

No. COA20-305

No. _____

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County

19-CVS-6295

RULE 11(c) SUPPLEMENT TO THE PRINTED RECORD ON APPEAL

**VOLUME I – Documents Submitted Before First Appeal
in No. 15-CVS-5836**

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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.

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HEARING BRIEF

Beverly Rubin's Answer to the condemnation complaint states 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." The First Affirmative Defense in the Answer states that upon receiving a copy of the Complaint she notified the Town that she contested the right of the Town of Apex to take any of her property interest. (See Answer and Letter of May 19, 2015). The letter was written just 19 days after the lawsuit was filed.

The question is whether the Town of Apex ("Town") legally exercised eminent domain proceedings to condemn an easement for sewer for the purpose of enriching a privately held company by Two and a Half Million dollars (\$2,500,000.00).

Unlike many condemnation proceedings, this is not a case where the Town is expanding its sewer or water lines to an area that is not already served by utilities. In fact, it is undisputed that years prior to this condemnation action, the Town completed an expansion of its sewer system in the same area as the properties that are involved in the history of this case. So as hard

as the Town wants to fit the square peg of this case being about a “public benefit” the facts and law never fit into the round hole.

There are several appellant decisions in North Carolina where the homeowner has challenged the right of a governmental body to take their property. In the most recent case, *Town of Matthews v. Wright*, 771 S.E.2d 328, 2015 LEXIS 320 (2015), the trial court and the North Carolina Court of Appeals dismissed the government's condemnation claim and found that the government unlawfully took the homeowner's land. This 2015 opinion of the Court of Appeals is the most recent decision in this area of law and shows an evolution in the caselaw toward questioning whether the government had the right to take the property. Often governmental bodies are too quick to invoke the power of eminent domain instead of evaluating the alternatives and choices to avoid this legal but drastic right.

This Court when confronted with the challenge that the Town impermissibly used its eminent domain powers to take Ms. Rubin's property must answer the well established test of whether the public has the right to a definite use of the condemned property and whether some benefit accrues to the public as a result of the desired condemnation. *Carolina Tel. & Tel. v. McLeod*, However, "not just any benefit to the general public will suffice under the test. Rather, the taking must furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power." *Id.* At 432, 364 S.E.2d at 402 (emphasis added).

Even if there is some incidental benefit to future property owners of the parcel of land immediately to the East of the Rubin tract, there was not the requirement for use of the governmental powers of eminent domain to achieve that benefit. Other options were available.

Wait until sewer was available from the South through the Aspnes/Ball property or run the sewer in the right of way of Olive Chapel Road.

The Town is not authorized to take the private property of Ms. Rubin for the benefit of one, or a few, others. *Phillips v. Hassett Mining Co.*, 244 N.C. 17, 92 S.E.2d 429 (1956). Further appellate decisions state that "To take property without an owner's consent for a nonpublic use, even though he paid its full value, is a violation of the state constitution and the due process clause of the federal constitution." *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

While decisions like *City of Asheville v. Resurgence*, 230 N.C. App. 80, 748 S.E.2d 751 (2013) and *Stout v. City of Durham*, 121 N.C. App. 716, 468 S.E.2d 254 (1996) upheld the use of eminent domain by the government, those cases are limited to their unique facts. In *Asheville*, the Town owned land to build affordable housing. A condition of the sale to Habitat for Humanity was that the property be connected to public sewer system. The Town condemned land for a sewer easement for the public benefit of affordable housing on land already owned by the City. The trial court found that in addition to the new housing at issue, the sewer easement area will be available to the public at large. In *Durham* the use of eminent domain was to extend sewer service to a shopping center and like in *Asheville*, as a result of the extension of service others in the community would have access to sewer. A public benefit could be found in both cases.

Cited in both cases is *Charlotte v. Heath*, 226 N.C. 750, 40 S.E.2d 600 (1946). The Supreme Court stated:

If there was in the record any evidence to sustain the theory that the use of the sewer line was intended to be confined, or could be confined in the future, to the 65 or 70 persons presently dwelling in the area to be served, and was not now,

nor could hereafter be accessible to the general public who seek residence there, he case might be different.

In 2015 when the Town of Apex approved on a 3-2 vote the resolution for condemnation for a sewer easement across Ms. Rubin's property there was and remains today no evidence that the sewer easement will serve anyone other than the owners of the land immediately adjacent to Ms. Rubin. The minutes of the closed session meeting do not mention anything about use of the sewer for others in the community (Exhibit 7).

The unique facts in *Asheville* and *Durham* are very different than the present case where Brad Zadell the owner of Parkside Builders, LLC, a private company of which the Town had no ownership interest in, begged and pleaded for the Town staff and even the Mayor to obtain a sewer easement across Ms. Rubin's land. The sewer easement would cut Ms. Rubin's property into two halves and destroy any ability to construct any improvements on her property in the location of the easement (an area forty feet wide) (Exhibit 1).

Zadell was constantly sending emails to the Director of Public Works, Timothy Donnelly, for assistance (Exhibit 15). Upon Zadell's request, even the town's attorney called Ms. Rubin asking Ms. Rubin to agree to a sewer easement (Exhibit 12). When the pressure by staff and the Town's attorney failed Zadell then went to the Mayor asking for the Town to condemn a sewer easement. Why, so that his privately held company that that had no plans to develop the land could have sewer service for one purpose --increase the value of the land and make his company very rich by flipping the property to another owner. The letter to the Mayor was almost a year before the town council even considered the matter in closed session (Exhibit 11).

A brief history of the ownership of the tracts of land is necessary. In 2010, Beverly Rubin purchased a tract of land located on Olive Chapel Road in Wake County. At the time she purchased her land and until 2013 her neighbors also owned large undeveloped tracts of land

consisting of a single family homes on septic systems. Ms. Rubin added multiple improvements to her house due to her plan to permanently live there.

In November 2012, Zadell through his company purchased from Sang Ok Park 12 acres of land (Exhibit 17). There was one parcel between the Park property and Ms. Rubin. The property was located in the county and zoned Residential 80W. Zadell later applied for annexation into the Town of Apex and filed a rezoning request to change the density to medium density residential which yields a much higher number of residential units on the 12 acres. Residents in the area filed a protest petition and were opposed to the rezoning application. The annexation and rezoning were heard by the town and ultimately approved on a unanimous vote August 13, 2013.¹ At the time of the rezoning hearing no one knew that Zadell's plans were to acquire all the land surrounding Ms. Rubin (see map attached hereto as Exhibit 10, which outlines all the properties acquired by Zadell's companies). Following successful rezoning, Zadell now set his sights on the Evans parcel. This land was to the immediate east of Ms. Rubin and had road frontage along Olive Chapel Road.

Zadell again filed an application for annexation and rezoning for the Evans parcel. The town heard and approved these applications in November 2013 again by unanimous approval. By December 2013, Zadell purchased the Evans 6.67 acre parcel. The total purchase price for both the Park's land and Evans was \$1,700,000 or blended approximately \$91,000 per acre (Exhibits 17 & 18). The properties are known as Arcadia East

Zadell had his properties rezoned but no sewer service. He bought the properties knowing they were in the county that did not have sewer. Thus the lower price per acre. Why

¹ The parties do not dispute that the Town of Apex approved the annexation and rezoning requests filed by Parkside Builders, LLC. The minutes of the Town meetings have not been included as exhibits but are available for inspection by the trial court if necessary.

the Town approved the annexations and the rezonings without evidence by Zadell that he had secured sewer service to Arcadia East is not disclosed in any evidence provided by the Town in respond to Request for Production of Documents. So Zadell would have to land bank Arcadia East until sewer was available. But there was another option. Buy more land. Along the western border of Ms. Rubin's property was a large tract consisting of approximately 29 acres that had a sewer main to its south. Zadell and others purchased this tract in May of 2014.

Now Zadell owned the land completely surrounding Ms. Rubin. The property to the west of Ms. Rubin is known as Arcadia West. It had sewer available to it.

Zadell had plenty of options. Again, he could land bank Arcadia East and wait for a sewer connection to the Town maintained line to the South or construct and maintain a pump station on Arcadia East and pump the sewer up to Olive Chapel along the right of way and connect with the sewer lines of Arcadia West. By using this approach Arcadia East has sewer and Rubin's property is preserved for her continued use.

In support of this Hearing we have submitted the Affidavit of Donald A. d'Ambrosi who stated that one of the options available to Zadell's company is the use of a pump station to move the sewage along the right of way of Olive Chapel Road. By using such an option Ms. Rubin's property would never had been considered for condemnation.

But unfortunately Zadell did not choose either of the mentioned options.

Remember the plea to the Mayor and the constant pressure to Public Works director Donnelly? It worked. On March 3, 2015, the Town Council held a closed session discussion for the purpose of hearing from staff on a proposed resolution for condemnation of a sewer easement across Ms. Rubin's property so that human waste from Arcadia East could be funneled under Ms. Rubin's property to Arcadia West and then to the sewer main line. And where is the waste being

transported across from Ms. Rubin's property? Right next to her swimming pool and living space above her garage (Exhibits 9).

And who presented the staff report for condemnation-Tim Donnelly same person that had been working with Zadell for the past two years on these projects. The minutes of the closed session consist of a single paragraph (Exhibit 7). Neither the minutes of the meeting nor those in attendance recall any discussion presented by staff of the fact that Zadell did not have to have sewer for Arcadia East at that time. By March 3, 2015, Zadell had not submitted any site plans to the Town or constructed any improvements to start any buildings. As important, there were no discussions by Donnelly during the closed session meeting of other options such as channeling the sewer along Olive Chapel Road and tying into Arcadia West in the right of way. It was single request by Donnelly-authorize condemnation to obtain a sewer easement across Ms. Rubin's property. In turns out the grand plan almost did not happen. The final vote was 3 in favor and 2 against. At least two members figured out what was occurring.

Why is Ms. Rubin so skeptical? Because of what she has now learned of what happened before the Town Council ever voted on the staff supported resolution for condemnation. One month prior to the Council vote to condemn Ms. Rubin's property, Zadell's company entered into a purchase contract to sell all of Arcadia East.

Exhibit F in that contract states: 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." (Exhibit F is attached as Exhibit 16 in the notebook. The document was produced in response to subpoenas issued in this case.)

Zadell knew a month before the Town ever voted to condemn Ms. Rubin's property for a sewer easement that the Town Council would approve it.

As demonstrated by the tax stamps on the deed, Zadell sells Arcadia East for \$4,200,000 or \$200,000 an acre. Same land that two years before he bought for \$91,000 an acre (Exhibits 17 & 18).

The Town contends that the power of condemnation is an automatic right. They have the power to take someone's property for utility services like sewer--end of discussion. However, as the hold adage goes the Town appears to be talking out of both sides of their mouth. They want to argue in upholding the legality of their take that it was for a "public benefit". However, if it was for a "public benefit" then why did the Town make Zadell's company sign a Unilateral Offer to pay Condemnation Award, Expenses and Costs and a Representation and Confidentiality Agreement (Exhibits 13 & 14)? Both documents signed by the Town and Zadell for his company. These documents demonstrate that this was not the normal course of expanding utility service for the "public benefit". The Town not only required Zadell's company to pay 100% of the costs of any condemnation award but also pay all the legal fees and expenses in this condemnation action. Obviously, at some point the Town told Zadell it would institute a condemnation action against Ms. Rubin but if she challenged it they were not responsible for the outcome should a court see the real truth: the truth of a government abusing its powers of condemnation only to profit the pockets of one man and his company. He needed the sewer easement so that his profits would increase by Two and Half Million Dollars.

Is there a public benefit here? Or perhaps the question is what is the public purpose in destroying Ms. Rubin's property to benefit a single individual and his company? And there is no

benefit to Ms. Rubin. Because of the location of the sewer line she cannot use the line. This is demonstrated by the correspondence between Tim Donnelly and Zadell (Exhibit 15).

The terms and conditions of the sewer easement as stated in the Complaint are alarming. They allow the Town to access Ms. Rubin's property anytime day or night. The Town has the right to conduct a significant number of activities above ground or below ground all as stated in the Complaint.

As previously mentioned, *Town of Matthews* is the most recent published decision to answer the questions before the court. It is helpful to understand the reasoning behind the trial court's decision. The trial court in portions of its Conclusions of Law state as follows:

1. 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 its right of eminent domain, and the selection of routes for roads and utilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously. *Dept. of Transportation v. MM Fowler, Inc.*, 275 N.C. 328, 167 S.E.2d 885 (2006).

2. When the proposed taking of property is "for the opening, widening, extending or improving roads, streets, alleys and sidewalks . . ." such purposes 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 of authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes 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).

3. Based upon the evidence before the Court, the Court finds that Plaintiff's purported taking is an arbitrary and capricious exercise by the Plaintiff of its powers of eminent domain.

The facts support the conclusion that the public interest were not being pursued instead this is all for one person's benefit. Despite the Town's attempt to disguise the purpose with all

the right catch phrases in its Resolution and lawsuit, the real facts are the history that led up to the decision.

Unlike the facts in *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988), which upheld the use of eminent domain, there is no evidence before this court that the Town of Apex ever had any plans to extend sewer service to Arcadia East before Zadell's request. This is evident by the requirement to pay 100% for the costs of the condemnation. There is also no dispute that several years prior to March 2015, the Town had already built and installed a sewer main to the south of the subject properties which was to serve these properties as they eventually developed by tying into the sewer to the south of Arcadia East.

The facts of this case align most closely with those in *Highway Com. v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965). While the facts in *Batts* dealt with a road, the critical similarity is that the road to be built was instigated by the written request of Mr. and Mrs. Batts. *Id.*, at 136-137. The road project was to benefit only a small number of individuals. The Court of Appeals held that the actions were for a private purpose and rejected the condemnation.

Just like in *Batts*, the request for the sewer arose from the *private interests of private individuals*, and not from any expansion of the Town's infrastructure or public need. The Town only took action because of the repeated requests of one person to serve one person's interests. There is absolutely no evidence that without the requests of Zadell that the Town ever would have condemned an easement across Ms. Rubin's property. There is no distinction between the analysis in *Batts* and this case. This Court should follow the decision in *Batts* and give Ms. Rubin her property back.

Should this Court find some public benefit that requires the court to then determine whether the paramount reason for the taking is for the public's interest or the private interest are paramount. *Highway Comm v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

[T]he exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not of itself warrant the exercise of a power . . . The controlling question is whether the paramount reason for the taking of land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether, on the other hand, the private interests are paramount and controlling and the public interests merely incidental."

Id.

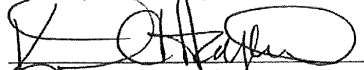
The home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids.

State Highway Commission v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967).

Beverly Rubin respectfully asks this court to conclude that Plaintiff's action in taking her property is null and void and that Plaintiff's claims be dismissed

This the 1 day of August, 2016.

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

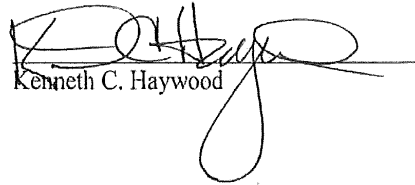


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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Hearing Brief upon the parties by hand delivery.

This 1 day of August, 2016.


Kenneth C. Haywood

6. In the development of property for residential uses, the owner can install septic systems or if available, use a municipality's sewer lines. For example, the Rubin property has a septic system. It is common for houses in this part of Wake County to be on septic systems.

7. It is my understanding that at the time the rezoning application was filed there was an existing sewer line proximate to the rear of Ms. Rubin's property and the Aspnes/Ball property.

8. During the rezoning application process with the Town of Apex, I was informed and understood that if the developer wished to connect to the sewer system already in place to the rear of the Aspnes/Ball property, it would need to obtain a sewer easement across the Aspnes/Ball property.

9. Upon approval of the governing municipality, private companies that create single family lots have the option of tying into the existing sewer line if their property is adjacent to a sewer line or they can obtain easements to an existing sewer line if they elect not to use septic systems.

10. In the event a sewer easement could not have been obtained across the Aspnes/Ball property then the company had a second option to obtain sewer service.

11. The parcel to the west of the Rubin tract extended to the existing sewer line ("Arcadia West"). There was common ownership of the parcels to the east and west of the Rubin property.

12. A pump station could have been built on the Arcadia East site that did not have direct access to a sewer line to pump effluent from its site along the right of way line of Olive Chapel Road to the Arcadia West site that did have access to the sewer line.

13. Sewer lines are often in the right of way of roads maintained by the State or by a Town and pump stations are a device to channel the effluent through the lines in the right of way.

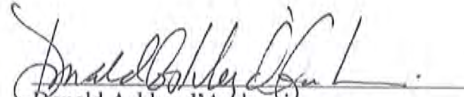
14. Instead of the two options mentioned that would cause no harm to Ms. Rubin, the private companies who own the land on either side of Ms. Rubin's property connected a sewer line under Ms. Rubin's property near her house in order to be able to avoid the use of a pump station or obtain the easement from Aspnes and Ball.

15. The decision to not use a pump station is a cost saving measure to the companies since it would be cheaper to install a sewer line across Ms. Rubin's property instead of installing a pump station near the right-of-way of Olive Chapel Road and running a sewer line in the right-of-way.

16. As a result of the sewer easement across Ms. Rubin's property it has limited the use of her property for any expansion.

17. From a land planning standpoint, the location of the sewer easement across the middle of Ms. Rubin's property cutting the front half from the rear half will create significant development challenges should Ms. Rubin or a subsequent owner choose to subdivide her property in the future.

Further the Affiant sayeth not this the 29 day of July, 2016.



Donald Ashley d'Ambrosi

STATE OF North Carolina

COUNTY OF WAKE

Sworn to and subscribed before me this day by Donald Ashley d'Ambrosi.

Date: 7/29/2016


(Official Signature of Notary)

Kenneth C Haywood
(Notary's Printed or typed name)

(Official Seal)



My Commission Expires: 11-27-2016

N.C. Gen. Stat. § 136-108

Current through Session Laws 2016-3, 2016 2nd Extra Session.

General Statutes of North Carolina > CHAPTER 136. TRANSPORTATION > ARTICLE 9.
CONDEMNATION

§ 136-108. Determination of issues other than damages

After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

History

1959, c. 1025, s. 2; 1963, c. 1156, s. 5; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.

General Statutes of North Carolina

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Neutral
As of: July 31, 2016 4:25 PM EDT

Town of Matthews v. Wright

Court of Appeals of North Carolina

January 20, 2015, Heard in the Court of Appeals; April 21, 2015, Filed

No. COA14-943

Reporter

771 S.E.2d 328; 2015 N.C. App. LEXIS 320

TOWN OF MATTHEWS, a North Carolina municipal corporation, Plaintiff, v. LESTER E. **WRIGHT** and wife, VIRGINIA J. **WRIGHT**, Defendants.

Prior History: **[**1]** Mecklenburg County, No. 13 CVS 9071.

Town of Matthews v. Wright, 214 N.C. App. 563, 714 S.E.2d 867, 2011 N.C. App. LEXIS 1835 (2011)

Disposition: AFFIRMED.

Core Terms

condemnation, street, public use, public street, trial court, neighbors, condemnation action, dedicated, public benefit, easement, email, minutes, opening, implied dedication, eminent domain, block, novo

Case Summary

Overview

HOLDINGS: [1]-Appellant town's condemnation action was properly dismissed because appellees property owners showed the action served no public benefit, under N.C. Gen. Stat. § 40A-3(b)(1) (2014), as the action would not "open" a street, since the street had not been closed, as access to it was never blocked, and other portions of the street were not public, especially when the property was at the end of a dead-end street, condemnation

would not provide neighbors' access to their land, utility service provider access, fire fighters' access to water, or general community interconnectedness, and the evidence showed the town was motivated by considerations irrelevant to the public benefit.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Transportation Law > Bridges & Roads > Private Roads

Transportation Law > Bridges & Roads > Dedication

Transportation Law > Bridges & Roads > Prescription

Transportation Law > Bridges & Roads > Condemnation

HN1 A private street or right-of-way may only become a public street by one of three methods: (1) in regular proceedings before a proper tribunal; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > State Condemnations

HN2 See N.C. Gen. Stat. § 40A-47 (2014).

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN3 N.C. Gen. Stat. § 7A-27 (2014) provides for an appeal of right to the North Carolina Court of Appeals from any final judgment of a superior court.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > State Condemnations

Constitutional Law > Bill of
Rights > Fundamental Rights > Eminent Domain
& Takings

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > Appeals > Standards of
Review > Questions of Fact & Law

HN4 De novo review is appropriate when reviewing decisions of a trial court on all issues other than damages in eminent domain cases. An appellate court reviews eminent domain issues de novo because of the well-settled principle that de novo review is required where constitutional rights are implicated. Both the United States and North Carolina Constitutions provide that citizens shall not be deprived of their property without due process of law. U.S. Const. amend XIV, § 1; N.C. Const. art. I, § 19. Constitutional rights are necessarily implicated in eminent domain cases because they involve a taking of private property.

Civil Procedure > Appeals > Standards of
Review > De Novo Review

HN5 Under a de novo review, an appellate court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Transportation Law > Bridges &
Roads > Condemnation

Governments > Local Governments > Duties &
Powers

HN6 N.C. Gen. Stat. § 40A-3(b) (2014) gives municipalities the power of eminent domain.

The statute allows municipalities to acquire by purchase, gift, or condemnation any property as long as the acquisition is for the public use or benefit and fulfills one of the statute's enumerated purposes. N.C. Gen. Stat. § 40A-3(b)(1) (2014) allows public condemnors to condemn land for the purpose of opening, widening, extending, or improving roads, streets, alleys, and sidewalks.

Governments > Local Governments > Duties &
Powers

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Burden Shifting

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > State Condemnations

HN7 A determination of whether a condemnor's intended use of land is for "the public use or benefit" is a question of law for the courts. If a municipality's condemnation action purports to serve one of the statutorily enumerated purposes for public condemnation, then the burden shifts to the property owner to refute the municipality's showing of a "public use or benefit." N.C. Gen. Stat. § 40A-3(b) (2014).

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

HN8 Two tests are used to determine whether a condemnation is for the public use or benefit: The first approach—the public use test—asks whether the public has a right to a definite use of the condemned property. The second approach—the public benefit test—asks whether some benefit accrues to the public as a result of the desired condemnation. North Carolina courts have held that a condemnation must satisfy both the "public use" and the "public benefit" test. Under the "public use" test, the dispositive determination is whether the general public has a right to a definite use of the property sought to be condemned. It is

the public's right to use, not the public's actual use, that is the key factor in making the "public use" determination. Under the "public benefit" test, the dispositive determination is whether some benefit accrues to the public as a result of the desired condemnation. However, not just any benefit to the general public will suffice under this test. Rather, the taking must furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power.

Administrative Law > Agency
Adjudication > Decisions > General Overview

Administrative Law > Agency
Adjudication > Review of Initial Decisions

Governments > State & Territorial
Governments > Legislatures

HN9 Four types of evidence can show an improper motive was employed by a legislative or administrative decision: (1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; and (4) the legislative or administrative history, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Counsel: Benjamin R. Sullivan, Parker Poe Adams & Bernstein, for plaintiff-appellant.

Peter J. Juran, for defendant-appellees.

Judges: HUNTER, JR., Robert N., Judge.
Judges BRYANT and STROUD concur.

Opinion by: HUNTER, JR., Robert N.

Opinion

[*329] Appeal by Plaintiff from judgment entered on 11 March 2014 by Judge F. Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals on 20

January 2015.

HUNTER, JR., Robert N., Judge.

The Town of Matthews appeals from a judgment dismissing its condemnation claim taking the road fronting Lester and Virginia Wright's home. The Town contends the trial court misapplied the "public use or benefit" test set forth in N.C. Gen. Stat. § 40A-3(b). We affirm the dismissal.

I. Factual & Procedural History

The Wrights own a home in a subdivision in Matthews. Their 1984 warranty deed contains a thirty-foot street easement known as "Home Place" which extends the full length of the North side and a part of the East side of their lot. One end of the street is a dead end. The Wrights' lot is near the dead end. At the other end of the street is an outlet which all landowners use to connect to Reveredy Lane. The Wrights and five other landowners have built homes along Home Place.

Who Owns Home Place?

A. Wright v. Town of Matthews ("Wright I"), 177 N.C. App. 1, 627 S.E.2d 650 (2006).

In 2004, the Wrights challenged the Town's Zoning Board of Adjustment's ("Zoning Board") determination that Home Place was a public street. The Zoning Board's 2004 decision was based upon a 1985 resolution declaring Home Place to be a public street, and the fact that in 1991 the town paved the street. The Wrights appealed by petition for writ of certiorari the determination to the superior court, which affirmed the decision of the Board. The Wrights appealed to this Court.

On 4 April 2006, in Wright I, this Court held that "the findings made by the Board and the trial court do not support the conclusion that Home Place is a public street." Wright I, 177 N.C. App. at 16, 627 S.E.2d at 661. **HN1** A private street or right-of-way may only become a public street by one of three methods: "(1) in regular proceedings before a proper tribunal . .

. ; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale." *Id. at 10, 627 S.E.2d at 658*. This Court held that there was no evidence that Home Place was adjudicated a public street through a condemnation proceeding or before a proper tribunal. *Id. at 10—11, 627 S.E.2d at 658*. Additionally, there was no evidence that Home Place was ever the subject of [**3] a gift or sale by the property owners. *Id. at 11, 627 S.E.2d at 658*. Therefore, "Home Place could only have become a public street by way of dedication or prescription." *Id.* Because the Town had not maintained Home Place for the requisite twenty-year time period to establish prescription, we held that the only way Home Place could have become a public street would be through prior dedication—either express or implied. *Id. at 15, 627 S.E.2d at 661*. We reversed the order of the trial court, and remanded for "further findings detailing whether or not Home Place became a public street by means of implied dedication." *Id. at 14, 627 S.E.2d at 661*.

Based on the decision of this Court in *Wright I*, the trial court vacated its order, and remanded the case back to the Zoning Board. *Town of Matthews v. Wright*, 194 N.C. App. 552, 553, 669 S.E.2d 841, 842 (2008). At a subsequent hearing on 10 August 2006, the Zoning Board determined "the issue of Implied Dedication was no longer an issue." *Id.*

[*330] *B. Town of Matthews v. Wright ("Wright II")*, 194 N.C. App. 552, 669 S.E.2d 841 (2008).

On 9 October 2006, without notice to the *Wrights*, the Town Board of Commissioners ("the Board") adopted a "Resolution Adding Streets To The Matthews Street System (NUNC PRO TUNC¹ [25 March 1985])." *Id. at*

554, 669 S.E.2d at 842. This resolution purportedly transformed Home Place into a "public street" retroactively, effective as of 1985. *Id.*

On 19 April 2007, the Town filed a complaint alleging the *Wrights* had erected two signs and a fence on a public street. *Id. at 553, 669 S.E.2d at 841*. The complaint alleged the Town ordered the *Wrights* to remove the obstructions within twenty days and they failed to comply. *Id.* The *Wrights* counterclaimed alleging trespass and raised, *inter alia*, the defense of *res judicata*. *Id. at 553, 669 S.E.2d at 841—42*. The trial court granted summary judgment in favor of the *Wrights*, finding that "Home Place is a private road," and dismissing the Town's complaint. *Id. at 554, 669 S.E.2d at 842*. The Town appealed that decision of the trial court to this Court, arguing that the *nunc pro tunc* resolution by the Board precluded the trial court's finding that Home Place is a private street. *Id. at 555, 669 S.E.2d at 843*.

In *Wright II*, this Court invalidated the Board's *nunc pro tunc* resolution. *Id. at 556, 669 S.E.2d at 843*. However, we declined to agree with the trial court's finding that "Home Place is a private road" without the requisite findings which we ordered in *Wright I*. *Id.* Therefore, in *Wright II*, we again reversed the trial [**5] court and remanded the matter for further findings to determine if Home Place was impliedly dedicated as a public street. *Id. at 556, 669 S.E.2d at 844*.

C. Town of Matthews v. Wright ("Wright III"), 214 N.C. App. 563, 714 S.E.2d 867, 2011 WL 3570212 (2011) (unpublished).

On remand, a hearing was held on 21 July 2010. *Wright III*, 214 N.C. App. 563, 714 S.E.2d 867, [WL] at *3. On 4 August 2010, the trial court issued an order with the following findings:

11. This Court finds that on March 25, 1985, at a duly constituted regular meeting of the *Town of Matthews* Board of Commissioners that a resolution adding

¹ *Nunc pro [**4] tunc* is "[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done." Black's Law Dictionary 1069 (6th ed. 1990).

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streets to the Town of Matthews street system was passed by the Board and that this resolution included Home Place.

....

14. At no time subsequent to 1985, did the Defendants bring an action for inverse condemnation or refuse services provided by the Town of Matthews with respect to the upkeep and maintenance of Home Place and, as a fact, Home Place is a public street and has been such since [a] regularly constituted proceeding before a proper tribunal in March 1985.

214 N.C. App. 563, 714 S.E.2d 867, [WL] at *4. The Wrights appealed that order. 214 N.C. App. 563, 714 S.E.2d 867, [WL] at *1. For a third time, on 16 August 2011, this Court reversed the decision of the trial court and remanded for findings on implied dedication in accordance with Wright I and Wright II. 214 N.C. App. 563, 714 S.E.2d 867, [WL] at *4. In Wright III, we agreed with the Wrights' assertion that "[the **6] Town] has twice now ignored the directive of the Court[.]" 214 N.C. App. 563, 714 S.E.2d 867, [WL] at *3, and we noted that despite our holdings in Wright I and Wright II, "no findings of fact were made as to whether Home Place was impliedly dedicated as a public street." *Id.*

On remand, on 17 September 2012, the issue of implied dedication was heard by a bench trial before Judge Beverly T. Beal. On 30 November 2012, the trial court issued a judgment ("the Beal judgment"), deciding the Wrights' interest in Home Place was a private right of way and not a public street. The trial court made the following relevant conclusions of law:

9. The language used in the deeds of conveyance constituting the Defendants' chain of title, in all of the variations, did not except from the land described as conveyed the portion contained within Home Place; rather, it only excepted from

the description a *right of way* for the street. The particular language used in each instance [***331**] does not imply the owner's intent to offer a dedication of the street to any governmental entity at the time of the conveyances.

....

11. There was no intent to dedicate Home Place as a public street, either real or apparent. There was no implied dedication of Home Place [****7**] as a public street.

After finding that the Wrights' easement had never been dedicated to the Town, the trial court dismissed the Town's cause of action against the Wrights.

The Beal judgment analyzed *only* the Wrights' easement in Home Place by examining their chain of title. The Beal judgment did not reference any of the Wrights' neighbors' chains of title. At oral argument, counsel for the parties stated that one landowner has granted the Town an easement to his portion of Home Place, but admitted that the legal status of the four other neighbors' easements has not been established.

D. Current Litigation

During the months following the issuance of the Beal judgment and leading up to the Town's filing of the present condemnation action, the Wrights constructed a fence on their property—bordering Home Place but not blocking its access. The evidence shows that the Wrights have never erected any structure that would prevent access to Home Place.

Nevertheless, the Wrights' neighbors expressed concerns to Town of Matthews Mayor Jim Taylor ("Mayor Taylor"), and to the Town Commissioners, that the Wrights might eventually block access to Home Place. In the spring of 2013, the Board held meetings [****8**] to discuss the possibility of condemning the Wrights' portion of Home Place. The minutes of those meetings, as well as emails between the Wrights' neighbors, Mayor Taylor, and the

Town Commissioners shed light on the decision-making process that led to the present condemnation action.

On 11 February 2013, the Board held a closed meeting during which the condemnation action was discussed. The meeting minutes reveal a desire by the Board to "permanently close the issue" of the Wrights' ownership of their easement in Home Place. The minutes also reveal that the Board members disagreed as to whether condemnation of the Wrights' property was appropriate. Commissioner Miller indicated that "it should be up to the neighbors to come to the Town with their concerns rather than having the Town step in before something actually happens."

Immediately following the 11 February 2013 closed Board meeting, Mayor Taylor emailed the Wrights' neighbors and others, encouraging them to "voice [their] concerns" about the Wrights' to the Board. Mayor Taylor's email said "[t]his might help swing some members of council to see the need to act sooner rather than waiting for the Wrights' to actually block the street or [*9] do something else that could limit access to emergency traffic if it was needed." Mayor Taylor indicated that he was "sending this from [his] personal email and not [his] town email in order to protect the privacy of [the] communication."

On 27 February 2013, Commissioner Moore stated in an email to one of the Wrights' neighbors that she is "a very good friend" of neighbor Paul Jamison,² and that she "fully support[s] moving forward with whatever action the Town must take to ensure . . . access, security, and safety — before anything happens." On the same day, Commissioner Gulley sent an email to another one of the Wrights' neighbors, indicating that she "personally believe[s] that we should 'take' the street now but not all council members agree. This has gone on much too long."

²Mr. Jamison owns property near but not abutting Home Place.

During the next public Board meeting, on 11 March 2013, Marty Kelso, one of the Wrights' neighbors, spoke during the public comment portion of the meeting, asking for "the Board's assistance in ensuring that Home Place remains a public street owned by the Town of Matthews." George Young also spoke at the meeting in support of the Wrights'. He stated "the taxpayers should [*10] [not] be paying any more money for litigation [*332] to deal with Home Place. Any additional litigation should be between the parcels involved and the Town should stay out of it."

Nevertheless, on 25 March 2013, the Board discussed the condemnation in closed session and decided to "move forward with [the] condemnation action and place it on the agenda for discussion in the public meeting on April 8, 2013." During the 8 April 2013 public session, the Board, at the urging of Mayor Taylor,³ unanimously approved a resolution stating the Town's intent to condemn the Wrights' property.

On 17 May 2013, the Town filed a complaint pursuant to N.C. Gen. Stat. § 40A, giving notice of the Town's intent to condemn a portion of the Wrights' land through eminent domain. The complaint included a description of the land to be condemned:

Being a portion of the Lester and Virginia Wright property as recorded in said Deed Book 4850 . . . : BEGINNING [*11] at a point at or near the centerline of a roadway designated as Home Place. The aforesaid point of beginning being the northwesterly corner of the Lester E. Wright and Virginia J. Wright property as recorded in Book 4850 . . . containing 20,071 sq. ft. (0.461 acres) more or less.

The complaint also stated the purpose of the condemnation: "for the opening, widening,

³The meeting minutes describe Mayor Taylor's statement to the Board as follows: "Minutes or hours, even seconds, can be the difference between life and death and he doesn't want anything like that to occur and have the Board look back and say it could have done something to prevent a tragedy."

extending, or improving roads, streets, alleys, and sidewalks and more particularly described as Home Place." The Town estimated that the just compensation value of the property to be condemned was \$1,500. The Town has not moved to condemn any portion of Home Place other than that portion which lies in front of the Wrights' property.

In the Wrights' response, they asserted numerous affirmative defenses including, *inter alia*, the defenses that the Town's condemnation serves no public use or benefit, inadequate compensation, and unclean hands.

On 21 January 2014, Judge F. Donald Bridges reviewed the condemnation action pursuant to N.C. Gen. Stat. § 40A-47, which provides that

HN2 [t]he judge, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, hear and determine any and all issues raised by the pleadings other **[**12]** than the issue of compensation, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 40A-47 (2014). Upon agreement between the parties, the trial court issued a judgment on this matter without further hearing, based on affidavits submitted by the parties. In its judgment, signed on 11 March 2014, the trial court made the following relevant finding of fact:

9. Given [the] factual context, I conclude that the action of the Plaintiff's Board of Commissioners on April 8, 2013 is simply an attempt to accomplish, through other means, what was originally intended by its actions on March 25, 1985, February 5, 2004, and October 9, 2006, rather than constituting a taking of property for some recently realized new need for a public purpose or benefit.

The trial court made the following relevant conclusions of law:

4. When the proposed taking of property is "for the opening, widening, extending or improving roads, streets, alleys and sidewalks . . ." such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private property cannot be considered **[**13]** in a vacuum and without regard to its factual history.

5. [T]he Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply reiterating its previous position, without any plans whatsoever for construction, improvements or alterations to the property being taken.

[*333] 6. Based upon the evidence before the Court, the Court finds that Plaintiff's purported taking is an arbitrary and capricious exercise by the Plaintiff of its powers of eminent domain.

The trial court concluded "[t]he Plaintiff's claim to the Wrights' Property by Eminent Domain is null and void." The Town filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to **HN3** N.C. Gen. Stat. § 7A-27 (2014), which provides for an appeal of right to the Court of Appeals from any final judgment of a superior court.

III. Standard of Review

Our Supreme Court has held **HN4** *de novo* review is appropriate when reviewing decisions of the trial court on all issues other than damages in eminent domain cases. See Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001). We review eminent domain issues *de novo* because of the well-settled principle that *de novo* review is required where constitutional rights are implicated. See **[**14]** *id.* Both the United States and North Carolina Constitutions

provide that citizens shall not be deprived of their property without due process of law. See U.S. Const. amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); N.C. Const. art. I, § 19 ("No person shall be . . . deprived of his . . . property, but by the law of the land."). Constitutional rights are necessarily implicated in eminent domain cases because they involve a taking of private property. Thus, we review the trial court's judgment in this case de novo. **HN5** "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." State v. Williams, 362 N.C. 628, 632—33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

IV. Analysis

HN6 N.C. Gen. Stat. § 40A-3(b) gives municipalities the power of eminent domain. The statute allows municipalities to "acquire by purchase, gift, or condemnation any property" as long as the acquisition is "[f]or the public use or benefit," and fulfills one of the statute's enumerated purposes. N.C. Gen. Stat. § 40A-3(b) (2014). Section (1) of the statute allows public condemnors to condemn land for the purpose of "[o]pening, widening, extending, or improving roads, streets, alleys, and sidewalks." N.C. Gen. Stat. § 40A-3(b)(1). For the following reasons, we hold that the **Wrights** Town's condemnation action against the **Wrights** should be dismissed as serving no public use or benefit, in violation of N.C. Gen. Stat. § 40A-3.

HN7 "[T]he determination of whether the condemnor's intended use of the land is for 'the public use or benefit' is a question of law for the courts." Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 429, 364 S.E.2d 399, 401 (1988). If a municipality's condemnation action purports to serve one of the statutorily enumerated purposes for public condemnation, then the burden shifts to the property owner to refute the municipality's showing of a "public use or benefit." See City of Burlington v. Isley Place Condominium

Ass'n, 105 N.C. App. 713, 714—15, 414 S.E.2d 385, 386 (1992); see also N.C. Gen. Stat. § 40A-3(b) (2014). Because the Town's condemnation action purports to be for the purpose of "opening" Home Place in accordance with section (1) of the statute, the burden is on the **Wrights** to show that the condemnation serves no public use or benefit.

HN8 Our Supreme Court uses two tests to determine whether a condemnation is for the public use or benefit: "The first approach—the public use test—asks whether the public has a right to a definite use of the condemned property. The second approach—the public benefit test—asks whether some benefit accrues to the public as a result of the desired condemnation." *Id.* at 430, 364 S.E.2d at 401 (internal citations omitted). North Carolina courts have held that a condemnation must **[**16]** satisfy both the "public use" and the "public benefit" test. See *id.* at 432, 364 S.E.2d at 402. Under the "public use" test, the dispositive determination is "whether the general public has a right to a definite use of the property sought to be condemned." *Id.* at 430, 364 S.E.2d at **[**334]** 401. It is the "public's right to use, not the public's actual use" that is the key factor in making the "public use" determination. *Id.* Under the "public benefit" test, the dispositive determination is "whether some benefit accrues to the public as a result of the desired condemnation." *Id.* However, "not just any benefit to the general public will suffice under this test. Rather, the taking must furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power." *Id.* at 432, 364 S.E.2d at 402 (citation and quotation marks omitted).

Here, the **Wrights** have met their burden of showing that no public use or benefit is achieved from this condemnation of their property. The **Wrights** have shown that the condemnation fails the "public benefit" test. We reject the Town's consistent characterization that this condemnation will "open" Home Place for public benefits. The predicate to "opening" Home Place is that it must have previously

been [**17] "closed" in some way. We see two ways in which Home Place could have been "closed": (1) if the Wrights blocked access to Home Place by placing a barricade on their property, or (2) if the entire street was public except for the Wrights' thirty-foot private portion of the street. The evidence presented here supports neither circumstance. Instead, the evidence shows that the Wrights have never blocked access to Home Place. Furthermore, although the Wrights' portion of Home Place is private land, with a right of way to the public for ingress and egress, most of the other landowners' portions of Home Place have never been dedicated to the Town. It defies reason that the Town would need to condemn only the Wrights' portion of Home Place in order to "open" the street.

The Town asserts that the condemnation serves the following public benefits: (1) neighbors' access to their land, (2) utility service provider access, (3) fire fighters' access to water, and (4) general community interconnectedness. Condemnation of the Wrights' portion of Home Place furthers none of these goals. Rather, condemnation of the Wrights' portion of Home Place would only allow for those public benefits on the Wrights' [**18] portion of Home Place, which is at a dead end and landlocked by other individuals' portions of Home Place. Most of the other portions of Home Place have neither been dedicated to the Town as public land nor condemned by the Town. Thus, opening the Wrights' thirty-foot portion of Home Place to the public through condemnation will have no effect on the present ability of fire fighters or utility providers to access Home Place as a whole. Similarly, community interconnectedness is not served by opening a small portion of a larger, dead-end street. Finally, regardless of the result in this condemnation case, the Wrights' neighbors will retain the right to access their properties through the easement in the Wrights' deed. Because the Wrights have shown that the condemnation fails the "public benefit" test, we do not address whether the condemnation satisfies the "public use" test.

The sequence of events leading up to the condemnation bolsters our conclusion that no public use or benefit is served by the condemnation. The evidence shows that the Town was motivated by considerations irrelevant to the public benefit.⁴ The evidence shows that Mayor Taylor and some of the Commissioners considered [**19] personal conflicts between the Town and the Wrights in making the decision to condemn—rather than considering the public use or benefit of the condemnation.

We need not reach the issue of whether the Town's decision to condemn was arbitrary or capricious because the Wrights have met their burden of showing that the Town's condemnation action does not serve the public use or benefit. Therefore, the Town's condemnation action should be dismissed.

[*335] V. Conclusion

For the reasons stated above, the judgment of the trial court dismissing the Town's condemnation action is affirmed.

AFFIRMED.

Judges BRYANT and STROUD concur.

⁴ In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, the United States Supreme Court listed *HN9* four types of evidence that can show an improper motive was employed by a legislative or administrative decision: "(1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; and (4) the legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).*

Caution
As of: July 31, 2016 1:06 PM EDT

State Highway Com. v. Batts

Supreme Court of North Carolina

September 29, 1965, Filed

No Number in Original

Reporter

265 N.C. 346; 144 S.E.2d 126; 1965 N.C. LEXIS 986

STATE HIGHWAY COMMISSION v. J. B. BATTS and Wife, BETTY JOYNER BATTS

Prior History: [***1] Appeal by defendants from *Bone, E. J.*, January Special Session 1964 of Nash. Docketed and argued as Case No. 254, Fall Term 1964, and docketed as Case No. 288, Spring Term 1965.

The State Highway Commission, pursuant to the provisions of *G.S. 136-103, et seq.*, and pursuant to a resolution of said commission duly passed, instituted a civil action to condemn and take for public use an estate or interest in lands owned by defendants, beginning on the point of intersection of the common property line of Lovie Anne Joyner and J. B. Batts and wife with the southern right of way boundary of secondary Road 1717, and running thence in a southeasterly direction, approximately 3,316 feet to a point in the property of J. M. Batts, for the purpose of constructing and maintaining a highway known as Project 5.322, Nash County. The action was commenced by the issuance of a summons, the filing of a complaint, the declaration of a taking, and the deposit of estimated compensation. The declaration of taking states that the interest or estate taken is "Easements, in perpetuity, for right of way for all purposes for which the plaintiff is authorized by law to subject the same." An identical [***2] action was commenced by the State Highway Commission against Lovie Anne Joyner. The pleadings in the Joyner case are not in the record.

Defendants filed an answer denying that the condemnation and taking was for a public purpose, and alleging that the condemnation and taking of their lands to construct and maintain a road 3,316 feet long ending in a *cul de sac* was for the sole use and private benefit of W. M. Batts and wife, and a few of their relatives, and praying that the court, after final hearing, permanently enjoin plaintiff from proceeding further with the condemnation proceeding, but if this relief be denied by the court, then that the defendants be awarded just compensation for their land taken. Defendants filed in their answer a cross-action asking that they recover \$ 75 for growing timber cut on their land prior to the issuance of the temporary injunction signed by Fountain, J.

Fountain, J., on motion of defendants, issued a restraining order enjoining plaintiff from constructing the proposed highway until a final hearing.

The action came on to be heard before Bone, E. J., at the January Special Session 1964 of Nash "for the purpose of determining whether or not [***3] the taking and acquisition of property of the defendants as set forth in the complaint and declaration of taking filed by the plaintiff, State Highway Commission, is for a public use." The attorneys for plaintiff and for defendants stipulated that the matter should be heard by Judge Bone without a jury and upon affidavits. The action of the *State Highway Commission v. Lovie Anne Joyner et al.* was consolidated with this case for the purpose of the hearing. Judge Bone, after hearing the affidavits offered by the plaintiff

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private property, projects, farm, public necessity, declaration, public road, convenience, minutes, vested, general public, public highway, final plan, incidental, excerpt

vested in the highway commission and that acts done in furtherance thereof were also unauthorized.

Case Summary

Procedural Posture

Defendant landowners sought review of a judgment from the Nash County Superior Court (North Carolina), which found in favor of plaintiff highway commission in its action to condemn and take for public use an estate or interest in lands owned by the landowners.

Overview

On appeal, the issue was whether the taking and condemnation of the landowners' property as set forth in the complaint and declaration of taking filed by the highway commission was for a public use for a state and county public highway, as contended by the highway commission, or was for the sole use and benefit of private individuals, as contended by the landowners. Upon review, the appellate court reversed the judgment of the trial court. There was nothing in the record to show that the construction and maintenance of the proposed road ending in a cul de sac on the private individuals' property was required by public necessity, convenience, or utility. The highway commission's declaration of taking and all the evidence in the record clearly showed that the construction the road ended in a cul de sac at a point in the private individuals' land and that when constructed the road would have been for the substantial and dominant use and benefit of the private individuals. Any use by, or any benefit for, the general public would have only been incidental and purely conjectural.

Outcome

The appellate court reversed the judgment of the trial court, and held that the construction of the road was beyond the scope of the authority

LexisNexis® Headnotes

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Real Property Law > Eminent Domain
Proceedings > Constitutional Limits &
Rights > General Overview

Real Property Law > Eminent Domain
Proceedings > Elements > Just Compensation

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

HN1 In the exercise of the sovereign power of eminent domain, private property can be taken only for a public use and upon the payment of just compensation. In any proceeding for condemnation under the sovereign power of eminent domain, what is a public use is a judicial question for ultimate decision by the court as a matter of law, reviewable upon appeal. The nature of a use, whether public or private, is ultimately a judicial question.

Governments > Local
Governments > Administrative Boards
Governments > Local Governments > Duties &
Powers
Governments > Public Improvements > General
Overview
Governments > Public Improvements > Bridges
& Roads
Governments > Public Lands > General
Overview
Governments > Public Lands > Forest Lands

Transportation Law > Bridges &
Roads > General Overview

HN2 N.C. Gen. Stat. § 136-45 provides: The general purpose of the laws creating the North

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and the affidavits offered by defendants, and the arguments of counsel, made the following Findings of Fact:

"1. That this action was instituted under the provisions of Article 9 of Chapter 136 of the General Statutes by the filing of a Complaint and Declaration of Taking, deposit of estimated compensation, and issuance of Summons which was duly served on the Defendants; that in said Complaint and Declaration of Taking, Plaintiff alleged that it is necessary to condemn and appropriate an interest or estate in property of Defendants for public use in the construction of Secondary Road 1768 under Project 5.322, Nash County; that Defendants filed Answer denying [***4] that said road was for public use for the reason that it was for the sole use and private benefit of Mr. and Mrs. W. M. Batts and a few of their relatives.

"2. That on June 6, 1963, and prior to the institution of this action, the State Highway Commission duly passed a resolution determining that it was necessary to appropriate an easement of right of way across the property of Defendants herein for public use in the construction of Project 5.322, Nash County.

"3. The investigation and consideration of the proposed road by the State Highway Commission prior to said resolution of June 6, 1963, was at the instigation of Mr. and Mrs. W. M. Batts, individuals owning property fronting on the proposed road.

"4. That on August 1, 1963, the State Highway Commission duly passed a resolution placing said proposed Secondary Road 1768 upon the North Carolina Secondary Roads System.

"5. That upon completion, said road will abut upon at least five different properties and will serve four dwellings; that said road will be open to the general public when completed and the public will have a legal right to use said road. That the

appropriation of Defendants' property is for the purpose of constructing [***5] a State maintained public road."

Based on his Findings of Fact, Judge Bone made one Conclusion of Law:

"1. That the appropriation of right of way by the Plaintiff as alleged in the Complaint across property of Defendants herein is for a public use, and the Plaintiff is entitled to maintain this action."

Based upon his findings of fact and his conclusion of law, Judge Bone entered Judgment denying defendants' prayer that the action be dismissed, and retaining the cause for the determination of all other issues raised by the pleadings, including the issue of just compensation. The learned judge further ordered that the temporary restraining order entered by Fountain, J., on 21 October 1963 is continued until the determination by the Supreme Court of the appeal taken from his judgment by defendants, on condition that defendants file with the court a suitable bond in the sum of five hundred dollars. Defendants J. B. Batts and wife filed the required bond.

From the judgment entered by Judge Bone, defendants J. B. Batts and wife and defendant Lovie Anne Joyner appealed to the Supreme Court. Counsel for the State Highway Commission and counsel for Lovie Anne Joyner stipulated [***6] that the determination by the Supreme Court of the appeal in the case of *State Highway Commission v. J. B. Batts and wife* would be determinative in the case of *State Highway Commission v. Lovie Anne Joyner* in the Nash County Superior Court.

Disposition: Reversed.

Core Terms

Highway, public use, condemnation, eminent domain, proposed road, construct, right of way, defendants', dwelling, cul de sac, appropriation, secondary road, right-of-way,

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Carolina State Highway Commission is that said Commission shall take over, establish, construct, and maintain a State-wide system of hard-surfaced and other dependable highways running to all county seats, and to all principal towns, State parks, and principal State institutions, and linking up with state highways of adjoining states and with national highways into national forest reserves by the most practical routes, with special view of development of agriculture, commercial and natural resources of the State. The Commission is vested with the power of general supervision over all matters relating to the construction of the State highways. N.C. Gen. Stat. § 136-18(1). All the other powers it possesses are incidental to the purpose for which it was created.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Governments > Public Improvements > Bridges
& Roads

Real Property Law > Eminent Domain
Proceedings > Constitutional Limits &
Rights > General Overview

Real Property Law > Eminent Domain
Proceedings > Elements > Just Compensation

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

Transportation Law > Bridges &
Roads > Condemnation

HN3 The North Carolina State Highway Commission as a State agency or instrumentality possesses the sovereign power of eminent domain, and by reason thereof can take private property for public use for highway purposes upon payment of just compensation. N.C. Gen. Stat. §§ 136-19, 136-103.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Governments > Public Improvements > Bridges
& Roads

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

Transportation Law > Bridges &
Roads > General Overview

Transportation Law > Bridges &
Roads > Condemnation

HN4 N.C. Gen. Stat. §§ 136-18(2), 136-45, vest in the North Carolina State Highway Commission broad discretionary powers in establishing, constructing, and maintaining highways as part of a State-wide system of hard-surfaced and other dependable highways, but the Commission has no power to condemn private property to construct a road for the private use of any person or group of persons, and if it does so, it is an arbitrary act and an abuse of the discretion vested in it.

Governments > Public Improvements > Bridges
& Roads

HN5 A cul de sac is defined as a way, street or alley open at one end only.

Governments > Public Improvements > Bridges
& Roads

Transportation Law > Bridges &
Roads > General Overview

HN6 The character of the place of beginning and ending of a proposed highway has a bearing on the question of its public necessity, utility, or convenience. If the proposed road neither begins nor ends at a pre-existing highway or other public place, it cannot as a rule be established as a highway, since in the nature of the case no public necessity exists for it, and if formally laid out it would not be of public utility or convenience; one terminus at least must be at a pre-existing highway or other public place. However, except where it is otherwise provided by statute, it is not requisite, in order to justify the establishment

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of a highway, that it should both begin and end at pre-existing highways or other public places, provided it is a public necessity, and, if laid out, will be of public utility and convenience; it is sufficient if one terminus is at an existing highway or other public place. Accordingly a cul de sac may be established as a highway, if public necessity, utility, or convenience requires, provided, in at least one jurisdiction, the terminus is at a place of necessary public resort.

Governments > Public Improvements > General Overview

Governments > Public Improvements > Bridges & Roads

Governments > State & Territorial
Governments > Boundaries

HN7 It has been held sufficient for the terminus of a public road to be located at a river, a creek, a lake, a church, a cemetery, a public school, a railroad station, a large manufacturing establishment, and intersecting points on two public roads. A road may properly terminate at the state line, although there is no highway connecting with it in the adjoining state, or at a county line, or at a town line, notwithstanding the persons in the adjoining town only will utilize it.

Governments > Public Improvements > Bridges & Roads

HN8 It is not essential that both termini of a highway connect with a public highway or a place of public resort, and a cul de sac may be a public highway, although, of course, it is not necessarily one.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Real Property Law > Eminent Domain
Proceedings > Constitutional Limits &
Rights > General Overview

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

HN9 "Public use," as applied in the exercise of the power of eminent domain, is not capable of a precise definition applicable to all situations. The term is elastic, and keeps pace with changing conditions, since the progressive demands of society and changing concepts of governmental duties and functions are constantly bringing new subjects forward as being for public use.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Environmental Law > Land Use &
Zoning > Eminent Domain Proceedings

Real Property Law > Eminent Domain
Proceedings > General Overview

Real Property Law > Eminent Domain
Proceedings > Constitutional Limits &
Rights > General Overview

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

Real Property Law > Inverse
Condemnation > General Overview

HN10 In the context of a taking by eminent domain, use by the general public as a universal test is recognized as inadequate. If public use is use by the public, eminent domain might be employed to secure sites for hotels and theaters, to which places in many states the public has by custom or statute the right of access without discrimination. If public use is synonymous with public advantage, or rather what the legislature might reasonably conceive to be the public advantage, not only might eminent domain be employed in behalf of all large industrial enterprises, but the size of farm holdings might be regulated to suit the prevailing economic theory of the time. Public use, as nearly as can be deduced from the generally accepted doctrines and decisions,

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may be defined as to include the following classes of takings: (1) Takings to enable the Government of the United States or of a state or subdivision thereof to carry on its public functions and to conserve the safety and health of the public whether or not the individual members of the public may make use of the property so taken. Public necessity alone justifies governmental taking of private property.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Real Property Law > Eminent Domain
Proceedings > Constitutional Limits &
Rights > General Overview

HN11 The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Governments > Public Improvements > Bridges
& Roads

Transportation Law > Bridges &
Roads > Condemnation

HN12 In taking over a road as a part of the highway system, the scenic value of such road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose.

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Governments > Public Improvements > Bridges
& Roads

Real Property Law > Eminent Domain
Proceedings > General Overview

Real Property Law > Eminent Domain
Proceedings > Constitutional Limits &
Rights > General Overview

Real Property Law > Eminent Domain
Proceedings > Elements > Public Use

Real Property Law > Eminent Domain
Proceedings > Procedures

Transportation Law > Bridges &
Roads > Condemnation

HN13 The existence of a public use is a prerequisite to the right of the North Carolina State Highway Commission to exercise the power of eminent domain to condemn private property, and final determination as to whether the proposed condemnation and taking of land by condemnation is for a public use is for judicial determination.

Governments > State & Territorial
Governments > Claims By & Against

HN14 An agency of the State is powerless to exceed the authority conferred upon it, and therefore cannot commit an actionable wrong.

Headnotes/Syllabus

Headnotes

1. Eminent Domain § 7a --

In proceedings to condemn an interest in lands, the court has the power to hear and determine whether the condemnation is for a public use and whether the Highway Commission is entitled to maintain the proceeding. G.S. 136-108.

2. Eminent Domain § 3 --

Private property can be taken under the power

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of eminent domain only for a public use, and what is a public use is a question of law for the trial court, reviewable on appeal.

3. Highways § 1 --

The North Carolina State Highway Commission is an agency of the State charged with the duty of establishing and maintaining a State-wide system of highways, and the Commission has such powers as have been delegated to it and those which are necessarily incidental to the purpose for which it was created, including the power of eminent domain, G.S. 136-18(1), G.S. 136-19, G.S. 136-103, but it does not have power to condemn [***7] private property to construct a road for the private use of any person or group of persons.

4. Eminent Domain § 3 --

"Public use" as related to the exercise of the power of eminent domain is not capable of precise definition applicable to all situations but must be construed with relation to the progressive demands and changing concept of governmental duties and functions, but, even so, it must be related to the carrying out of a public function and not the use by or for particular individuals or for the benefit of particular estates.

5. Eminent Domain § 3 -- Uncontradicted evidence held to show that the proposed road was not for a public use.

This proceeding by the State Highway Commission was instituted to condemn an interest in land to construct a road. The uncontradicted evidence was to the effect that the proposed road was to begin at the boundary of a secondary road and run some 3,316 feet and end in a *cul de sac*, and that it would abut five farm properties upon which there were three houses at the time the proceeding was initiated, a fourth house being

constructed thereafter and that the five farm properties were occupied by relatives by blood [***8] or marriage. *Held*: The evidence discloses that the proposed road was for the substantial and dominant benefit of a private landowner and a few of his relatives and not for a public use, and injunction will lie to enjoin the Highway Commission from proceeding further with such condemnation.

6. Eminent Domain § 7a --

In a proceeding by the State Highway Commission to condemn an interest in lands for a proposed road, an answer alleging that the road was not for a public use states a legal defense, and demurrer *ore tenus* to the answer is overruled.

7. Eminent Domain § 9 --

Where employees of the Highway Commission go upon land of a private owner and cut trees upon the right of way of a proposed road, and it is later judicially determined that the road was for a private use and that the Highway Commission had no power to condemn property for the road, the cutting of the trees amounts to an unauthorized trespass for which the Commission, as a State agency, cannot be held liable, since it had no authority to commit the trespass.

*Counsel: Attorney General T. W. Bruton, Assistant Attorney General Harrison Lewis, and Trial Attorney Claude W. Harris for the North [***9] Carolina State Highway Commission plaintiff appellee.*

Don Evans for defendant appellants.

Judges: Parker, J. Higgins, J., dissenting. Denny, C.J., and Sharp, J., join in the dissent.

Opinion by: PARKER

Opinion

[*350] [*129] Defendants first assign as error that Judge Bone erred in finding as a fact that on 6 June 1963 the State Highway Commission duly passed a resolution determining that it was necessary to appropriate an easement of right of way across the property of defendants herein for public use in the construction of Project 5.322, Nash County. Defendants' second assignment of error is that Judge Bone erred in his finding of fact No. 5 "That the appropriation of Defendants' property is for the purpose of constructing a State maintained public road." Defendants' third and last assignment of error, except a formal one to the judgment, is that Judge Bone erred in his conclusion of law "That the appropriation of right of way by the Plaintiff as alleged in the Complaint across property of Defendants herein is for a public use."

Plaintiff offered in evidence an excerpt from the minutes of the State Highway Commission meeting held in Raleigh, North Carolina, on 6 June 1963 [*10] with eleven members present. This excerpt from the minutes shows that the following resolution, the material parts of which are quoted here, was introduced by Commissioner Elliott, seconded by Commissioner Webb, and being put to a vote was unanimously carried:

[*351] "Whereas, right-of-way acquisition in accordance with the preliminary right-of-way plans on file in the Right-of-Way Department has heretofore been determined to be necessary and authorized by the Commission; and

* * *

"Whereas, the final plans for the following projects have been prepared and provide for the construction of the sections of highways embraced in said projects within the uniform parallel [*130] right-of-way widths as shown on the respective plans, *

* * and

"Whereas, upon the recommendations of the engineers of the Commission, the

Commission finds that such rights of way as shown on the final plans and hereinafter set out are necessary for the construction of said projects;

"Now, Therefore, Be and it is Hereby Resolved and Ordained that the rights of way for the location, construction, relocation and reconstruction of the sections of highways embraced in the following projects shall be [*11] as shown in detail on the final plans for said projects, as hereafter identified * * *."

Then follows a description of seven projects, and a description of the eighth project which is as follows:

"Project 5.322, Nash County: Grading, drainage and paving from the point of intersection of the common property line of Lovie Anne Joyner and J. B. Batts, et ux, with the southern right-of-way boundary of S.R. 1717, and running thence in a southeasterly direction, approximately 3,316 feet to a point in the property of J. M. Batts, with right of way as indicated upon the final plans for said project, the same being identified as Addendum 8 to the minutes of the June 6, 1963 State Highway Commission Meeting and are incorporated herein by reference."

After the eighth project follows a description of four more projects. Then the excerpt from the minutes ends with these words:


"Be it Further Resolved that the Right-of-Way Department is directed to acquire the hereinabove described rights of way, construction easements and control of access and such rights of way, construction easements and control of access as heretofore acquired by the Right-of-Way Department in [*12] conformance with said final plans is hereby ratified, and the Attorney General is requested to institute on behalf of the Commission proceedings to acquire rights of way, construction easements and control of access upon determination by

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the Chief Right-of-Way Engineer and the Attorney [*352] General that it is necessary that such proceedings be instituted to carry forward the right-of-way acquisition for said projects."

Plaintiff further offered in evidence an excerpt from the minutes of the State Highway Commission meeting held in Raleigh, North Carolina, on 1 August 1963 with seventeen members present. This excerpt from the minutes shows the following:

"Acting on the recommendation of Secondary Roads Director Roney, the following additions, deletions, and a correction to a previously approved addition, all pertaining to the Secondary Road System, were approved on a motion made by Commissioner Tate, seconded by Commissioner Elliott, and unanimously carried: "Additions:

 [Go to Table1](#)

Then follows a list of 77 Additions from many counties, and in this list the following: [***13]

 [Go to Table2](#)

[**131] Plaintiff also offered in evidence an affidavit of Donald Thomas Overman to this effect: He is now employed by the State Highway Commission as Safety and Emergency Planning Engineer, and that prior to 13 July 1963 he was District Engineer, Division 4, District 2, which embraces Nash County. He is familiar with Secondary Road 1768, Nash County, known locally as the Batts Road. Prior to 13 July 1963, and particularly on 6 June 1963, this road existed as an unimproved farm road. That said road as relocated and reconstructed by the State Highway Commission will serve at least five different property owners and four dwellings, and is on the State highway system, and when completed will be open to the general public.

Defendants' evidence shows these facts: Their land is between W. M. Batts' land and Secondary Road 1717. An old farm road

leads from Secondary Road 1717 across the lands of Lovie Anne Joyner to the lands of W. M. Batts and J. M. Batts, now occupied by Charlie Batts. This old farm road has never been closed due to weather conditions and has provided free access to the highway from W. M. Batts' and J. [***14] M. Batts' lands for over 60 years. The only people using this farm road are the people living back of J. B. Batts and Lovie Anne Joyner and people who go back there to call on them. The State Highway Commission seeks to condemn their land for the purpose of constructing a dead-end road over it for the sole use and private benefit of Mr. and Mrs. W. M. Batts and a few of their relatives. The action of [*353] the State Highway Commission was initiated by a letter of Mr. and Mrs. W. M. Batts. Mr. and Mrs. W. M. Batts were notified by the State Highway Commission that if they wanted the road they requested, they would be required to give the Commission a bond indemnifying them for whatever damages defendants and Lovie Anne Joyner might prove as a result of the condemnation, and that Mr. and Mrs. Batts did give the Commission such an indemnifying bond. That the State Highway Commission advised Mrs. W. M. Batts of the policy of the Commission requiring four dwellings fronting on the proposed road. At that time there were three dwellings fronting on the proposed road, to wit, Charles Batts, nephew of W. M. Batts, and his mother-in-law in one dwelling; C. O. Vick, Mrs. Batts' brother, [***15] in another dwelling; and Mr. and Mrs. W. M. Batts in the other dwelling. Thereafter, Charlie Batts built a shell house on the proposed road, and Mrs. W. M. Batts' daughter, Mrs. Phil Ellis, moved in with her family. Mrs. W. M. Batts sought the help of the Nash County Board of Commissioners, and on 8 June 1962 presented a written request for a proposed new road to said Board, purporting to be signed by all the property owners on the said road. However, two of the adjoining property owners, J. B. Batts and Lovie Anne Joyner had not signed it, and had not even been apprised of said written request. As a consequence of the written request, the Nash County Board of

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Commissioners on 8 June 1962 passed a resolution requesting the State Highway Commission to take the proposed road into the State secondary road system. This resolution was forwarded to the Commission. However, on 3 September 1963, when the Nash County Board of Commissioners discovered that all the property owners had not in fact signed the request, the Board passed another resolution rescinding their prior resolution of request, and so notified the State Highway Commission. The proposed road is only 3,316 feet long, and [***16] dead-ends at or near Charlie Batts' house. Back of Charlie Batts' property is Tar River. The only persons who would use the proposed road, other than Mr. and Mrs. W. M. Batts and their relatives, would be persons having business or social relations with them. That the following sketch marked Exhibit "X" shows the proposed road, the farm road through the property of Lovie Ann Joyner, and the lands of the various parties adjacent to the proposed road and the farm road.

[*354] [**132] [SEE EXHIBIT "X" IN ORIGINAL]

[*355] [**133] Judge Bone was empowered by the provisions of G.S. 136-108 to hear and determine the question specified in his judgment.

The basic question for decision is this: Whether the taking and condemnation of defendants' property as set forth in the complaint and declaration of taking filed by the State Highway Commission is for a public use for a State and county public highway, as contended by the Commission, or is for the sole use and benefit of W. M. Batts and wife and a few of their relatives, as contended by defendants.

HN1 In the exercise of the sovereign power of eminent domain, private property can be taken only for a public use and upon [***17] the payment of just compensation. Charlotte v. Heath, 226 N.C. 750, 40 S.E. 2d 600; Strong's N. C. Index, Vol. 2, Eminent Domain, § 3. In any proceeding for condemnation under the

sovereign power of eminent domain, it is settled by our decisions that what is a public use is a judicial question for ultimate decision by the court as a matter of law, reviewable upon appeal. Redevelopment Commission v. Hagins, 258 N.C. 220, 128 S.E. 2d 391; Charlotte v. Heath, *supra*; Highway Commission v. Young, 200 N.C. 603, 158 S.E. 91; Yarborough v. Park Commission, 196 N.C. 284, 145 S.E. 563. To the same effect, Rindge Co. v. Los Angeles County, 262 U.S. 700, 67 L. Ed. 1186, in which it is said: "The nature of a use, whether public or private, is ultimately a judicial question."

The State Highway Commission was created by the General Assembly, G.S. 136-1, as an unincorporated State agency or instrumentality, and is charged with the duty of exercising certain administrative and governmental functions for the purpose of constructing and maintaining State and county public roads. Smith v. Highway Commission, 257 N.C. 410, 126 S.E. 2d 87; Equipment Co. v. Hertz Corp., [***18] 256 N.C. 277, 123 S.E. 2d 802. **HN2** "The general purpose of the laws creating the State Highway Commission is that said Commission shall take over, establish, construct, and maintain a State-wide system of hard-surfaced and other dependable highways running to all county seats, and to all principal towns, State parks, and principal State institutions, and linking up with state highways of adjoining states and with national highways into national forest reserves by the most practical routes, with special view of development of agriculture, commercial and natural resources of the State * * *." G.S. 136-45. The Commission is vested with the power of "general supervision over all matters relating to the construction of the State highways * * *." G.S. 136-18(1). "All the other powers it possesses are incidental to the purpose for which it was created." DeBruhl v. Highway Commission, 245 N.C. 139, 95 S.E. 2d 553.

HN3 The State Highway Commission as a State agency or instrumentality possesses the sovereign power of eminent domain, and by reason thereof [*356] can take private

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property for public use for highway purposes upon payment of just compensation. G.S. 136-19, 136-103; Moore [***19] v. Clark, 235 N.C. 364, 70 S.E. 2d 182; Highway Commission v. Basket, 212 N.C. 221, 193 S.E. 16.

HN4 G.S. 136-18(2) and 136-45 vest in the State Highway Commission broad discretionary powers in establishing, constructing, and maintaining highways as part of a State-wide system of hard-surfaced and other dependable highways, but the State Highway Commission has no power to condemn private property to construct a road for the private use of any person or group of persons, and if it does so, it is an arbitrary act and an abuse of the discretion vested in it.

The State Highway Commission designates the road it proposes to construct in [**134] this case across the lands of defendants and Lovie Anne Joyner as Project 5.322, Nash County. In its declaration of taking, it thus describes Project 5.322, Nash County:

"Beginning on the point of intersection of the common property line of Lovie Anne Joyner and J. B. Batts *et ux* with the southern right of way boundary of Secondary Road 1717, and running thence in a southeasterly direction, approximately 3,316 ft. to a point in the property of J. M. Batts, end of project."

It is therefore indubitable that the road will end [***20] in a *cul de sac* on the property of J. M. Batts about 3,316 feet from Secondary Road 1717. **HN5** A *cul de sac* is defined as a way, street or alley open at one end only. Black's Law Dictionary, 4th Ed., p. 453; Ballentine's Law Dictionary, 2d Ed., p. 317; 25 C.J.S., p. 20.

This is said in 39 C.J.S., Highways, § 27, pp. 948-49:

HN6 "The character of the place of beginning and ending of a proposed highway has a bearing on the question of its public necessity, utility, or convenience.

If the proposed road neither begins nor ends at a pre-existing highway or other public place, it cannot as a rule be established as a highway, since in the nature of the case no public necessity exists for it, and if formally laid out it would not be of public utility or convenience; one terminus at least must be at a pre-existing highway or other public place. However, except where it is otherwise provided by statute, it is not requisite, in order to justify the establishment of a highway, that it should both begin and end at pre-existing highways or other public places, provided it is a public necessity, and, if laid out, will be of public utility and convenience; it is sufficient if one terminus [***21] is at an existing highway or other public place. Accordingly a *cul de sac* may be established as a highway, if public [*357] necessity, utility, or convenience requires, provided, in at least one jurisdiction, the terminus is at a place of necessary public resort.

HN7 "It has been held sufficient for the terminus of a public road to be located at a river, a creek, a lake, a church, a cemetery, a public school, a railroad station, a large manufacturing establishment, and intersecting points on two public roads. A road may properly terminate at the state line, although there is no highway connecting with it in the adjoining state, or at a county line, or at a town line, notwithstanding the persons in the adjoining town only will utilize it."

To the same effect, see Lewis on Eminent Domain, 3d Ed., Vol. I, pp. 512-13. See also Nichols on Eminent Domain, 3d Ed., p. 705, and 25 Am. Jur., Highways, § 5.

In 39 C.J.S., Highways, § 1, p. 916, it is said:

"According to the weight of authority, however, **HN8** it is not essential that both termini of a highway connect with a public highway or a place of public resort, and it is held that a *cul de sac* may be a public highway, [***22] although, of course, it is

not necessarily one."

In S. v. McDaniel, 53 N.C. 284, defendant was placed on trial on an indictment for obstructing a public highway. The jury found a special verdict. The trial court being of opinion defendant was not guilty upon the facts found in the special verdict gave judgment accordingly, and the State appealed. The Court, after discussing the facts found in the special verdict, citing authority, and stating "* * * we concur with the Superior Court in the judgment that the obstruction of it is not indictable," went on to use this language, which is *obiter dictum*: "From the finding of the jury, we suppose the road terminated at the church, and was, therefore, what is called in French phrase, a *cul de sac*. It is difficult to conceive of a highway a mile long [**135] and closed up at one end, for the public at large cannot be in use of it * * *." No authority is cited to sustain the *obiter dictum*. If it be construed to mean, which it apparently does, that a highway connecting at one end with a public highway and ending in a *cul de sac* cannot as a matter of law be a highway, we disapprove of it as being against the great [***23] weight of modern authority.

HN9 "Public use," as applied in the exercise of the power of eminent domain, is not capable of a precise definition applicable to all situations. The term is elastic, and keeps pace with changing conditions, since the progressive demands of society and changing concepts of governmental duties and functions are constantly bringing new subjects [*358] forward as being for "public use." Charlotte v. Heath, *supra*; 18 Am. Jur., Eminent Domain, § 36.

This is said in 18 Am. Jur., Eminent Domain, § 38:

HN10 "Use by the general public as a universal test is recognized as inadequate. If public use is use by the public, eminent domain might be employed to secure sites for hotels and theaters, to which places in many states the public has by custom or

statute [now perhaps in all states by reason of the recent federal Civil Rights Act] the right of access without discrimination. If public use is synonymous with public advantage, or rather what the legislature might reasonably conceive to be the public advantage, not only might eminent domain be employed in behalf of all large industrial enterprises, but the size of farm holdings might be regulated to suit [***24] the prevailing economic theory of the time. Public use, as nearly as can be deduced from the generally accepted doctrines and decisions, may be defined as to include the following classes of takings:

"(1) Takings to enable the Government of the United States or of a state or subdivision thereof to carry on its public functions and to conserve the safety and health of the public whether or not the individual members of the public may make use of the property so taken. Public necessity alone justifies governmental taking of private property."

In Charlotte v. Heath, *supra*, the Court said:

HN11 "The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common."

In Reed v. Highway Commission, 209 N.C. 648, 184 S.E. 513, the Court held that **HN12** in taking over a road as a part of the highway system, the scenic value of such road and its necessity as [***25] a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose.

In the case of Stratford v. City of Greensboro, 124 N.C. 127, 32 S.E. 394, a taxpayer,

resident of Greensboro, brought an action to restrain the city from borrowing money from Caesar Cone with which to open and make a new street, alleging that such activities by the city are not necessary and required for the public use of the city, but on the [*359] contrary they were to be made for the private use and benefit of Caesar Cone; that such benefits as might accrue to the city were only incidental. Caesar Cone was the owner of a large tract of land situate on the north and northeast of the city of Greensboro and lying partly within the corporate limits of the city. The plaintiff also sought to restrain the city from [*136] holding an election for authorization to borrow the money from Cone. The first issue submitted to the jury was framed on the view that in all cases where municipal authorities proceed to open and build new streets, having authority so to do in their charter or general law, such proceedings cannot be [***26] made the subject of judicial investigation except in cases of actual fraud. There was a verdict in favor of the defendants. The Supreme Court awarded a new trial. In its opinion the Court said: "In the case before us, the main question raised by the pleadings was whether the use, to which the new street and improvements were to be devoted, was a public use. It was not necessary on the part of the plaintiff to allege or prove actual fraud in the transaction. If the substantial benefit was for the defendant Cone as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void."

Judge Bone's 5th finding of fact in part is "that upon completion, said road will abut upon at least five different properties and will serve four dwellings." The uncontradicted evidence is that at the time Mr. and Mrs. W. M. Batts wrote their letter which initiated plaintiff's action here, 3 April 1961, there were three buildings fronting on the proposed road, to wit, Charlie Batts, nephew of W. M. Batts, and his mother-in-law in one dwelling, C. O. Vick, Mrs. Batts' brother, in another dwelling; and Mr. and Mrs. W. M. [***27] Batts in the other dwelling; and thereafter Charlie Batts built a shell house on

the proposed road, and Mrs. W. M. Batts' daughter, Mrs. Phil Ellis, moved in with her family. The uncontradicted evidence is that farming is done on the property of W. M. Batts, J. M. Batts, and Lovie Anne Joyner, and that no other business is done there by the present occupants.

Plaintiff's declaration of taking shows conclusively that the road it proposes to construct by condemning lands of defendants here and of Lovie Anne Joyner will begin with the southern right of way boundary of Secondary Road 1717, will run thence in a southeasterly direction about 3,316 feet, and end in a *cul de sac* at a point in the property of J. M. Batts. There is nothing in the record before us to show the proposed road will have any scenic value, or that it will end at any place used by the public. There is nothing in the record before us to show that the construction and maintenance of the proposed road ending in a *cul de sac* on the property of J. M. Batts is required by public necessity, [*360] convenience, or utility. Judge Bone found as a fact "that on August 1, 1963, the State Highway Commission duly [***28] passed a resolution placing said proposed Secondary Road 1768 upon the North Carolina Secondary Roads System." The State Highway Commission's resolution does not state it was for a public use, but we will assume that that may be implied from the wording of the resolution. That declaration by the State Highway Commission is entitled to great weight, but the State Highway Commission cannot by its mere *fiat* make a private use a public use. **HN13** The existence of a public use is a prerequisite to the right of the State Highway Commission to exercise the power of eminent domain to condemn private property, and final determination as to whether the proposed condemnation and taking of defendants' land by condemnation is for a public use is for judicial determination. The State Highway Commission's declaration of taking and all the evidence in the record clearly show that the construction of Project 5.322, Nash County, ends in a *cul de sac* at a point in the land of J. M. Batts and that when

265 N.C. 346, *360; 144 S.E.2d 126, **136; 1965 N.C. LEXIS 986, ***28

constructed Project 5.322, Nash County, would be for the substantial and dominant use and benefit of Mr. and Mrs. W. M. Batts and a few of their relatives; and that any use by, or any benefit for, [***29] the general public will be only incidental and purely conjectural; that it is not for a public use, and that no public necessity, convenience, or utility exists for the State Highway Commission to condemn defendants' and Lovie Anne Joyner's land, and that the building of the proposed road by plaintiff will be an [**137] abuse of the discretion vested in it to establish, construct, and maintain highways for public use, as part of a State-wide system of hard-surfaced and other dependable highways. Under such circumstances, the State Highway Commission cannot exercise its sovereign power of eminent domain. *Stratford v. City of Greensboro, supra*; *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 A. 785; *Minnesota Canal and Power Co. v. Koochiching Co.*, 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N.W. 405, 7 Ann. Cas. 1182; 18 Am. Jur., Eminent Domain, p. 671; Annot. 44 A.L.R., p. 737. To sustain the proposed condemnation and appropriation of defendants' lands under the facts and circumstances here would set a dangerous precedent for the expenditure of public funds by the State Highway Commission to condemn private property for the construction and maintenance [***30] of a road for private use.

Defendants have assigned as error this part of Judge Bone's 5th finding of fact: "That the appropriation of defendants' property is for the purpose of constructing a State-maintained public road." This exception is sustained. There is no evidence in the record to support this challenged finding of fact, in that all the evidence in the record shows [**361] that the taking by plaintiff of defendants' lands here was without their consent and against their will and not for a public purpose.

Judge Bone erred in finding and concluding as a matter of law that the condemnation and appropriation of a right of way by plaintiff as alleged in the complaint and the declaration of

taking across lands of defendants here and of Lovie Anne Joyner is for a public use, and that plaintiff is entitled to maintain this action. Based upon plaintiff's complaint and its declaration of taking, and all the evidence, he should have found as facts and concluded as a matter of law and adjudged that the condemnation and appropriation of a right of way across lands of defendants and Lovie Anne Joyner to construct Project 5.322, Nash County, ending in a *cul de sac* on the lands [***31] of J. M. Batts, was not for a public use, but was for the substantial and dominant use and benefit of W. M. Batts and wife, and a few of their relatives, and that any use by, or benefit to, the public would be merely incidental and entirely conjectural, and that the building of the proposed road by plaintiff will be an abuse of the discretion vested in it to establish, construct, and maintain highways, as part of a State-wide system of hard-surfaced and other dependable highways, and he should have issued an injunction permanently restraining plaintiff from proceeding with the condemnation and appropriation of their lands.

Plaintiff filed in this Court a demurrer *ore tenus* to the further answer and cross-action of the defendants, upon the ground that the same fails to state a cause of action as an affirmative defense. The further answer alleges as a defense that the condemnation and appropriation of their land by the plaintiff was not for a public use but was for the sole use of Mr. and Mrs. W. M. Batts and a few of their relatives, which, if established, is a legal defense to plaintiff's action. The demurrer *ore tenus* is overruled.

The judgment entered below is reversed, [***32] and a judgment will be entered in the superior court of Nash County in accordance with this opinion, and in this judgment it will be adjudged and decreed that defendants' cross-action to recover \$ 75 for plaintiff's cutting of growing trees upon their lands be dismissed. Defendants allege that the construction of such highway is beyond the scope of the authority vested in the Commission and

265 N.C. 346, *361; 144 S.E.2d 126, **137; 1965 N.C. LEXIS 986, ***32

inferentially that acts done in furtherance thereof are also unauthorized. We have agreed. Therefore, the cutting of the trees was not a taking of private property for public use. It was merely an unauthorized trespass by employees of the Commission, for which no cause of action exists against the Commission [**138] in favor of defendants. It is *damnum absque injuria*. **HN14** An agency of the State is powerless to exceed the authority conferred upon it, and therefore cannot commit an actionable wrong. *Schloss v. Highway Commission*, 230 N.C. 489, [*362] 53 S.E. 2d 517; *Carpenter v. R. R.*, 184 N.C. 400, 114 S.E. 693; *Teer v. Jordan*, 232 N.C. 48, 59 S.E. 2d 359; *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182; *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E. 2d 18; *Shingleton* [***33] v. State, 260 N.C. 451, 133 S.E. 2d 183. The defendants should not be heard to say that the taking of their land is not for a public purpose, but the taking of their trees was.

The finding of fact is supported by affidavits. It sustains the conclusion. Both support the order entered by Judge Bone. I vote to affirm.

Reversed.

Dissent by: HIGGINS

Dissent

Higgins, J., dissenting:

The parties stipulated that Judge Bone should try the case without a jury. Pursuant to the stipulation, he found:

"5. That upon completion, said road will abut upon at least five different properties and will serve four dwellings; that said road will be open to the general public when completed and the public will have a legal right to use said road. That the appropriation of Defendants' property is for the purpose of constructing a State maintained public road."

Upon the foregoing finding, he concluded:

"1. That the appropriation of right of way by the Plaintiff as alleged in the Complaint across property of Defendants herein is for a public use, and the plaintiff is entitled to maintain this action."

- R S (I) 172 -

Account Summary - 0283566

Page 1 of 1



[Home](#)
Wake County Real Estate Data
Account Summary
 Real Estate ID **0283566** PIN # **0721482119**

[iMaps](#)
[Tax Bills](#)

[Account Search](#)

Location Address
2613 OLIVE CHAPEL RD

Property Description
RCMB MADELINE J CALDER TR2 BM2000-01587

[Pin/Parcel History](#) | [Search Results](#) | [New Search](#)

[NORTH CAROLINA](#) | [Account](#) | [Buildings](#) | [Land](#) | [Deeds](#) | [Notes](#) | [Sales](#) | [Photos](#) | [Tax Bill](#) | [Map](#)

Property Owner RUBIN, BEVERLY L (Use the Deeds link to view any additional owners)	Owner's Mailing Address 2613 OLIVE CHAPEL RD APEX NC 27502-6789	Property Location Address 2613 OLIVE CHAPEL RD APEX NC 27502-6789
Administrative Data Old Map # 645-00000-0000 Map/Scale 0721 01 VCS 20WC900 City Fire District 23 Township WHITE OAK Land Class AC>10-HS ETJ WC Spec Dist(s) Zoning R-80W History ID 1 History ID 2 Acreage 11.46 Permit Date 6/22/2012 Permit # 0000122681	Transfer Information Deed Date 6/16/2010 Book & Page 13973 2151 Revenue Stamps 2180.00 Pkg Sale Date 6/16/2010 Pkg Sale Price \$1,090,000 Land Sale Date 7/31/2001 Land Sale Price \$557,500 Improvement Summary Total Units 1 Recycle Units 1 Apt/SC Sqft Heated Area 6,029	Assessed Value Land Value \$627,320 Assessed Bldg. Value \$457,734 Assessed Tax Relief Land Use Value Use Value Deferment Historic Deferment Total Deferred Value Use/Hist/Tax Relief Assessed Total Value \$1,085,054 Assessed*

*Wake County assessed building and land values reflect the market value as of January 1, 2016, which is the date of the last county-wide revaluation. Any inflation, deflation or other economic changes occurring after this date does not affect the assessed value of the property and cannot be lawfully considered when reviewing the value for adjustment.

The January 1, 2016 values will remain in effect until the next county-wide revaluation. Until that time, any real estate accounts created or new construction built is assessed according to the 2016 Schedule of Values.

For questions regarding the information displayed on this site, please contact the Revenue Department at RevHelp@wakegov.com or call 919-856-5400.



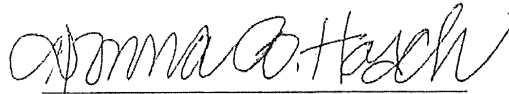
APEX TOWN COUNCIL MEETING

TUESDAY, MARCH 3, 2015

Closed Session to receive legal advice and give Town Attorney direction related to a potential condemnation case involving a sewer easement, and potential condemnation cases involving a pump station, force main, gravity sewer, water, and electric easements

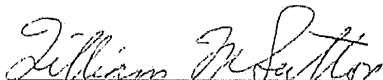
In attendance were: Mayor William Sutton, Mayor Pro Tem Eugene Schulze, Council Members Scott Lassiter, Bill Jensen, Nicole Dozier and Denise Wilkie; Town Manager Bruce Radford, Assistant Town Manager Drew Havens, Town Clerk Donna Hosch, Town Attorney Laurie Hohe, Public Works Director Tim Donnelly, Assistant Public Works Director David Hughes, and Utilities Systems Specialist Steve Adams. Also in attendance was Attorney David Farrell.

- (1) Donnelly stated staff was looking for a resolution for Beverly Rubin. This would be between Arcadia West, what makes sewer work for Arcadia East, and what would be the smallest and least impacting that would serve the property. We have tried to negotiate with Rubin. She states it's not the money, she doesn't want the development. For just sewer, the offer was the appraised amount of \$10,600. Rubin anticipated being in attendance this evening, but she was not. Dozier stated she would vote against the resolution.



Donna B. Hosch, CMC, NCCMC, Town Clerk

ATTEST:



William M. Sutton, Mayor



"The Peak of Good Living"

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

TOWN OF APEX

CLERK'S CERTIFICATION

STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, Donna B. Hosch, CMC, NCCMC, Town Clerk, Town of Apex, North Carolina, do hereby certify that the attached is a true copy of RESOLUTION NO. 15-0303-11 RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS TO ACQUIRE A SEWER EASEMENT approved by the Apex Town Council at its Regular Meeting held on March 3, 2015.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official Seal of the Town of Apex, North Carolina, this the 10th day of March 2015.


Donna B. Hosch, CMC, NCCMC
Town Clerk



TOA-0496

RESOLUTION: 15-0303-11

**RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS
TO ACQUIRE A SEWER EASEMENT**

WHEREAS, the Town of Apex is improving its sewer system and related thereto needs to improve its sewer connectivity including the construction of a new sewer connector line and facilities; and

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

To be used for the construction, operation, and maintenance of a 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, public streets, sidewalks and appurtenances thereto.

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

1. For the purposes stated above under the authority of Chapter 40A of the North Carolina General Statutes and Section 6.5 of the Apex Town Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, the Town Council does hereby authorize the acquisition through eminent domain or negotiated purchase property interests described below:

A 40 foot wide Gravity Sewer easement for the purposes described above, in, upon, across, over, and under 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

2. 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.

TOA-0010

3. The Director of Public Works or his designee is authorized to make adjustments to the exact location of easements if practical considerations so require.

4. Any condemnation actions previously filed are hereby ratified and authorized and the same are hereby authorized to proceed. The sending of such notices of entry and/or notices of eminent domain proceedings as required by law or are prudent and courteous even though not required and the performing of such investigations (including the obtaining of real estate appraisals, land planning studies, engineering studies and tree valuations) as the Town Attorney determines are needed are hereby authorized and/or ratified. Any notices of entry or notices of eminent domain previously sent with respect to the project described above are hereby ratified.

Motion made by Council Member Wassiter

Motion seconded by Council Member Vulkie

With 13 Council Members voting aye.

With 2 Council Members voting no.

Adopted and effective this the 3rd day of March, 2015.

William M. Sutton
William M. Sutton
Mayor

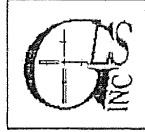
ATTEST:
Donna B. Hosch
Donna B. Hosch, CMC
Town Clerk

APPROVED AS TO FORM:
Laurie L. Holte
Laurie L. Holte
Town Attorney

To: condemnation arcadia east sewer connector resolution authorizing condemnation

TOA-0011

EXHIBIT A



GRIFFIN LAND SURVEYING, INC.

P.O. BOX 148

FUQUAY-VARINA, NC 27526

PH: (919) 567-1963 FAX: (919) 567-1954

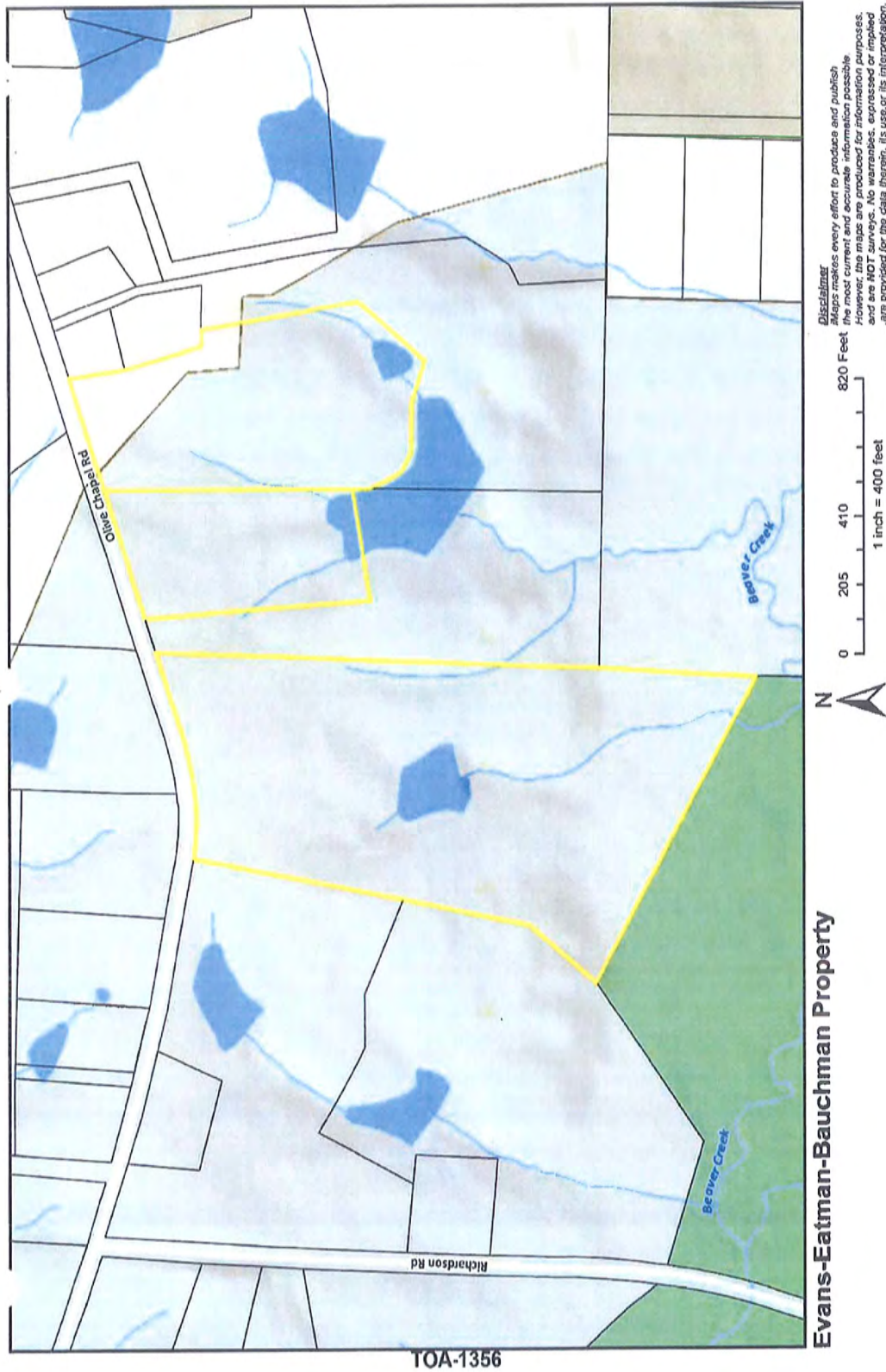
glsinc@nc.rr.com

EASEMENT DESCRIPTION

Being a portion of a tract of land in White Oak Township, Wake County, North Carolina, located at 2613 Olive Chapel Road, and recorded in Book of Maps 2000 Page 1587, Wake County registry and more particularly described as follows:

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, N02-14-28E 41.18 feet to the point and place of BEGINNING, said easement containing 6256 square feet (0.14 acres). This description was drafted by Griffin Land Surveying, Inc. on 7/16/14 based on a sewer alignment provided by Jones & Cnossen Engineering, PLLC.

TOA-0069



TOA-1356

Evans-Eatman-Bauchman Property

Tammy Moldovan

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

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

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

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

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

Tim,

Attached is the letter to the Mayor

Thanks,

Brad

PARKSIDE BUILDERS, LLC

910 Windy Road
Apex, North Carolina 27502

August 19, 2014

Mayor William M. Sutton
Town of Apex
Apex Town Hall
73 Hunter Street
Apex, North Carolina 27502

Dear Mr. Sutton:

We own property at 2605 Olive Chapel Road and 2533 Olive Chapel Road in Apex. We are in the design phase for the subdivision of this land in residential lots. Sewer design for this subdivision provides for connection to the sewer line in the Arcadia West subdivision. The only way to make this connection is through the property located at 2613 Olive Chapel Road owned by Beverly L. Rubin.

Attached please find the following documents related to our discussions with Mrs. Rubin regarding the acquisition of the easement through her property: (a) Purchase and Sale of Easement Agreement; (b) map showing the proposed sewer easement; and (c) email correspondence with Mrs. Rubin and her rejection of the proposed purchase of the easement.

We are asking for the Town's assistance with the acquisition of the sewer easement by condemnation through the Rubin property and for a place on the next available Town Council meeting for such purpose. We have exhausted all other means to acquire the easement.

Thank you very much for your consideration of our request.

Sincerely,

Brad Zadell
Manager

Enclosures

Cc: Bruce Radford, Town Manager
Tim Donnelly, Director of Public Works
Steve Adams, Utilities Systems Specialist

TOA-0217

Tammy Moldovan

From: Laurie Hohe
Sent: Tuesday, February 03, 2015 3:22 PM
To: 'Brad.zadell@gmail.com'
Cc: Tim Donnelly; Steve Adams
Subject: RE: Beverly Rubin easement

Brad,

I have left her a message, but have not yet spoken with her. I will try her again and let you know when I hear back from her.

Laurie

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

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

Laurie

Did you get in touch with Beverly yesterday?

.nanks

Brad

Sent from my iPhone

> On Feb 2, 2015, at 8:52 AM, Laurie Hohe <Laurie.Hohe@apexnc.org> wrote:
>
> Thank you Brad. I plan to reach out to Ms. Rubin today.
>
> Laurie
>
> Laurie L. Hohe
> Town Attorney
> Town of Apex
> PO Box 250
> Apex, NC 27502
> 919-249-3376
> laurie.hohe@apexnc.org
>
>

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

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

- R S (I) 184 -

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

UNILATERAL OFFER TO PAY CONDEMNATION AWARD, EXPENSES, AND COSTS

This Unilateral Offer to Pay Condemnation Award, Expenses, and Costs (this "Offer") is made this the 9th day of MARCH, 2015, by Parkside Builders, LLC, a North Carolina limited liability company ("Promisor") to the Town of Apex, North Carolina, a municipal corporation (the "Town").

1. The Promisor unilaterally offers, promises, agrees, and covenants to be bound by an Agreement with the Town containing the terms and provisions stated in Subparagraphs a-m immediately below and to render all the performances described therein if the Town renders the performance described in **Paragraph 2** below.

a. Just Compensation Award, expenses, etc. Promisor shall pay the Town all the expenses, costs, attorneys' fees, trial materials costs, damages, interest, just compensation awards, and all other expenses incurred by the Town that arise from or are related to the condemnation action defined in **Paragraph 2** below (the "Condemnation Action").

b. Expert Witnesses. Without limiting the foregoing, Promisor shall pay to the Town all reasonable expenses incurred by the Town for such expert witnesses as the Town deems necessary or desirable to adjudicate or resolve the Condemnation Action including, but not limited to, appraisers, engineers, land planners, and wetlands experts. Said experts shall be retained by the Town.

c. Initial Condemnation Deposit and other Payments. If Promisor has not done so prior to the filing of the Condemnation Action, Promisor shall pay to the Town within ten (10) days of the Town's filing the Condemnation Action the initial

■

condemnation deposit as determined by the Town, and Promisor shall pay all such additional amounts as the Wake County Superior Court or any other court, tribunal or agency may order or direct the Town to pay in connection with the Condemnation Action.

d. Indemnification by Promisor. Promisor shall indemnify and hold the Town, its officials (elected and appointed), employees, insurers, attorneys, agents, representatives, successors and assigns harmless from and against any and all threatened and actual claims, counter claims, third party claims, suits, demands, causes of action, actions, judgments, damages, penalties, fines, assessments, violations, notices of violations, costs, fees, expenses (including without limitation attorneys' fees and expenses), losses and liabilities arising out of or relating in any way to the Condemnation Action, including but not limited to filing fees, service of process fees, expert witness fees, witness fees, court and court reporter fees, fines, sanctions, penalties, judgments, and attorneys' fees, and any and all other costs, fees, expenses or other monetary liabilities incurred by the Town, or for which the Town may be or becomes liable, in connection with the Condemnation Action. As a limitation on the foregoing, it is understood and agreed that Promisor shall have no obligation to reimburse the Town for the time spent on the Condemnation Action by regular employees of the Town, including but not limited to time spent on the Condemnation Action by the Town Manager, the Town Attorney, and Public Works employees.

e. Invoices, Payment, Incurring of Expenses. The obligations of Promisor to pay the Town any money under any provision of this Agreement are included within the term "**Expenses.**" The Town shall invoice Promisor from time to time for Expenses that are incurred. Promisor shall pay the Town for the amounts invoiced within ten (10)

days of receipt of an invoice from the Town. Expenses are incurred as soon as the Town commits to their payment or becomes obligated to their payment; the Town does not have to have made payment on Expenses for the Expenses to have been incurred.

f. Security. At the time of submitting this Unilateral Offer, Promisor shall deliver security to the Town in the amount of \$50,000.00 in the form of a cash security deposit or a letter of credit in a form satisfactory to the Town. The Town shall possess the security and may apply it, without prior demand on Promisor, against any amounts invoiced to Promisor, but only if the Promisor fails to pay all or part of an invoice within the initial ten (10) day period after sent to Promisor. If Promisor performs its obligations under this Agreement, the Town shall return any unused portion of the security to Promisor after Promisor has fulfilled any and all of its obligations under this Agreement. If the Town uses all or any portion of the security, Promisor shall replenish the security back to the amount of \$50,000.00 within ten (10) days of receiving a request from the Town to do so.

g. No Warranty of Success. Promisor 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 and agrees that a failure of the Condemnation Action to succeed at obtaining the easements will not cause the Town to be liable to Promisor in any way.

h. Notices, etc. All notices, requests, demands, and other communications made under this Agreement shall be in writing and shall be deemed duly given if delivered by hand or sent by registered or certified mail, postage prepaid, return receipt requested, or by reputable overnight courier service, charges prepaid, to the respective

address set forth below or to such other address as any Party may specify by notice to the others in accordance with this Paragraph. The Parties shall endeavor to send copies of the above to each of the email addresses provided below, but the failure to do so will not render a communication ineffective. Notwithstanding any other provision related to notices, the following items addressed to Promisor may be delivered to Promisor by email at the email addresses listed below and the same shall be effective when received:

- i. Invoices under Paragraph 1e.
- ii. Requests to replenish the security, under Paragraph 1f.

If to the Town, to:

Apex Public Works Director
Attention: Tim Donnelly
73 Hunter Street
Post Office Box 250
Apex, North Carolina 27502
Email: tim.donnelly@apexnc.org

And copy to:

Apex Legal Department
Attention: Laurie Hohe
73 Hunter Street
Post Office Box 250
Apex, North Carolina 27502
Email: laurie.hohe@apexnc.org

If to Promisor, to:

Parkside Builders, LLC
Attention: Brad Zadel
910 Windy Road
Apex, NC 27502
Telephone No.: 919-427-7106
E-mail: brad.zadell@gmail.com

i. Enforcement. If this Offer is accepted, should any party commence any legal proceeding to enforce the resulting contract or to redress any breach or threatened breach of any of the provisions of the contract, the prevailing party shall be entitled to recover all of such party's costs and expenses, including but not limited to attorneys' fees, incurred in connection with the recovery of such relief. Provided, however, that such expenses, other than attorneys' fees, recovered under this **Subparagraph g** shall be recovered only if and to the extent reasonably incurred; attorneys' fees shall be recoverable only to the extent that such fees are charged in good faith for services actually rendered at the rates customarily charged by the lawyers rendering such services in conformity with their standard billing practices and all applicable ethical codes.

j. Survival and Binding Effect. The terms of the contract formed by acceptance of this Offer shall survive and shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. There are no intended or other third-party beneficiaries of this contract.

k. Waiver and Modification. No provision of the contract formed by acceptance of this Offer, may be waived, modified, amended, discharged, or terminated, except by written instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in such instrument.

l. Entire Offer. This Offer and the contract formed by its acceptance contain all of the terms proposed and agreed upon and there are no other representations or agreements, oral or written, between the parties with respect to the subject matter hereof, nor

have any factual, legal, or other promises or representations been made by or to any party to induce any other party to offer or accept this Offer except those expressly set forth herein.

m. Informed Execution. Promisor, and the Town by acceptance of this Offer, warrant and represent to the other party that: (a) such party has been fully informed of and has full knowledge of the terms and contents of this Offer; (b) such party has received the counsel and assistance of such party's attorneys with respect to all aspects of this Offer, including but not limited to the terms, contents, and consequences of this Offer; and (c) such party has executed this Offer, or has caused this Offer to be duly and properly executed by its authorized officers and/or representatives, as the party's own free and voluntary act, with the intention to be bound hereby.

n. Governing Law. This Offer and the contract formed by its acceptance, having been executed in North Carolina, by a North Carolina municipal corporation regarding property located in North Carolina and regarding transactions and occurrences which will occur in North Carolina, shall be governed and construed in accordance with the laws of the State of North Carolina, without reference to any conflict or choice of laws provisions which might operate to make the laws of any other jurisdiction applicable.

2. Mode of Acceptance of This Offer. This Offer shall be accepted, if at all, by the Town's filing the Condemnation Action (defined below) and thereafter having this Offer executed by its Mayor or Town Manager as provided below. Promisor shall not revoke this Offer between the time the Town files the Condemnation Action and the time the Mayor or Manager executes this Offer. For the purposes of this Offer, the "**Condemnation Action**" means: 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**. The Condemnation Action

includes, but is not limited to, any counterclaims, cross-claims, third-party claims, separate lawsuits, damage claims, special proceedings, and appeals, arising out of or relating in any way to the 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**.

3. Organization, Qualification, Power and Authority of Promisor: Promisor represents and warrants that (a) it has the corporate and/or statutory power and authority to make this Offer and be bound by the contract formed by its acceptance and to perform the obligations under the same; (b) such execution, performance and consummation has been authorized by all necessary corporate officers; and (c) each person who executes this Offer is duly authorized and fully empowered to execute and deliver this Offer on its behalf and as the act of the corporate party for whom he or she executes and delivers this Offer.

[REMAINDER OF PAGE LEFT BLANK INTENTIONALLY]

In Witness of its making this Offer, this Offer is executed by an official of Parkside Builders, LLC acting with due authority as of the date written below.

Parkside Builders, LLC

[Signature]
[Signature]

2-10-15
Date

ATTEST:

By: [Signature]
Print Name: Donna B. Hosch
Title: Secretary

[AFFIX CORPORATE SEAL-STAMP]

In Witness of its accepting this Offer, this Offer is executed by the Town Manager of the Town of Apex acting with due authority as of the date written below.

Town of Apex, North Carolina,
a North Carolina Municipal Corporation

ATTEST:

By: [Signature]
Donna B. Hosch, CMC
Town Clerk

By: [Signature]
Bruce A. Radford, Town Manager

EXHIBIT A



GRIFFIN LAND SURVEYING, INC.

P.O. BOX 148

FUQUAY-VARINA, NC 27526

PH: (919) 567-1963 FAX: (919) 567-1954

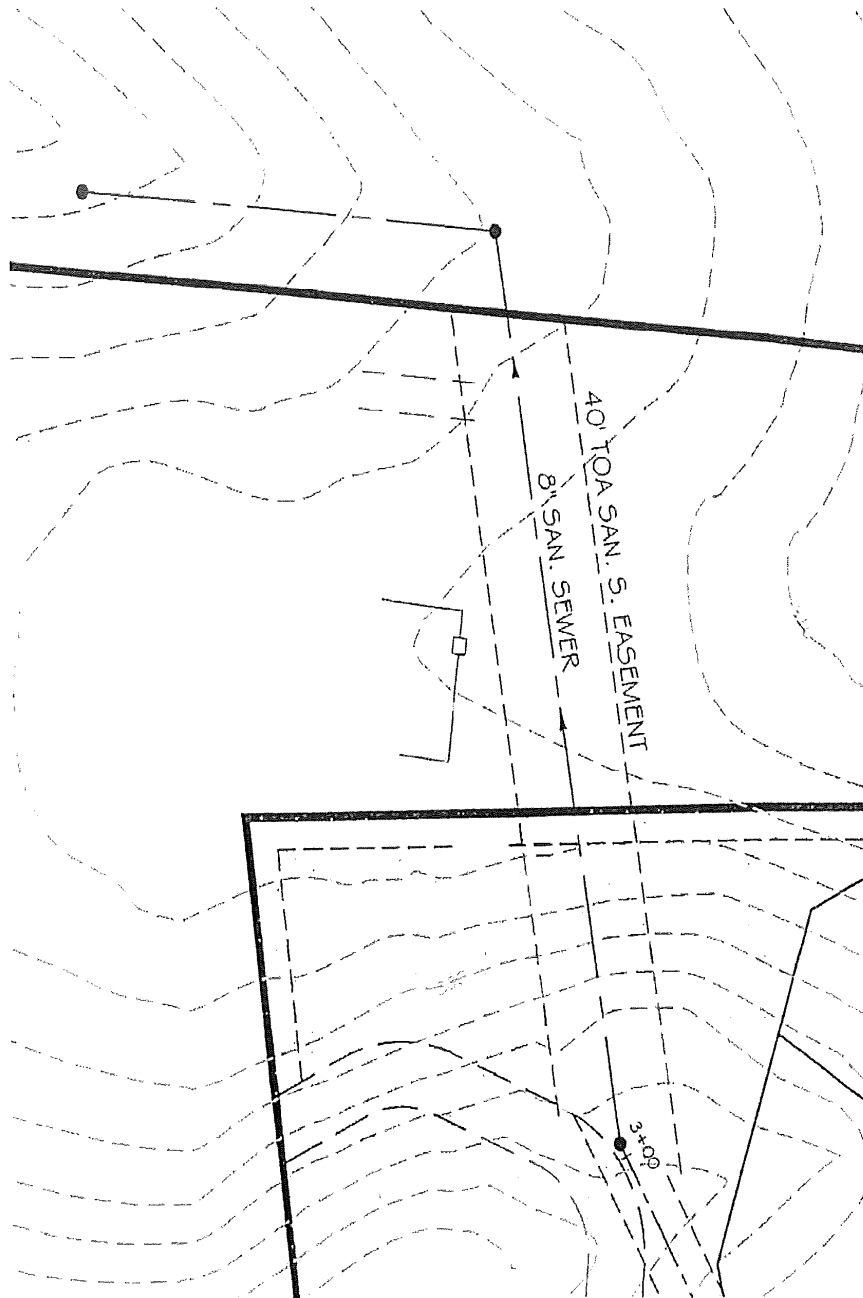
glsinc@nc.rr.com

EASEMENT DESCRIPTION

Being a portion of a tract of land in White Oak Township, Wake County, North Carolina, located at 2613 Olive Chapel Road, and recorded in Book of Maps 2000 Page 1587, Wake County registry and more particularly described as follows:

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, N02-14-28E 41.18 feet to the point and place of BEGINNING, said easement containing 6256 square feet (0.14 acres). This description was drafted by Griffin Land Surveying, Inc. on 7/16/14 based on a sewer alignment provided by Jones & Cnossen Engineering, PLLC.

" Sewer Exhibit



**REPRESENTATION AND
CONFIDENTIALITY AGREEMENT**

THIS REPRESENTATION AND CONFIDENTIALITY AGREEMENT (this "Agreement") is made and entered into this the 9th day of MARCH, 2015, by and among Parkside Builders LLC, ("Parkside"), the Town of Apex, a North Carolina municipal corporation (the "Town"), and Vandeventer Black, LLP ("Counsel"), hereinafter referred to collectively as the "Parties" and individually as a "Party"

WITNESSETH:

WHEREAS, the Town needs to acquire certain sewer easements and temporary construction easements to expand the Town's public sewer infrastructure for the purpose of expanding the territory within which the Town provides convenient public water and sewer service, all in order to promote the public safety, health, and general welfare; these easements are described in the attachments to Resolution ~~2015-0303~~ 2015-0303-11 (hereinafter the "Easements"); and

WHEREAS, the Easements are important to the Town's comprehensive water and sewer infrastructure plans; and

WHEREAS, the Parties understand that in order to acquire the Easements, condemnation actions may need to be filed in Wake County Superior Court condemning the Easements and that the Town will need legal counsel to represent it in any such actions; the condemnation actions covered by this Agreement are the condemnation actions authorized by Town of Apex Resolution ~~2015-0303~~ 2015-0303-11 (hereinafter the "Condemnation Actions"); and

WHEREAS, Parkside has made or intends to make a unilateral offer to pay the Town's costs, including attorneys' fees, of the Condemnation Actions (hereinafter the "Unilateral Offer"); and

WHEREAS, the Parties recognize that they have a common and joint interest in the efficient, just and successful conclusion of the Condemnation Actions and that Parkside by virtue

of its being responsible for the financial aspect of the Condemnation Actions has a legitimate interest in being able to communicate freely with Counsel and the Town about all matters related to the Condemnation Actions; and

WHEREAS, the Parties desire and intend to maintain the attorney-client privilege, the work-product privilege, and such other privileges as may attach to information and records relevant to the Condemnation Action that they now possess or may possess in the future notwithstanding its distribution to the Parties; and

WHEREAS, the Parties desire and intend to provide for the preservation of all applicable privileges notwithstanding the distribution of such confidential and privileged information to and among the Parties and Counsel.

NOW, THEREFORE, in consideration of the premises and promises herein contained, and for other good and valuable consideration, the receipt and adequacy of which is hereby expressly acknowledged, the Parties stipulate, covenant, and agree as follows:

ARTICLE I

PRIVILEGED AND CONFIDENTIAL INFORMATION

1. Definition of Privileged and Confidential Information: Privileged and confidential information (collectively, "Confidential Information") shall include the following:

- a. Information related to this Agreement, any agreement arising from the Unilateral Offer or the Condemnation Actions communicated between or among the Parties and Counsel or any subset thereof;
- b. Information gathered by Counsel or any Party in connection with the Condemnation Actions;
- c. Such other information as the Parties or Counsel shall designate as privileged or confidential;

d. Any information, opinion, theory, document, compilation, creation, or thing which would be characterized as "work product" under the laws of the United States or of North Carolina, including, but not limited to materials prepared or collected in anticipation of litigation generally, or in anticipation of the Condemnation Actions specifically, by Counsel, by either of the Parties, or by the consultants, sureties, indemnitors, insurers, officials, employees, or agents of either of the Parties and the mental impressions, conclusions, opinions, or legal theories of Counsel or other representative of either Party; and

e. Any communication or materials which would be covered by the attorney-client privilege under the laws of the United States or of North Carolina.

2. Use of Confidential Information and Non-Disclosure. Confidential Information shall be used solely in connection with the Condemnation Actions and efforts to obtain the Easements. Except as required by law, no Confidential Information shall be disclosed voluntarily to any third party without the prior consent of all Parties, which shall not be unreasonably withheld. This limitation on the use of Confidential Information shall continue after the termination of the Condemnation Actions and notwithstanding the withdrawal of any Counsel from this Agreement.

3. Application of the Joint Defense Doctrine. The joint defense doctrine shall apply fully to all Confidential Information.

4. Request or Demand for Confidential Information by Third Parties. In the event that the legal process, including but not limited to subpoenas, notices of deposition, requests for production of documents, public records requests, Freedom of Information Act requests, requests for admissions, interrogatories, or requests for interrogatories, is employed against any Party to compel the disclosure of Confidential Information, the Party to whom such legal process is

directed shall notify the other Parties of such occurrence. The party to whom such legal process is directed shall assert all rights and privileges with respect to the Confidential Information sought in order to maintain its confidentiality and the other Parties shall provide full cooperation in all lawful efforts to protect Confidential Information. A Party's compliance with any court order shall not be a breach of this Agreement.

5. Ownership of Confidential Information. Confidential Information, and all copies thereof, shall remain the property of the Party collecting and/or communicating such Confidential Information.

ARTICLE II

ENGAGEMENT OF COUNSEL AND COMPENSATION

1. Engagement of Counsel. The Town agrees to engage Counsel, being the law firm of Vandeventer Black, LLP, with David P. Ferrell as lead counsel from said firm, to represent it in the Condemnation Actions. The Condemnation Actions include all aspects of the prosecution, negotiation, or settlement of each and every condemnation action included in the Condemnation Actions and all other matters as defined in the Unilateral Offer by Parkside to the Town.

2. Compensation. Counsel shall be compensated in accordance with the terms of a separate agreement between Counsel and Parkside. Consistent with any contract arising from the Unilateral Offer, the Parties agree that Parkside will be solely responsible for the legal fees and costs of Counsel related to the Condemnation Actions. The Town expressly acknowledges that legal fees charged by Counsel related to the Condemnation Actions will be paid by Parkside, consents to such payment, and waives any objection thereto.

3. Direction of Action. The Town shall have the sole authority to direct Counsel and the Condemnation Actions including the proceedings therein and the settlement thereof. Initial deposits shall be reasonable and based on appraisals. The Parties are authorized to communicate

with each other in any combination in furtherance of this Agreement or the Condemnation Actions in any manner that is convenient, without the need for all to be notified of or participate in the communications. Counsel is authorized to disseminate information regarding this Agreement or the Condemnation Actions to the Parties.

4. Dissemination of Information. The Parties agree that any information communicated to Counsel regarding this Agreement or the Condemnation Actions may be disclosed by Counsel to any other Party.

ARTICLE IV

WAIVER OF CONFLICTS

Each of the Parties affirms that their interests are aligned, and that there is no present conflict between them regarding the Condemnation Actions, this Agreement, or the Unilateral Offer and Agreement. Additionally, Counsel shall be free to represent either Party in matters which do not relate to the (i) the Condemnation Actions, (ii) the Unilateral Offer and Agreement, or (iii) this Agreement. In the event that a conflict arises between Parkside and the Town in the Condemnation Actions, then all Parties hereto agree that 1) Counsel shall discontinue its representation related to the Condemnation Actions, the Unilateral Offer and Agreement and this Agreement, and 2) Counsel shall be entitled to be paid under the terms of this Agreement for all work performed by them through the date of discontinuance of representation. In the event of a conflict and discontinuance of representation as just described, the Town shall have the right to select an outside attorney to represent it in the Condemnation Actions and Parkside shall have the duty to pay the attorney's fees at the same rate as said attorney's going rate, not to exceed the rate it was paying Counsel, and Parkside shall have the right to retain its own attorney to monitor the Condemnation Actions and act as co-counsel for Parkside, and said new attorneys shall have the same rights of access to information as if there had been no change in counsel.

ARTICLE V

FURTHER TERMS

1. Effective Date. This agreement shall be effective upon its full execution. After the Effective Date of this agreement, the Town shall retain the sole discretion to determine whether to file the Condemnation Actions contemplated hereby. If the Town directs Counsel not to file the Condemnation Actions, then this agreement shall terminate except for the provisions pertaining to compensation of Counsel and the waiver of conflicts of interest.

2. Survival and Binding Effect. The terms of this Agreement shall survive and shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, beneficiaries, legal representatives, successors, and assigns.

3. Waiver and Modification. Neither this Agreement, nor any provision hereof, may be waived, modified, amended, discharged, or terminated, except by written instrument signed by the Party against whom the enforcement of such waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in such instrument.

4. Entire Agreement. This Agreement, the Unilateral Offer and Agreement, and any engagement agreement between Counsel and Parkside are the only agreements between the Parties with respect to the subject matter hereof, and this Agreement, the Unilateral Offer and Agreement, and any engagement agreement contain all of the terms agreed upon, and there are no other representations or agreements, oral or written, between the Parties with respect to the subject matter hereof, nor have any factual, legal, or other promises or representations been made by or to any Party to induce the Party to execute this Agreement, except those expressly set forth herein.

5. Organization, Qualification, Power and Authority of Parties: The Parties and Counsel represent and warrant that (a) it has the corporate and/or statutory power and authority

to enter into this Agreement and to perform the obligations under the Agreement; (b) such execution, performance and consummation has been authorized by all necessary corporate or other officers; and (c) each person who executes this Agreement is duly authorized and fully empowered to execute and deliver this Agreement on its behalf and as the act of the corporate, business, or professional entity, for whom he or she executes this Agreement.

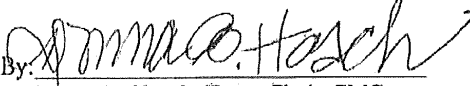
[REMAINDER OF PAGE LEFT BLANK INTENTIONALLY]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement under Seal
as of the day and year first above written.

TOWN OF APEX, NORTH CAROLINA

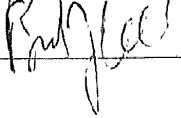
By: 
Bruce A. Radford, Town Manager

ATTEST:

By: 
Donna B. Hosch, Town Clerk, CMC



PARKSIDE BUILDERS, LLC

By: 

VANDEVENTER BLACK, LLP

By: 

Town condemnation agenda east sewer connector representation and confidentiality agreement



"The Peak of Good Living"

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

TOWN OF APEX NORTH CAROLINA

CLERK'S CERTIFICATION

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, Donna B. Hosch, CMC, NCCMC, Town Clerk, Town of Apex, North Carolina, do hereby certify that the attached is a true copy of RESOLUTION NO. 15-0303-11 RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS TO ACQUIRE A SEWER EASEMENT approved by the Apex Town Council at its Regular Meeting held on March 3, 2015.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official Seal of the Town of Apex, North Carolina, this the 10th day of March 2015.


Donna B. Hosch, CMC, NCCMC
Town Clerk



TOA-0496

RESOLUTION: 15- 0303-11

**RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS
TO ACQUIRE A SEWER EASEMENT**

WHEREAS, the Town of Apex is improving its sewer system and related thereto needs to improve its sewer connectivity including the construction of a new sewer connector line and facilities; and

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

To be used for the construction, operation, and maintenance of a 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, public streets, sidewalks and appurtenances thereto.

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

1. For the purposes stated above under the authority of Chapter 40A of the North Carolina General Statutes and Section 6.5 of the Apex Town Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, the Town Council does hereby authorize the acquisition through eminent domain or negotiated purchase property interests described below:

A 40 foot wide Gravity Sewer easement for the purposes described above, in, upon, across, over, and under 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

2. 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.

3. The Director of Public Works or his designee is authorized to make adjustments to the exact location of easements if practical considerations so require.

4. Any condemnation actions previously filed are hereby ratified and authorized and the same are hereby authorized to proceed. The sending of such notices of entry and/or notices of eminent domain proceedings as required by law or are prudent and courteous even though not required and the performing of such investigations (including the obtaining of real estate appraisals, land planning studies, engineering studies and tree valuations) as the Town Attorney determines are needed are hereby authorized and/or ratified. Any notices of entry or notices of eminent domain previously sent with respect to the project described above are hereby ratified.

Motion made by Council Member

Wassiter

Motion seconded by Council Member

Dulkie

With 03 Council Members voting aye.

With 02 Council Members voting no.

Adopted and effective this the 3rd day of March, 2015.

William M. Sutton
William M. Sutton
Mayor

ATTEST:

Donna B. Hosch

Donna B. Hosch, CMC
Town Clerk

APPROVED AS TO FORM:

Laurie L. Holte

Laurie L. Holte
Town Attorney

This condemnation agenda is a sewer connector/resolution authorizing condemnation

TOA-0498

EXHIBIT A



GRIFFIN LAND SURVEYING, INC.

P.O. BOX 148

FUQUAY-VARINA, NC 27526

PH: (919) 567-1963 FAX: (919) 567-1954

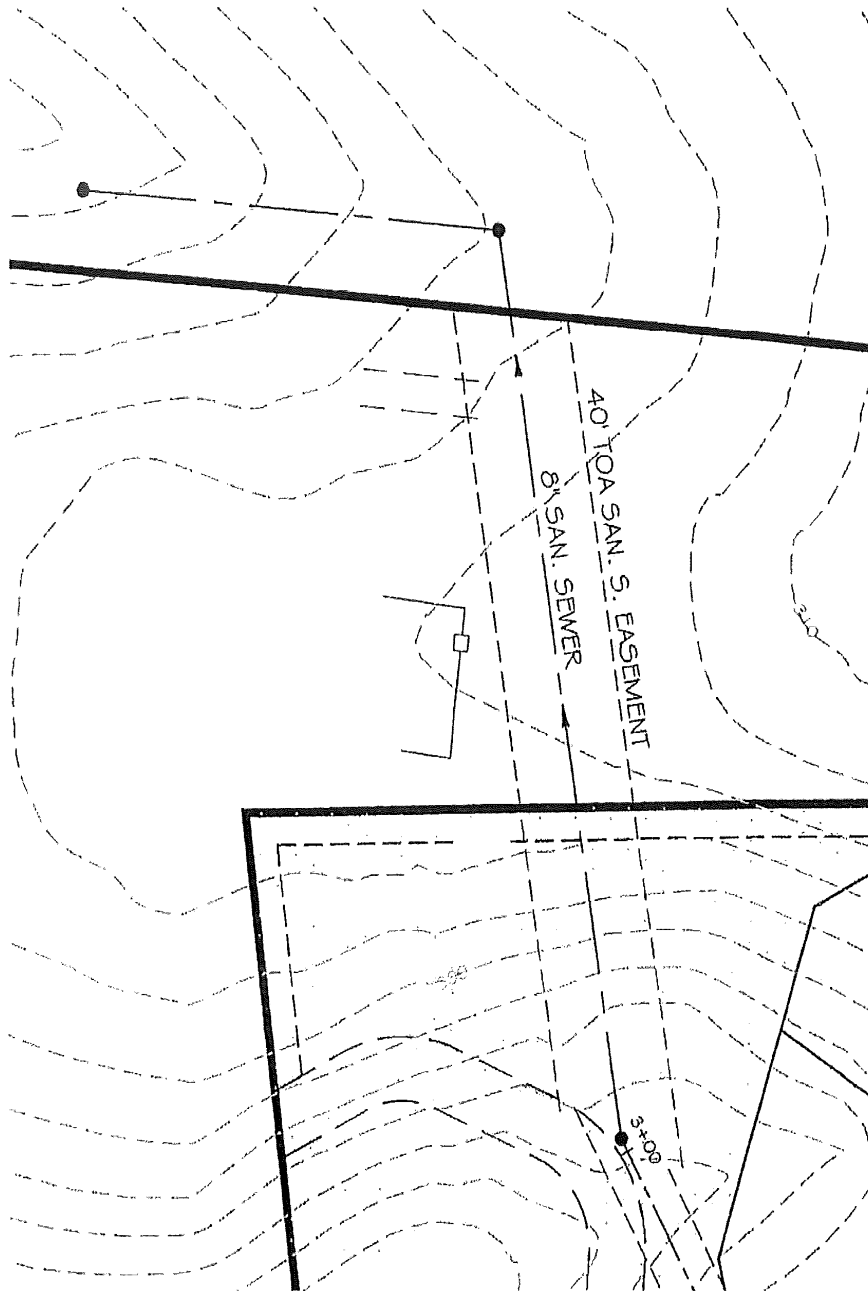
glsinc@nc.rr.com

EASEMENT DESCRIPTION

Being a portion of a tract of land in White Oak Township, Wake County, North Carolina, located at 2613 Olive Chapel Road, and recorded in Book of Maps 2000 Page 1587, Wake County registry and more particularly described as follows:

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, N02-14-28E 41.18 feet to the point and place of **BEGINNING**, said easement containing 6256 square feet (0.14 acres). This description was drafted by Griffin Land Surveying, Inc. on 7/16/14 based on a sewer alignment provided by Jones & Crossen Engineering, PLLC.

"Sewer Exhibit"



Tammy Moldovan

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

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

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

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

Ok. Thanks Tim

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

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

Thanks for any input

Brad

Sent from my iPhone

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

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

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

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

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

- R S (I) 209 -

Tim

Yes. We would pay for an appraiser that you guys recommend. Remember, they can get sewer from our Arcadia West project that is down hill. Correct?

Thanks

Brad

Sent from my iPhone

On Sep 8, 2014, at 3:34 PM, Tim Donnelly <Tim.Donnelly@apexnc.org> wrote:

Brad,

While I think your offer is reasonable, I cannot say (to our Council) an appraisal would not be higher since the sewer is not particularly well positioned to serve the Rubin property. The best approach before we take this to Council is to have an appraisal from an appraiser we recommend. Can you fund one to get this done? If so, Steve Adams can give you the name of some we are working with that understand what we want.

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

From: Brad Zadell (<mailto:brad.zadell@gmail.com>)

Sent: Monday, September 08, 2014 10:38 AM

To: Tim Donnelly

Subject: Fwd: Purchase of sewer easement for Beverly Rubin

Begin forwarded message:

From: Beverly Rubin <blrubin63@gmail.com>

Subject: Re: Purchase of sewer easement

Date: August 17, 2014 at 8:18:21 PM EDT

To: "Brad.zadell@gmail.com" <brad.zadell@gmail.com>

Cc: Jim Saputo <jim.saputo@recoverylogistics.net>, Stuart Jones <stuart@jonescrossen.com>

Hi Brad

We are confirming that we decline your offer.

Sent from my iPhone

On Aug 14, 2014, at 9:59 AM,
"Brad.zadell@gmail.com"

<brad.zadell@gmail.com> wrote:

Beverly

I gave you the sewer easement contract for Arcadia East connection a few weeks ago at the neighborhood PUD for Arcadia West.

Do you and Peter have a response to that contract?

Thanks for any input

Brad

Sent from my iPhone

AGREEMENT OF SALE


by and between
Transom Row Properties II, LLC, as Seller
and
RELIABUILT, LLC, as Buyer


EXHIBIT F

Exceptions to Seller's Warranties and Representations

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.

Date Agreed:


Buyer's Initials


Seller's Initials



Wake County Register of Deeds
Post Office Box 1897
Raleigh, North Carolina 27602-1897

Laura M. Riddick
Register Of Deeds

STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, LAURA M. RIDDICK, REGISTER OF DEEDS IN AND FOR THE ABOVE NAMED
STATE AND COUNTY, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE
AND EXACT COPY OF AN INSTRUMENT RECORDED IN THE WAKE COUNTY
REGISTRY ON November 14, 2012, IN BOOK 15014 PAGE 1054.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND CAUSED
THE OFFICIAL SEAL OF MY SAID OFFICE TO BE AFFIXED HERETO THIS, THE
29TH DAY OF JULY, 2016.

A handwritten signature in cursive script, reading "Laura M. Riddick", written over a horizontal line.

REGISTER OF DEEDS

A handwritten signature in cursive script, reading "Delia Little", written over a horizontal line.

DEPUTY / ASSISTANT

(SEAL)

A handwritten signature in cursive script, reading "Delia Little", written over a horizontal line.

DEPUTY / ASSISTANT (Printed Name)

BK015014PG01054

WAKE COUNTY, NC 61
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
11/14/2012 AT 11:00:14
STATE OF NORTH CAROLINA
REAL ESTATE EXCISE TAX: \$1500
BOOK:015014 PAGE:01054 - 01056

Excise Tax \$1,500.00

Recording Time, Book and Page

Parcel Identifier No: 0125841

After Recording Hold For: Grantee

This instrument was prepared by: Sang Ok Park

Brief Description for the index

Lot 5 12.08 Acres Map 1987/691

NORTH CAROLINA GENERAL WARRANTY DEED

THIS DEED delivered this 13th day of November, 2012 by and between

GRANTOR	GRANTEE
SANG OK PARK , widow	PARKSIDE BUILDERS, LLC
Forwarding Address: 3356 Winston Drive Burlington, NC 27215	Mailing address: 218 Edinburgh Drive Cary, North Carolina 27511
This property is NOT the primary residence of the Grantor.	Property Address: 2533 Olive Chapel Road Apex, NC 27502
Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g., corporation or partnership.	

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

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

BEING all of Lot 5, containing 12.08 acres, according to plat entitled "Recombination for John W. and Patricia M. Bauchman and Lenore A. Larson, White Oak Township, Wake County, North Carolina", dated April 28, 1987 prepared by William O. Yates, and recorded in Book of Maps 1987, Page 691, Wake County Registry.

A map showing the above described property is recorded in Map Book 1987, Pages 691, Wake County Registry.

BK015014PG01055

t

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple. And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated.

Title to the property hereinabove described is subject to the following exceptions:

a. Public service utility easements of record and visible easements, Ad valorem property taxes for 2012 and subsequent years, and Restrictions and all easements of record.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, or if corporate, has caused this instrument to be signed in its corporate name by its duly authorized officers and its seal to be hereunto affixed by authority of its Board of Directors, the day and year first above written.

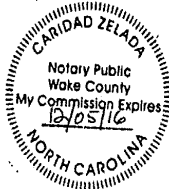
Sang Ok Park (SEAL) _____ (SEAL)
Sang Ok Park
Wake County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: Sang Ok Park

Date: November 01, 2012

Official Seal

Caridad Zelada
Typed notary name, Notary
My commission expires: 12/05/16



BK015014PG01056



BOOK:015014 PAGE:01054 - 01056

Yellow probate sheet is a vital part of your recorded document.
Please retain with original document and submit for rerecording.



Wake County Register of Deeds
Laura M. Riddick
Register of Deeds

This Customer Group _____
of Time Stamps Needed

This Document _____
New Time Stamp
of Pages 3

22.004-1/20/06



Wake County Register of Deeds
Post Office Box 1897
Raleigh, North Carolina 27602-1897

Laura M. Riddick
Register Of Deeds

STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, LAURA M. RIDDICK, REGISTER OF DEEDS IN AND FOR THE ABOVE NAMED
STATE AND COUNTY, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE
AND EXACT COPY OF AN INSTRUMENT RECORDED IN THE WAKE COUNTY
REGISTRY ON DECEMBER 02, 2013, IN BOOK 15519 PAGE 2372.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND CAUSED
THE OFFICIAL SEAL OF MY SAID OFFICE TO BE AFFIXED HERETO THIS, THE
29TH DAY OF JULY, 2016.


REGISTER OF DEEDS


DEPUTY / ASSISTANT

(SEAL)


DEPUTY / ASSISTANT (Printed Name)

BK015519PG02372

WAKE COUNTY, NC 331
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
12/02/2013 AT 16:06:44
STATE OF NORTH CAROLINA
REAL ESTATE EXCISE TAX: \$1900
BOOK:015519 PAGE:02372 - 02374

NORTH CAROLINA GENERAL WARRANTY DEED

Excise Tax: \$1,900.00

Parcel Identifier No. 0025711 Verified by _____ County on the ____ day of _____, 20____
By: _____

Mail/Box to: Grantee

This instrument was prepared by: Benjamin H. Hervey, Hervey & Hervey, P.A.

Brief description for the Index: Tract 1, Book of Maps 2000, Page 1587

THIS DEED made this 2nd day of December 2013, by and between

GRANTOR	GRANTEE
Michael J. Evans and wife, Jean M. Evans 2605 Olive Chapel Road Apex, NC 27502	Parkside Builders, LLC 218 Edinburgh Drive Cary, NC 27511

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

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

BEING all of Tract 1, Henry C. Robbins Property, as shown on map entitled "Recombination Map for Madeleine J. Calder" by Larry I. Chasak, Professional Land Surveyor, dated 08/02/00 and recorded in Book of Maps 2000, Page 1587, Wake County Registry.

The property hereinabove described was acquired by Grantor by instrument recorded in Book 11038, Page 1534.

All or a portion of the property herein conveyed includes the primary residence of a Grantor.

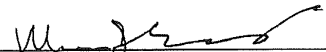
BK015519PG02373

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

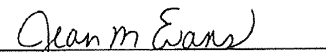
And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever, other than the following exceptions:

- 1) Ad Valorem taxes for the current year and subsequent years.
- 2) All easements, covenants, and restrictions of record.
- 3) Zoning regulations and ordinances.

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



Michael J. Evans

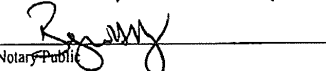


Jean M. Evans

State of North Carolina – County of Wake

I, the undersigned Notary Public of the County of Wake and State aforesaid, certify that **Michael J. Evans and Jean M. Evans** personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed.

Witness my hand and Notarial stamp or seal this 2nd day of December, 2013.



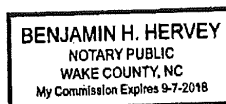
Notary Public

(Affix Seal)

Benjamin H. Hervey

Notary's Printed or Typed Name

My Commission Expires: 09-07-2018



BK015519PG02374



BOOK:015519 PAGE:02372 - 02374



Please retain yellow trailer page

It is part of the recorded document and must be submitted with the original for re-recording.

Laura M. Riddick

Register of Deeds

Wake County Justice Center
300 South Salisbury Street, Suite 1700
Raleigh, NC 27601

☐ New Time Stamp

☐ \$25 Non-Standard Fee

☐ Additional Document Fee

☐ Additional Reference Fee

This Customer Group

This Document

____ # of Time Stamps Needed

____ 3 # of Pages I



Wake County Register of Deeds
Post Office Box 1897
Raleigh, North Carolina 27602-1897

Laura M. Riddick
Register Of Deeds

**STATE OF NORTH CAROLINA
COUNTY OF WAKE**

I, LAURA M. RIDDICK, REGISTER OF DEEDS IN AND FOR THE ABOVE NAMED
STATE AND COUNTY, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE
AND EXACT COPY OF AN INSTRUMENT RECORDED IN THE WAKE COUNTY
REGISTRY ON December 31, 2014, IN BOOK 15883 PAGE 1007.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND CAUSED
THE OFFICIAL SEAL OF MY SAID OFFICE TO BE AFFIXED HERETO THIS, THE
29TH DAY OF JULY, 2016.



REGISTER OF DEEDS



DEPUTY / ASSISTANT

(SEAL)



DEPUTY / ASSISTANT (Printed Name)

- R S (I) 221 -

(Page 1 of 3)

BK015883PG01007

WAKE COUNTY, NC
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
12-31-2014 AT 16:06:21

BOOK:015883 PAGE:01007 - 01009

Excise Tax: \$ 0.00

Parcel Identification No.: 0721492287 and 0721487910

Prepared by: James Andrew Saputo, Jr.

After Recording Return to: P.O. Box 1328, Cary, North Carolina 27512

Brief Description: Tract 1, Henry C. Robbins Property and
Lot 5, Recombination for John W. and Patricia M. Bauchman and Lenore A. Larson

NORTH CAROLINA GENERAL WARRANTY DEED

THIS DEED made this 1st day of December, 2014, by and between

GRANTOR:

PARKSIDE BUILDERS, LLC,
a North Carolina limited liability company
910 Windy Road
Apex, North Carolina 27502

and

GRANTEE:

TRANSOM ROW PROPERTIES II, LLC,
a North Carolina limited liability company
P.O. Box 1328
Cary, North Carolina 27512

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

[SEE ATTACHED EXHIBIT A]

Submitted electronically by Hervey & Hervey, P.A. in compliance with North Carolina statutes governing recordable documents and the terms of the submitter agreement with the Wake County Register of Deeds.

BK015883PG01008

The property above described was acquired by Grantor by instrument recorded in Book 15519, Page 2372 and Book 15014, Page 1054.

A map showing a portion of the property above described is recorded in Book of Maps 2000, Page 1587 and Book of Maps 1987, Page 691, Wake County Registry.

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

And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated. Title to the property hereinabove described is subject to the following exceptions:

1. All easements encumbrances, rights-of-way and restrictions of record.
2. Lien of ad valorem taxes for the year 2014.
3. *see attached Exhibit A*

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, the day and year first above written.

PARKSIDE BUILDERS, LLC

By: *Bradley Zadell* (Seal)
Bradley Zadell, Manager

The property described herein (please initial one):

 Does include the primary residence of any Grantor.
 X Does not include the primary residence of any Grantor.

Wake County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: Bradley Zadell.

Date: 12/11/2014

Laura G. Ward
Laura G. Ward, Notary Public
(Printed Name)

My commission expires: 6.17.2016



- R S (I) 223 -

(Page 3 of 3)

BK015883PG01009

EXHIBIT A

Legal Description

Parcel 1

BEING all of Tract 1, Henry C. Robbins Property, as shown on map entitled "Recombination Map for Madeline J. Calder" by Larry I. Chasak, Professional Land Surveyor, dated 08/02/00 and recorded in Book of Maps 2000, Page 1587, Wake County Registry.

Parcel 2

BEING all of Lot 5, containing 12.08 acres, according to plat entitled "Recombination for John W. and Patricia M. Bauchman and Lenore A. Larson, White Oak Township, Wake County, North Carolina" dated April 28, 1987 prepared by William O. Yates, and recorded in Book of Maps 1987, Page 691, Wake County Registry.

SUBJECT TO THE FOLLOWING DEEDS OF TRUST:

1. Deed of Trust to W. Craig George, Trustee for CapStone Bank, Beneficiary recorded December 2, 2013 in Book 15519, Pages 2375-2387, Wake County Registry.
2. Deed of Trust to W. Craig George, Trustee for CapStone Bank, Beneficiary recorded November 14, 2012 in Book 15014, Pages 1057-1069, Wake County Registry.



Wake County Register of Deeds
Post Office Box 1897
Raleigh, North Carolina 27602-1897

Laura M. Riddick
Register Of Deeds

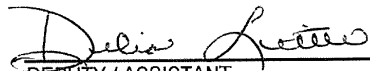
STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, LAURA M. RIDDICK, REGISTER OF DEEDS IN AND FOR THE ABOVE NAMED
STATE AND COUNTY, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE
AND EXACT COPY OF AN INSTRUMENT RECORDED IN THE WAKE COUNTY
REGISTRY ON June 11, 2015, IN BOOK 16046 PAGE 314.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND CAUSED
THE OFFICIAL SEAL OF MY SAID OFFICE TO BE AFFIXED HERETO THIS, THE
29TH DAY OF JULY, 2016.



REGISTER OF DEEDS



DEPUTY / ASSISTANT

(SEAL)



DEPUTY / ASSISTANT (Printed Name)

BK016046PG00314

WAKE COUNTY, NC
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
06-11-2015 AT 11:22:38
STATE OF NC REAL ESTATE
EXCISE TAX: \$8,400.00
BOOK:016046 PAGE:00314 - 00316

Excise Tax: \$8,400.00

Parcel Identification No.: 0721485984

Prepared by: James Andrew Saputo, Jr.
After Recording Return to: Grantee

Brief Description for Index: Tract 1, Book of Maps 2015, Page 847

NORTH CAROLINA SPECIAL WARRANTY DEED

THIS DEED made this 10th day of June, 2015, by and between

GRANTOR:

TRANSOM ROW PROPERTIES II, LLC,
a North Carolina limited liability company
P.O. Box 1328
Cary, North Carolina 27512

and

GRANTEE:

RILEY'S POND DEVELOPERS, LLC
a North Carolina limited liability company
1210 Trinity Road, Suite 102
Raleigh, North Carolina 27607

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

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

BEING all of Tract 1 as shown on a map entitled
"Recombination Plat for Transom Row Properties II, LLC"
As shown on a map recorded in Book of Maps 2015, Page 847
Wake County Registry

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

BK016046PG00315

The property above described was acquired by Grantor by instrument recorded in Book 15883, Page 1007, Wake County Registry.

A map showing the property above described is recorded in Book of Maps 2015, Page 847, Wake County Registry.

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

And the Grantor covenants with the Grantee, that Grantor has done nothing to impair such title as Grantor received, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated:

1. All easements encumbrances, rights-of-way and restrictions of record.
2. Lien of ad valorem taxes for the year 2015.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, the day and year first above written.

The property described herein (please initial one):

_____ Does include the primary residence of any Grantor.
 X Does not include the primary residence of any Grantor.

TRANSOM ROW PROPERTIES II, LLC

By: Brad Zadell (Seal)
Brad Zadell, Manager

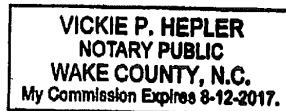
Wake County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated:
Brad Zadell

Date: 6-10-15

Vickie P. Hepler
Vickie P. Hepler, Notary Public
(Printed Name)

(Seal)



My commission expires: 8-12-17

BK016046PG00316

Transom Row Properties II, LLC, as the owner of the property consisting of 19.033 acres shown on the plat entitled "Exempt Plat, Recombination Plat for Transom Row Properties II, LLC" recorded in Book of Maps 2015, Page 847, Wake County Registry, hereby certifies that there are no tenants or parties with rights to the Property under a lease (oral or written) or any other agreement.

Transom Row Properties II, LLC

By: 

Name: Lattie Frank Floyd, Jr.

Title: Manager

STATE OF NORTH CAROLINA

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

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

**TOWN OF APEX'S MEMORANDUM
OF LAW**

NOW COMES Plaintiff Town of Apex ("the Town"), by and through counsel, and hereby responds in opposition to the allegations of Defendant Beverly L. Rubin ("Defendant" or "Rubin") regarding the constitutionality of the Town's taking and the Town's legal right to take in the above-captioned action. The Town respectfully requests that the Court uphold the Town's taking of a sewer easement across Rubin's property.

FACTS

On March 3, 2015, the Town Council of the Town of Apex ("Town Council") determined that it was necessary and in the public interest for the Town to acquire an easement across property owned by Rubin ("Property") to be used for the construction, operation, and maintenance of a gravity sewer line and related facilities connected with the Apex Sewer System. (See Affidavit of Timothy Donnelly, ¶ 9). For this purpose, the Town Council voted to acquire through the Town's power of eminent domain a forty (40) foot wide gravity sewer easement, with a total area of .14 acres, across a portion of the Property.

The Town filed its condemnation action against Rubin on April 30, 2015. Rubin answered on July 7, 2015. In her answer, Rubin contested the constitutionality of the Town's taking of an easement on the Rubin Property for this sewer project.

ARGUMENT

The Town's taking of a sewer easement across the Rubin Property is for the public use and benefit, and is a constitutional and proper use of the Town's power of eminent domain. "[W]hether a condemnor's intended use of the property is for the public use or benefit is a question of law for the courts." *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 178, 582 S.E.2d 697, 699 (2003).

A taking is for a proper and constitutional purpose if it is both for the public use and the public benefit. *Stout v. City of Durham*, 121 N.C. App. 716, 718, 468 S.E.2d 254, 257 (1996). "[B]ecause of the demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase [public use or benefit] is elastic and keeps pace with changing times." *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 429-30, 364 S.E.2d 399, 401 (1988). "[T]he public use test asks whether the public has a right to a definite use of the condemned property." *Id.* at 430, 364 S.E.2d at 401. "[T]he public benefit test asks whether some benefit accrues to the public as a result of the desired condemnation." *Id.*

When determining whether a taking is for a public, rather than a private, purpose, "[t]he exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not of itself warrant the exercise of a power..." *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988) (quoting *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (quoting 26 Am.Jur.2d *Eminent Domain* §§ 32, 33 (1966))). Moreover, "it is immaterial that, in the immediate future, only a small segment of the population will be likely to make actual use of it." *Vance County v. Royster*, 271 N.C. 53, 60, 155 S.E.2d 790, 796 (1967). Rather, "the public's right to use, not the public's actual use, is the key factor in making the required determination." *Carolina Tel. & Tel. Co. v. McLeod* at 430, 364 S.E.2d at 401. The Town's taking of an easement across the Rubin Property for the installation of the Project — which is a gravity sewer line — is for both a public use

and the public benefit.

The Town is a duly chartered Municipal Corporation of North Carolina. The General Assembly has given municipalities the power to construct, operate, protect, and regulate wastewater systems under N.C. Gen. Stat. §§ 160A-311 & 312, and has granted municipalities the power to condemn property to establish or extend sewer systems under N.C. Gen. Stat. § 40A-3(b)(4). The Town has exercised its power of eminent domain pursuant to its Town charter, Section 6.5, to condemn a portion of the Rubin Property for the purpose of improving its public sewer system. Sewer systems are essential infrastructure that is typically provided by a municipality to its residents.

The Project is for a public use in that, following the completion of the Project, the sewer infrastructure will be owned by and maintained by the Town and will be able to provide service to multiple residential homesites in a residential subdivision that borders the Property, as well as additional properties. The Project does not involve the exercise of condemnation in order to give a private party utility infrastructure, but, instead, involves a municipality owning, operating, and bringing sanitary services to residential properties by the improvement of an existing and functioning municipal sewer system. This project is for the public benefit, as an enhanced and expanded municipal sanitary sewer system benefits the entire community by protecting public health through the safe and efficient conveyance of sewage to water treatment facilities.

Even if one assumes for the sake of argument that this sewer project benefits just one property, however, it could still pass the public use and public benefit test. The Court of Appeals has determined in previous cases that infrastructure serving only one residential parcel is still capable of being a public use for the public benefit. For instance, in *Carolina Tel. and Tel. Co. v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988), the Court of Appeals found that a telephone company properly condemned land to construct a telephone line to service a single property. Although the condemnation would not have been necessary but for the benefitting landowner's need for phone

service, the *McLeod* Court found that the condemnation was still proper because once the telephone cable was laid, every member of the public had a common and identical right to tap into or use the telephone line. Further, the *McLeod* Court noted that “the provision of telephone service [to the single customer was] a small part of a more important and more far-reaching effort — the effort to ensure that, in an era in which the telephone has truly become a necessity, whole communities, as well as members of individual communities, are interconnected by telephone systems.” *Id.* 434, 364 S.E.2d at 404. See also *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1966) (finding that NCDOT’s partial condemnation of property was proper even though it was solely undertaken to build a road benefitting a single, landlocked property because the road was “an incidental part of a comprehensive and complex highway project of national significance”).

Further, North Carolina courts have found that projects involving the construction and expansion of sewer infrastructure are for a public purpose — even where a private developer or small number of residents are the primary beneficiaries of the project. For instance, in *City of Charlotte v. Heath*, 226 N.C. 750, 756, 40 S.E.2d 600, 605 (1946), the Supreme Court of North Carolina found that the City of Charlotte had properly condemned land for the construction of a sewer system that would serve a small group of citizens living outside of the city limits. Although the taking would only immediately help a small group of residents, the *Heath* Court still found that the taking was for a public use and the public benefit. As in *Heath*, Apex’s taking here is to expand its existing sewer infrastructure and to provide residents and future residents with sewer, including in an approved subdivision, Riley’s Pond. The sewer service provided by the Town is not personal to any one person but is, instead, an appurtenance to land that may be utilized by members of the general public who live there or may seek to live there in the future.

The present case involves a fact pattern that is similar to the more recent case of *Stout v. City of Durham*, 121 N.C. App. 716, 468 S.E.2d 254 (1996), in which the Court of Appeals found that

the public use and benefits test was satisfied where the City of Durham condemned property to construct a sewer pipeline project across the property to serve a private shopping center. Unlike the commercial development at issue in *Stout*, the development at issue herein is a residential subdivision, which is sorely needed in a town like Apex that is experiencing substantial population growth. Moreover, the *Stout* Court found that, although the condemned landowner offered evidence showing that the condemnor undertook the project pursuant to an agreement with the developer of the shopping center, the public use and benefit of the project was not altered or defeated by any such agreement.

The Court of Appeals reached a similar conclusion in *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 582 S.E.2d 697 (2003), in which a landowner challenged a taking for the expansion of the City of Kannapolis' sewer system. The challenging landowner believed the City had impermissibly condemned his land because the expansion of the sewer system would primarily benefit a neighboring landowner who planned to develop his property as a subdivision. The *Tucker* Court disagreed with the condemned landowner, finding that the taking was for both a public use and the public benefit because multiple landowners would have the right to connect to the expanded sewer system.

The Court of Appeals further supported *Stout* in the recent case of *City of Asheville v. Resurgence Development Co. LLC*, 230 N.C. App. 80, 748 S.E.2d 751 (2013). In that case, the City of Asheville owned property which it eventually intended to sell to a developer of affordable housing. Prior to the sale, the City took a sewer easement across the defendant's property that would connect the City's property to an existing pump station and provide sewer access to the City's property (which it planned to sell to a developer). The defendant balked at the City's taking, arguing that it was not for a public purpose because it would ultimately benefit the developer to whom the City sold its property. The Court of Appeals disagreed with the defendant, finding that the sewer

project was for a public use and benefit, even if the eventual purchaser of the City's property might initially benefit from the project.

CONCLUSION

The Town has the power of eminent domain and has condemned property for a proper purpose. The improvement and expansion of a sewer system to serve residential properties is the type of public project typically undertaken by municipalities. The Town's gravity sewer project is for a public purpose and for the public benefit, and, consequently, the Town's taking is constitutional and a proper exercise of their statutory authority. Therefore, the Court should deny Defendant's challenge to Apex's right and authority to condemn for a sewer easement across Rubin's Property.

This the 28th day of July, 2016.



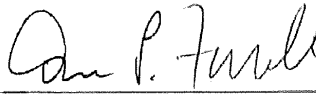
David P. Ferrell
N.C. State Bar No.: 23097
Email: dferrell@vanblacklaw.com
Ashley P. Holmes
N.C. State Bar No.: 42911
Email: apholmes@vanblacklaw.com
VANDEVENTER BLACK LLP
P.O. Box 2599
Raleigh, NC 27602-2599
Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Attorney for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing TOWN OF APEX'S MEMORANDUM OF LAW
was served by facsimile and by mailing the same, via U.S. Mail, postage prepaid to the following:

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

This the 28th day of July, 2016.



David P. Ferrell



Robert Bailey
1210 Trinity Rd. Suite 102
Raleigh, NC 27607

7/28/2016

Steven Adams
Town of Apex
Real Estate & Public Utilities
PO Box 250
Apex, NC 27502

Mr. Adams,

As of 7/27/16, Royal Oaks Homes has pre-sold four homes in Riley's Pond Subdivision. The lots we have sold are listed below with their contractual closing dates.

Lot 42 – August 2016 Closing
Lot 34 – September 2016 Closing
Lot 41 – October 2016 Closing
Lot 25 – January 2017 Closing

Feel free to contact me with any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Bailey".

Robert Bailey
Land Development Manager
Royal Oaks Homes

Tammy Moldovan

From: Laurie Hohe
Sent: Tuesday, February 03, 2015 3:22 PM
To: 'Brad.zadell@gmail.com'
Cc: Tim Donnelly; Steve Adams
Subject: RE: Beverly Rubin easement

Brad,

I have left her a message, but have not yet spoken with her. I will try her again and let you know when I hear back from her.

Laurie

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

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

Laurie

Did you get in touch with Beverly yesterday?

Thanks

Brad

Sent from my iPhone

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

>

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

>

> Laurie

>

> Laurie L. Hohe

> Town Attorney

> Town of Apex

> PO Box 250

> Apex, NC 27502

> 919-249-3376

> laurie.hohe@apexnc.org

>

>

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

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

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

Tammy Moldovan

From: Brad Zadell <brad.zadell@gmail.com>
Sent: Friday, February 06, 2015 1:14 PM
To: Laurie Hohe
Cc: Tim Donnelly; Steve Adams; Bruce Racford
Subject: Re: Beverly Rubin easement

Thanks Laurie. We will get all the papers signed and the letter of credit to secure payment of condemnation expenses, etc.

Brad

On Feb 6, 2015, at 12:23 PM, Laurie Hohe <Laurie.Hohe@apexnc.org> wrote:

> Brad,
>
> I've spoken with Ms. Rubin. She was unwilling to discuss a settlement for the sewer easement. She understands that the next step is to request approval for condemnation for the sewer connection from Town Council. She will be out of the state during the week of February 17th and has asked to wait until the March 3, 2015 Council meeting so that she may be able to address the Town Council. The Manager agreed. We'll prepare the resolution for the March 3, 2015 Town Council meeting.
>
> I've attached the Town's standard Unilateral Offer to Pay Condemnation Award, Expenses and Costs. This agreement requires a cash security deposit or letter of credit to secure payment of condemnation expenses and just compensation.
>
> Also attached is the Town's standard Representation and Confidentiality Agreement. I will forward a copy of the engagement letter for the attorney who will represent the Town in the event that condemnation is approved and filed. The engagement letter is an attachment to the representation and confidentiality agreement.
>
> Both agreements will need to be signed by Parkside Builders in the event that Town Council approves the request for condemnation.
>
> If you have questions, please let me know.
>
> Laurie
>
> Laurie L. Hohe
> Town Attorney
> Town of Apex
> PO Box 250
> Apex, NC 27502
> 919-249-3376
> laurie.hohe@apexnc.org
>
>
>

>

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

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

> Sent: Tuesday, February 03, 2015 3:02 PM

> To: Laurie Hohe

> Cc: Tim Donnelly; Steve Adams

> Subject: Re: Beverly Rubin easement

>

> Laurie

>

> Did you get in touch with Beverly yesterday?

>

> Thanks

>

> Brad

>

> Sent from my iPhone

>

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

>>

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

>>

>> Laurie

>>

>> Laurie L. Hohe

>> Town Attorney

>> Town of Apex

>> PO Box 250

>> Apex, NC 27502

>> 919-249-3376

>> laurie.hohe@apexnc.org

>>

>>

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

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

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

>> To: Laurie Hohe

>> Cc: Tim Donnelly; Steve Adams

>> Subject: Beverly Rubin easement

>>

>> Laurie

>>

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

>>

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

>>

>> Let me know what else you may need

>>

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

>>

>> Thanks

>>

>> Brad Zadell

>>

>> Sent from my iPhone

> <Unilateral offer re Condemnation Action.doc><Representation and Confidentiality Agreement- Eminent Domain - Arcadia East Sewer Connector.doc>

Tammy Moldovan

From: Tim Donnelly
Sent: Wednesday, May 28, 2014 3:47 PM
To: Hank Fordham
Cc: Dianne Khin; Steve Adams; David Hughes
Subject: RE: Important Issue

Hank,

I think Jones and Cnossen is trying to explore a sewer route across the property for Brad Zadell.

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

From: Hank Fordham
Sent: Wednesday, May 28, 2014 3:39 PM
To: Beverly Rubin
Cc: pieterderidder2@gmail.com; Steve Adams; Tim Donnelly
Subject: RE: Important Issue

Beverly,

I will look into whether the Town of Apex is involved. Do you have a picture of the stake and its location? Any information about the stake and its location would help me to get to the bottom of this.

Best regards,
Hank
Henry C. Fordham, Jr.
Apex Town Attorney
P.O. Box 250
Apex, N.C. 27502
Voice: (919) 249-1127
Fax: (919) 249-1128

From: Beverly Rubin [<mailto:brubin@merkleinc.com>]
Sent: Wednesday, May 28, 2014 3:33 PM
To: Hank Fordham
Cc: pieterderidder2@gmail.com
Subject: Important Issue

Dear Frank,
Someone, without permission, placed stakes on our property at 2613 Olive Chapel Road, with an indication of a sewer line. Please call me at your earliest convenience at one of the two numbers below. Also, I consider this a trespass and will pursue all legal remedies.

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

VANDEVENTER BLACK LLP

David P. Ferrell

dferrell@vanbik.com
www.vanbik.com

434 Fayetteville Street, Suite 2000 • P.O. Box 2599 • Raleigh, NC 27602-2599 • Office 919.754.1171 • Facsimile 919.754.1317

February 13, 2015

Laurie Hohe, Esq.
Town of Apex
PO Box 250
Apex, NC 27502

Via Electronic Mail Only

Re: Engagement Agreement – Arcadia East Sewer Connector

Dear Laurie:

This letter will confirm our previous conversations where the Town of Apex ("you" or "the Town") has retained Vandeventer Black LLP to represent the Town in connection with the acquisition of property from private landowners for water and/or sewer service for the Arcadia East Sewer Connector Project (the "Project"). The representation includes assisting the Town with the acquisition of easements or fee ownership and related condemnation actions regarding landowners who have not provided the Town easements or fee ownership necessary for the construction of the Project. If we are requested to represent the Town on other matters in the future, the terms set forth below shall apply unless we enter into a superseding engagement letter with you.

In order to enable us to effectively render these services, you will fully and accurately disclose all facts and keep us advised of all developments relating to matters we are handling. You will otherwise fully cooperate with us and will be available to attend meetings, discovery proceedings and conferences, hearings and other proceedings. You will preserve all documents, including electronic documents and files that would in any way be relevant to this matter. We have made no promises or guarantees to you concerning the outcome of matters we handle for you and cannot do so. Nothing in this letter should be construed as such a promise or guarantee.

The fee for legal services provided will be on an hourly basis. Current hourly legal rates are: partners - \$280.00, associates - \$190.00, and paralegals - \$90.00. Our hourly rates are periodically adjusted; our statements for legal services shall reflect the hourly rates in effect when such services are performed. The attorneys of this firm use a minimum time increment of one-tenth hour, which may result in more time being billed than is actually spent performing legal services.

We will represent the Town and will provide legal services to assert and protect its rights in connection with the acquisition of the right-of-way for the Project. We will keep you informed of our efforts on behalf of the Town and invite you to communicate with us if you have any questions.

I have waived our firm's policy that new clients provide the firm with an advanced fee to be held in the firm's trust account during the representation. The Town agrees to pay currently

TOA-0474

Town of Apex
February 13, 2015
Page 2 of 4

all reasonable and necessary costs and expenses for investigating, preparing and presenting your claims and will remain responsible for reimbursement or payment of these costs and expenses whatever the ultimate outcome of the matter. Costs and expenses include photocopying, messenger and delivery service, computerized research, travel (including mileage, parking, meals and ground transportation), long-distance telephone, telecopying, word processing, filing fees and other miscellaneous expenses associated with the pursuit of your claims. In addition to our fees you agree to pay our reasonable and necessary out of pocket expenses or disbursements. Disbursements will include long distance telephone charges, delivery charges, reproduction costs, computer research charges, filing fees and travel expenses. Our policy in regard to billing for disbursements is attached.

Our statement for legal fees and expenses will be rendered to you monthly and will be due upon receipt. We will expect payment to be made promptly, and without regard to the consummation of any proposed transaction or outcome of any matter. Any statement which is not paid within 30 days of its date will be considered past due and may be at our discretion subject to an interest charge at prevailing commercial rates, as indicated by the *Wall Street Journal's* Prime Rate. The law firm reserves the right to apply your funds in trust to any outstanding balance.

We will seek to keep you informed as to the progress of our engagement. As appropriate, we will send you copies of significant papers prepared or received by us. Unless you inform us in writing that particular matters require added security, we will routinely use email and cellular phones for such communications. Documents, including electronic files, will be handled, stored, and disposed of in accordance with the firm's document retention policy as it may change from time to time, unless we have a different written agreement.

In the following circumstances, we have the right to withdraw from representing you upon giving you reasonable notice to enable you to secure other counsel:

- (1) if you fail to cooperate in the preparation and presentation of your claims or otherwise breach this agreement; or
- (2) if, for professional or ethical reasons, we cannot proceed with our representation.

If we elect to withdraw, you will take all steps necessary to free us of any obligation to perform further, including the execution of any documents necessary to complete our withdrawal. If at any time you have a dispute concerning this agreement, statements for services or any matters handled by us on your behalf, you agree to engage in confidential, formal non-binding mediation in Raleigh, North Carolina as a condition precedent to any legal action. The laws of the State of North Carolina shall apply to this agreement without respect to its choice of law rules.

In the event of our withdrawal or discharge, we will be entitled to be paid fees for services rendered up to the date of our withdrawal or discharge. We will also be entitled to reimbursement of any costs and expenses paid or incurred on your behalf up to the date of withdrawal or discharge.

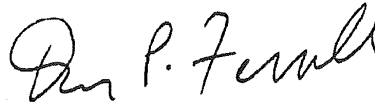
TOA-0475

Town of Apex
February 13, 2015
Page 3 of 4

Thank you for choosing my firm to provide legal representation to you in this matter. If you have any questions about my agreement to represent you in this matter or the fee, please give me a call and I will be glad to discuss it with you. If the foregoing correctly reflects your understanding of the terms and conditions of our representation, please indicate your acceptance by signing this letter in the space provided below and return it to our office. I am pleased to have this opportunity to be of service and to work with you in this matter.

Yours sincerely,

VANDEVENTER BLACK LLP

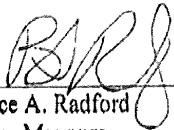


David P. Ferrell

DPF/tjm

Enclosures

AGREED TO AND ACCEPTED:



Bruce A. Radford
Town Manager
On Behalf of the Town of Apex

Mar 11, 15
Date

TOA-0476

Town of Apex
February 13, 2015
Page 4 of 4

Policy in Regard to Billing for Disbursements

We will bill you for disbursements made on your behalf as indicated below:

Telephone charges. Our long distance telephone charges will be based upon our direct dial rates. In the event that telephone calls are made from locations other than our offices, the cost will be based on actual credit card or cellular telephone costs incurred. We will not bill you for local telephone service.

Photocopies. Standard photocopies (8 ½ x 11 and 11 x 14) will be billed at 20 cents per page. Other photocopies produced by outside vendors (color and enlargements) will be billed at cost without markup.

Outside computer research (Lexis or Westlaw). We will bill at the normal Lexis or Westlaw rate without markup.

Filing fees will be billed at the charges incurred.

Travel expenses. We will bill travel expenses at our cost without markup.

Express delivery services (Federal Express, Airborne, etc.). We will bill you for the charges at the regular rate listed by the express delivery company.

Facsimile. We will bill facsimile copies at our cost including long distance charges, if any.

Court reporters, expert witnesses, investigators, accountants, appraisers, will be billed at our cost without markup.

Our philosophy is to minimize out of pocket expenses consistent with those required in conjunction with the legal services we provide. We manage our expenses on behalf of clients as if they were our personal expenses.

**REPRESENTATION AND
CONFIDENTIALITY AGREEMENT**

THIS REPRESENTATION AND CONFIDENTIALITY AGREEMENT (this "Agreement") is made and entered into this the 9th day of MARCH, 2015, by and among Parkside Builders LLC, ("Parkside"), the Town of Apex, a North Carolina municipal corporation (the "Town"), and Vandeventer Black, LLP ("Counsel"), hereinafter referred to collectively as the "Parties" and individually as a "Party"

WITNESSETH:

WHEREAS, the Town needs to acquire certain sewer easements and temporary construction easements to expand the Town's public sewer infrastructure for the purpose of expanding the territory within which the Town provides convenient public water and sewer service, all in order to promote the public safety, health, and general welfare; these easements are described in the attachments to Resolution ~~2015-0302~~ ¹¹ hereinafter the "Easements"); and

WHEREAS, the Easements are important to the Town's comprehensive water and sewer infrastructure plans; and

WHEREAS, the Parties understand that in order to acquire the Easements, condemnation actions may need to be filed in Wake County Superior Court condemning the Easements and that the Town will need legal counsel to represent it in any such actions; the condemnation actions covered by this Agreement are the condemnation actions authorized by Town of Apex Resolution ~~2015-0303~~ ¹¹ hereinafter the "Condemnation Actions"); and

WHEREAS, Parkside has made or intends to make a unilateral offer to pay the Town's costs, including attorneys' fees, of the Condemnation Actions (hereinafter the "Unilateral Offer"); and

WHEREAS, the Parties recognize that they have a common and joint interest in the efficient, just and successful conclusion of the Condemnation Actions and that Parkside by virtue

of its being responsible for the financial aspect of the Condemnation Actions has a legitimate interest in being able to communicate freely with Counsel and the Town about all matters related to the Condemnation Actions; and

WHEREAS, the Parties desire and intend to maintain the attorney-client privilege, the work-product privilege, and such other privileges as may attach to information and records relevant to the Condemnation Action that they now possess or may possess in the future notwithstanding its distribution to the Parties; and

WHEREAS, the Parties desire and intend to provide for the preservation of all applicable privileges notwithstanding the distribution of such confidential and privileged information to and among the Parties and Counsel.

NOW, THEREFORE, in consideration of the premises and promises herein contained, and for other good and valuable consideration, the receipt and adequacy of which is hereby expressly acknowledged, the Parties stipulate, covenant, and agree as follows:

ARTICLE I

PRIVILEGED AND CONFIDENTIAL INFORMATION

1. Definition of Privileged and Confidential Information: Privileged and confidential information (collectively, "Confidential Information") shall include the following:

- a. Information related to this Agreement, any agreement arising from the Unilateral Offer or the Condemnation Actions communicated between or among the Parties and Counsel or any subset thereof;
- b. Information gathered by Counsel or any Party in connection with the Condemnation Actions;
- c. Such other information as the Parties or Counsel shall designate as privileged or confidential;

d. Any information, opinion, theory, document, compilation, creation, or thing which would be characterized as "work product" under the laws of the United States or of North Carolina, including, but not limited to materials prepared or collected in anticipation of litigation generally, or in anticipation of the Condemnation Actions specifically, by Counsel, by either of the Parties, or by the consultants, sureties, indemnitors, insurers, officials, employees, or agents of either of the Parties and the mental impressions, conclusions, opinions, or legal theories of Counsel or other representative of either Party; and

e. Any communication or materials which would be covered by the attorney-client privilege under the laws of the United States or of North Carolina.

2. Use of Confidential Information and Non-Disclosure. Confidential Information shall be used solely in connection with the Condemnation Actions and efforts to obtain the Easements. Except as required by law, no Confidential Information shall be disclosed voluntarily to any third party without the prior consent of all Parties, which shall not be unreasonably withheld. This limitation on the use of Confidential Information shall continue after the termination of the Condemnation Actions and notwithstanding the withdrawal of any Counsel from this Agreement.

3. Application of the Joint Defense Doctrine. The joint defense doctrine shall apply fully to all Confidential Information.

4. Request or Demand for Confidential Information by Third Parties. In the event that the legal process, including but not limited to subpoenas, notices of deposition, requests for production of documents, public records requests, Freedom of Information Act requests, requests for admissions, interrogatories, or requests for interrogatories, is employed against any Party to compel the disclosure of Confidential Information, the Party to whom such legal process is

directed shall notify the other Parties of such occurrence. The party to whom such legal process is directed shall assert all rights and privileges with respect to the Confidential Information sought in order to maintain its confidentiality and the other Parties shall provide full cooperation in all lawful efforts to protect Confidential Information. A Party's compliance with any court order shall not be a breach of this Agreement.

5. Ownership of Confidential Information. Confidential Information, and all copies thereof, shall remain the property of the Party collecting and/or communicating such Confidential Information.

ARTICLE II

ENGAGEMENT OF COUNSEL AND COMPENSATION

1. Engagement of Counsel. The Town agrees to engage Counsel, being the law firm of Vandeventer Black, LLP, with David P. Ferrell as lead counsel from said firm, to represent it in the Condemnation Actions. The Condemnation Actions include all aspects of the prosecution, negotiation, or settlement of each and every condemnation action included in the Condemnation Actions and all other matters as defined in the Unilateral Offer by Parkside to the Town.

2. Compensation. Counsel shall be compensated in accordance with the terms of a separate agreement between Counsel and ~~Parkside~~ ^{the Town}. Consistent with any contract arising from the Unilateral Offer, the Parties agree that Parkside will be solely responsible for the legal fees and costs of Counsel related to the Condemnation Actions. The Town expressly acknowledges that legal fees charged by Counsel related to the Condemnation Actions will be paid by Parkside, consents to such payment, and waives any objection thereto.

3. Direction of Action. The Town shall have the sole authority to direct Counsel and the Condemnation Actions including the proceedings therein and the settlement thereof. Initial deposits shall be reasonable and based on appraisals. The Parties are authorized to communicate

with each other in any combination in furtherance of this Agreement or the Condemnation Actions in any manner that is convenient, without the need for all to be notified of or participate in the communications. Counsel is authorized to disseminate information regarding this Agreement or the Condemnation Actions to the Parties.

4. Dissemination of Information. The Parties agree that any information communicated to Counsel regarding this Agreement or the Condemnation Actions may be disclosed by Counsel to any other Party.

ARTICLE IV

WAIVER OF CONFLICTS

Each of the Parties affirms that their interests are aligned, and that there is no present conflict between them regarding the Condemnation Actions, this Agreement, or the Unilateral Offer and Agreement. Additionally, Counsel shall be free to represent either Party in matters which do not relate to the (i) the Condemnation Actions, (ii) the Unilateral Offer and Agreement, or (iii) this Agreement. In the event that a conflict arises between Parkside and the Town in the Condemnation Actions, then all Parties hereto agree that 1) Counsel shall discontinue its representation related to the Condemnation Actions, the Unilateral Offer and Agreement and this Agreement, and 2) Counsel shall be entitled to be paid under the terms of this Agreement for all work performed by them through the date of discontinuance of representation. In the event of a conflict and discontinuance of representation as just described, the Town shall have the right to select an outside attorney to represent it in the Condemnation Actions and Parkside shall have the duty to pay the attorney's fees at the same rate as said attorney's going rate, not to exceed the rate it was paying Counsel, and Parkside shall have the right to retain its own attorney to monitor the Condemnation Actions and act as co-counsel for Parkside, and said new attorneys shall have the same rights of access to information as if there had been no change in counsel.

ARTICLE V

FURTHER TERMS

1. Effective Date. This agreement shall be effective upon its full execution. After the Effective Date of this agreement, the Town shall retain the sole discretion to determine whether to file the Condemnation Actions contemplated hereby. If the Town directs Counsel not to file the Condemnation Actions, then this agreement shall terminate except for the provisions pertaining to compensation of Counsel and the waiver of conflicts of interest.

2. Survival and Binding Effect. The terms of this Agreement shall survive and shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, beneficiaries, legal representatives, successors, and assigns.

3. Waiver and Modification. Neither this Agreement, nor any provision hereof, may be waived, modified, amended, discharged, or terminated, except by written instrument signed by the Party against whom the enforcement of such waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in such instrument.

4. Entire Agreement. This Agreement, the Unilateral Offer and Agreement, and any engagement agreement between Counsel and Parkside are the only agreements between the Parties with respect to the subject matter hereof, and this Agreement, the Unilateral Offer and Agreement, and any engagement agreement contain all of the terms agreed upon, and there are no other representations or agreements, oral or written, between the Parties with respect to the subject matter hereof, nor have any factual, legal, or other promises or representations been made by or to any Party to induce the Party to execute this Agreement, except those expressly set forth herein.

5. Organization, Qualification, Power and Authority of Parties: The Parties and Counsel represent and warrant that (a) it has the corporate and/or statutory power and authority

to enter into this Agreement and to perform the obligations under the Agreement; (b) such execution, performance and consummation has been authorized by all necessary corporate or other officers; and (c) each person who executes this Agreement is duly authorized and fully empowered to execute and deliver this Agreement on its behalf and as the act of the corporate, business, or professional entity, for whom he or she executes this Agreement.

[REMAINDER OF PAGE LEFT BLANK INTENTIONALLY]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement under Seal
as of the day and year first above written.

TOWN OF APEX, NORTH CAROLINA

By: B. Radford
Bruce A. Radford, Town Manager

ATTEST:

By: D. B. Hosch
Donna B. Hosch, Town Clerk, CMC



PARKSIDE BUILDERS, LLC

By: R. J. [Signature]

VANDEVENTER BLACK, LLP

By: D. L. [Signature]

Town of Apex, North Carolina, hereby certifies that the foregoing is a true and correct copy of the original as the same appears in the records of the Town of Apex, North Carolina.



"The Peak of Good Living"

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

TOWN OF APEX

CLERK'S CERTIFICATION

STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, Donna B. Hosch, CMC, NCCMC, Town Clerk, Town of Apex, North Carolina, do hereby certify that the attached is a true copy of RESOLUTION NO. 15-0303-11 RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS TO ACQUIRE A SEWER EASEMENT approved by the Apex Town Council at its Regular Meeting held on March 3, 2015.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official Seal of the Town of Apex, North Carolina, this the 10th day of March 2015.


Donna B. Hosch, CMC, NCCMC
Town Clerk



RESOLUTION: 15-0303-11

**RESOLUTION AUTHORIZING EMINENT DOMAIN PROCEEDINGS
TO ACQUIRE A SEWER EASEMENT**

WHEREAS, the Town of Apex is improving its sewer system and related thereto needs to improve its sewer connectivity including the construction of a new sewer connector line and facilities; and

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

To be used for the construction, operation, and maintenance of a 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, public streets, sidewalks and appurtenances thereto.

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

1. For the purposes stated above under the authority of Chapter 40A of the North Carolina General Statutes and Section 6.5 of the Apex Town Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, the Town Council does hereby authorize the acquisition through eminent domain or negotiated purchase property interests described below:

A 40 foot wide Gravity Sewer enement for the purposes described above, in, upon, across, over, and under 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

2. 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.

3. The Director of Public Works or his designee is authorized to make adjustments to the exact location of easements if practical considerations so require.

4. Any condemnation actions previously filed are hereby ratified and authorized and the same are hereby authorized to proceed. The sending of such notices of entry and/or notices of eminent domain proceedings as required by law or are prudent and courteous even though not required and the performing of such investigations (including the obtaining of real estate appraisals, land planning studies, engineering studies and tree valuations) as the Town Attorney determines are needed are hereby authorized and/or ratified. Any notices of entry or notices of eminent domain previously sent with respect to the project described above are hereby ratified.

Motion made by Council Member Wassiter

Motion seconded by Council Member Dulkie

With 13 Council Members voting aye.

With 2 Council Members voting no.

Adopted and effective this the 3rd day of March, 2015.

William M. Sutton
William M. Sutton
Mayor

ATTEST:

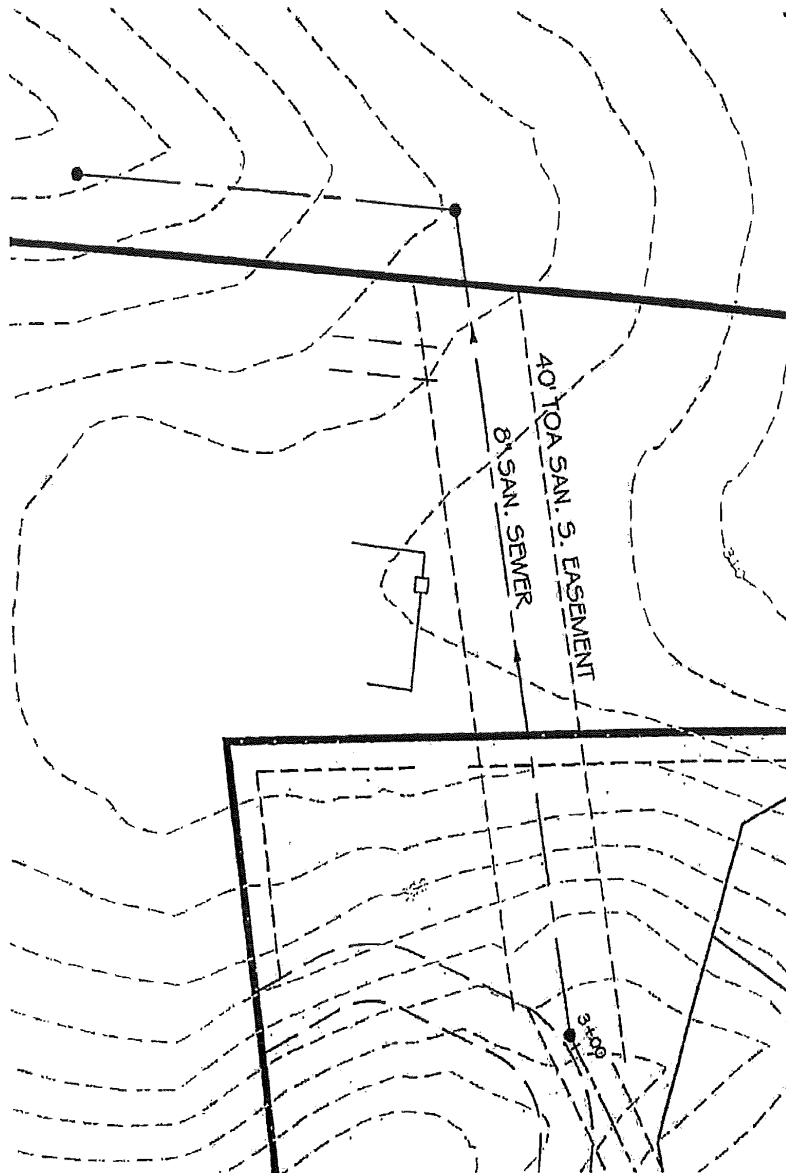
Donna B. Hosch
Donna B. Hosch, CMC
Town Clerk

APPROVED AS TO FORM:

Laurie L. Holle
Laurie L. Holle
Town Attorney

To: condemnation around east sewer connector installation authorizing condemnation

"Sewer Exhibit"



Tammy Moldovan

From: Jennie Kirschbaum
Sent: Thursday, February 02, 2012 10:16 AM
To: Steve Adams
Subject: Rubin Deed
Attachments: deed #2119.docx

Resend the Rubin deed. Use this one and discard the previous deed I emailed.

Jennie Kirschbaum
Town of Apex
Legal Services
P.O. Box 250
Apex, NC 27502
Tel: (919) 249-1126
Fax: (919) 249-1128

