Although the sewer pipe had been installed for approximately one year prior to the all other issues hearing in the prior condemnation action, 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.

20. 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. A determination of the extent of the Town's rights in its inversely condemned easement will be determined in this proceeding.

21. Inverse condemnation is Defendant's sole remedy for the physical invasion and inverse taking by the Town. Public use or purpose is not an element of an inverse condemnation claim. Inverse condemnation statutory 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).

22. The Town is likely to sustain irreparable harm if an injunction is not issued. Further, an injunction is necessary to protect the Town's rights during the pendency of the litigation.

23. An injunction is necessary to preserve the status quo by restraining Defendant from interfering with the operation and use of the sewer pipe, for it would produce injury to the Town during the litigation.

24. An injunction is necessary to prevent Defendant from blocking or removing the sewer pipe during the litigation since such action would render a judgment in this matter ineffectual.

25. Removal of the sewer pipe and the corresponding interruption in public sewer service to residents of the Town, specifically the 50 homes and/or lots in the Riley's Pond Subdivision, would cause significant, immediate and irreparable harm.

26. If the sewer pipe is disabled or removed, the approximately 50 residential homes and/or lots in the Riley's Pond Subdivision would lose their connection to the Town's public sanitary sewer system.

27. The existing sewer pipe is the only sewer pipe or facility connecting the Riley's Pond Subdivision to Town sewer service.

28. There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots in the Riley's Pond Subdivision.

29. The gravity sewer pipe has been situated 18 feet beneath Defendant's property since 29 July 2015. The Town does not need to access the surface of Defendant's property to maintain the sewer pipe. As a result, there is no inconvenience to Defendant to enjoin her interference with the sewer pipe during the pendency of this action.

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

CONCLUSIONS OF LAW

1. The Town is likely to succeed on the merits of its claims for declaratory and injunctive relief.

2. The Declaratory Judgment Act is available to adjudicate the rights of the parties in the sewer easement and sewer pipe. *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966)

(judicial declaration of right to easement over lands of defendant authorized by Declaratory Judgment Act).

3. The prior condemnation action and corresponding Judgment does not negatively affect the Town's likelihood to succeed on the merits of its claims in the Complaint.

4. The Town is likely to sustain irreparable harm if the injunction is not issued.

5. An injunction is necessary to protect the Town's rights and preserve the status quo during the course of this litigation.

6. An injunction is necessary to prevent Defendant from blocking or removing the sewer pipe during the litigation since such action would render a judgment in this matter ineffectual.

7. This injunction will prevent irremediable injury or threatened injury to or destruction of the Town's claimed property rights in the sewer easement.

8. Removal of the sewer pipe and the corresponding interruption in public sewer service to residents of the Town, specifically the 50 homes and/or lots in the Riley's Pond Subdivision, would cause significant, immediate and irreparable harm.

9. If the sewer pipe is disabled or removed, the approximately 50 residential homes and/or lots in the Riley's Pond Subdivision would lose their connection to the Town's public sanitary sewer system.

10. The existing sewer pipe is the only sewer pipe or facility connecting the Riley's Pond Subdivision to Town sewer service. There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots in the Riley's Pond Subdivision.

11. The gravity sewer pipe has been situated 18 feet beneath Defendant's property since 29 July 2015. The Town does not need to access the surface of Defendant's property to maintain

the sewer pipe. As a result, there is no inconvenience to Defendant to enjoin her interference with the sewer pipe during the pendency of this action.


12. No legal (as opposed to equitable) relief is available to the Town as a result of its claims in the Complaint - in that money damages are not an available remedy to a condemnor as it relates to the inversely condemned sewer easement.

13. No bond is required of the Town herein.

IT IS THEREFORE ORDERED that the Defendant, her agents, attorneys or other persons acting on her behalf or in concert with her, is enjoined and restrained *pendente lite* from taking any action to remove, disturb, interrupt, or impair the use of the existing underground sewer line which crosses under the Property, and

IT IS FURTHER ORDERED that this preliminary injunction shall remain in effect during the pendency of the captioned action, and be binding upon Defendant, her agents, attorneys or other persons acting on her behalf or in concert with her.

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.

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. 19-CVS-6295

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
N.C. State Bar No. 35406
mleerberg@foxrothschild.com
Troy D. Shelton
N.C. State Bar No. 48070

tshelton@foxrothschild.com
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
Telephone: 919.755.8700
Facsimile: 919.755.8800

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

Kenneth C. Haywood
N.C. State Bar No. 19066
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. 19-CVS-6295" 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



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.

FILED
2020 FEB 10 P 3:22
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. 19-CVS-6295

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



Matthew Nis Leerberg
N.C. State Bar No. 35406
mleerberg@foxrothschild.com
Troy D. Shelton
N.C. State Bar No. 48070
tshelton@foxrothschild.com
434 Fayetteville Street, Suite 2800
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HOWARD, STALLINGS, FROM,
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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 "Transcript Documentation in Case No. 19-CVS-6295" was served via U.S. Mail, postage prepaid, on the 10th 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: MLeerberg@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 black ink, appearing to read 'ML' followed by a stylized flourish.

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,

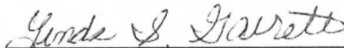
DEFENDANT.

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 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. 28 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) 131 to R S (II) 329 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 130;
 - b. The Rule 9(d) Documentary Exhibits, consisting of one volume, numbered Doc. Ex. 1 through Doc. Ex. 28 (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) 131 through R S (II) 329 (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 122) (electronic copies of which will be uploaded after this appeal is docketed).

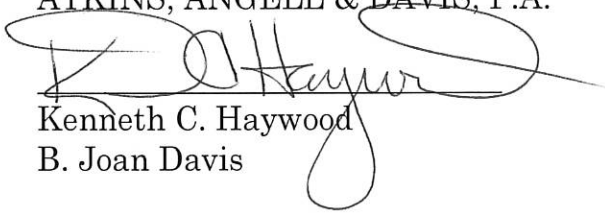
This 14th day of May 2020.

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 preliminary injunction motion in case number 19-CVS-6295?

2. Did the trial court err by denying Defendant's motion to dismiss in case number 19-CVS-6295?

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

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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:

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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:

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