No. COA20-304

No. _____ TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
15-CVS-5836

****

RULE 9(d) DOCUMENTARY EXHIBITS

(Cited as Doc. Ex. pp-pp)

****

I N D E X

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David P. Ferrell

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CONFIDENTIAL COMMUNICATION FOR SETTLEMENT PURPOSES ONLY

February 13, 2017

Kenneth C. Haywood
Boxley, Bolton, Garber, & Haywood, LLP
Post Office Drawer 1429
Raleigh, North Carolina 27602

Via Electronic & US Mail

RE: Town of Apex v. Beverly L. Rubin
Wake County Superior Court File No.: 15-CVS-5836
Our File No.: 037851-000071

Dear Kenneth:

I am writing to respond to your February 2, 2017 letter. As I mentioned in my voice mail today, the purpose of this letter is to respond to Ms. Rubin's proposal, address Ms. Rubin's threat to obstruct and damage a portion of the Town of Apex ("Town")'s public sanitary sewer, and to provide several settlement options for Ms. Rubin to consider. As I have mentioned to you a number of times, we hope Ms. Rubin will be willing to meet with us in person to discuss settlement opportunities to resolve this dispute.

Ms. Rubin's proposals

I have discussed both options listed in your February 2, 2017 settlement proposal with the Town Council and Town staff, and the Town does not accept the proposals. The judge's order dismissing our condemnation petition has been properly appealed to the Court of Appeals. The order is stayed during the pendency of the appeal. There is no legal basis for the Town or any private party to pay Ms. Rubin for the use of public sanitary sewer. Further, given the current and necessary use of the public sewer service by a number of residents and citizens of the Town, and the status of the court's order on appeal, the Town does not agree to cease using the public sanitary sewer.

Ms. Rubin's threat to obstruct and damage the Town's public sanitary sewer

We request that Ms. Rubin reconsider her threat to obstruct and damage the Town's public sanitary sewer system. There is no legal basis for Ms. Rubin to undertake "self-help" regarding the subject matter of the appeal. The judge's order regarding the condemnation petition is on appeal. Further, an owner has no common law right to bring a trespass action against a municipality. *McAdoo v. City of Greensboro*, 91 N.C. App 570, 573, 372 S.E.2d 742, 744 (1988). If Ms. Rubin and/or a utility contractor on her behalf tampers, obstructs or damages the Town's sanitary sewer pipe or any related apparatus, they will be held jointly and severally liable for any damage to the Town's property, environmental damage to surrounding properties, and

any property damage suffered by citizens or property owners currently utilizing the sewer pipe for service. In addition, Ms. Rubin and any utility contractor acting on her behalf would violate Sec. 12-88 ad 12-89 of the Town's Code of Ordinances, as well as be guilty of a misdemeanor (see attached, Exhibits 1 and 2). Please share this information with any contractor Ms. Rubin contacts about obstructing and damaging the Town's sanitary sewer system. Again, if Ms. Rubin insists on taking steps to obstruct and damage the Town's sanitary sewer system, the Town will pursue all legal options to preserve and protect its public sewer system and the interests of Town residents that rely on this public sewer system.

Alternative sewer options

The Town has examined alternatives to providing sewer services to the Riley's Pond subdivision, including options to address sewer service if Ms. Rubin unlawfully obstructs and damages a portion of the Town's sanitary sewer. A temporary sewer option includes "pump and haul", which may require a pump and haul truck to travel to and access the manhole shown by a red circle on the photo attached as Exhibit 3. This would occur approximately 2 times a day. Access routes to the manhole are still being examined. Alternatively, a diesel powered emergency sewer bypass pump may be used to pump the sewer from the manhole shown by a red circle on the enclosed photo along the surface of the ground to another location to be removed. If so, an above ground pipe would have to be installed and run to a location that is accessible by the pump and haul truck. This emergency sewer bypass pump would have to be manually turned on and operated 2 times a day for 30 minutes at a time. The above-ground pipe may run along the property line between Ms. Rubin's property and the Riley's Pond subdivision property toward Olive Chapel Road. With either pump and haul approach, there would be some noise and some odor from the manhole area noted on the attached photo while the pump and haul activities are being conducted.

A permanent sewer solution could involve constructing a pump station and corresponding force main sewer pipes and connecting these force main sewer pipes to the sewer service in the Arcadia West subdivision. Although it is not a preferred solution from an engineering, environmental, impact to landowners, and cost standpoint, it is an option and one Ms. Rubin has advocated. If a pump station is to be constructed, it will have to be constructed in the area shown on the photo attached as Exhibit 4. The pump station will look similar to the pump station in the photo attached as Exhibit 5. The force main sewer pipes would likely run down the property line between the Rubin tract and the Riley's pond subdivision tract (see yellow dotted line on Exhibit 4). Depending on various factors, some portion of the force main sewer pipe easement may overlap the boundary of Ms. Rubin's property and Riley's Pond subdivision. This would allow the sewer pipe and easement areas to be contained within the required setbacks of any residential development plan. An access route to the pump station site will be needed during construction of the pump station and thereafter for Town and other maintenance vehicles. Access routes to the pump station site are still being examined. Also, an easement would be needed across Ms. Rubin's property that would run parallel to and in close proximity to Olive Chapel Road, in order to connect the force main sewer pipes to the Town's sanitary sewer system (see yellow dotted line on Exhibit 4).

The Town's settlement alternatives

The Town requests Ms. Rubin consider these settlement alternatives:

1. The Town would reduce the size of the current easement to 5 feet wide, instead of the current width of 40 feet. As you know, after the condemnation complaint was filed, the Town agreed to install the sewer pipe by the "jack and bore method" instead of digging an open trench, as an accommodation to Ms. Rubin. As such, the pipe and casing are properly installed, and any maintenance of the pipe would be done by accessing it from either manhole on neighboring properties. Because this installation method was chosen and the existence of the casing around the pipe, the Town would reduce the size of the easement down to 5 feet, approximately 2 feet on each side of the pipe (the pipe is approximately 8 inches in diameter). This should benefit Ms. Rubin if she ever intends to develop her property into a residential subdivision, or sell to a developer who will develop the property. A 5-foot easement would fit within the side yard setbacks that would be required for any residential subdivision development plan. Also a road could be constructed across the easement area (as is allowable currently). So the easement would not negatively impact the development of Ms. Rubin's property.

2. The Town could move the existing sewer pipe approximately 30 feet closer to Olive Chapel Road (See Exhibit 6). Various engineers have re-examined the topography and believe that a gravity sewer pipe could be installed in that general area. It is still an open question as to whether a sewer pipe in this location could be installed by the "jack and bore" method, or whether an open trench would have to be dug to install the sewer pipe. A survey of the property will be necessary to answer this question with certainty. But if Ms. Rubin's primary concern is the proximity of the sewer pipe to her swimming pool, this approach may address that concern.

3. The existing easement and sewer pipe would remain, and the Town would connect Ms. Rubin to Town sewer at the manhole shown circled in red on the photo attached as Exhibit 7 at no cost to Ms. Rubin. Ms. Rubin would grant any necessary easements for this connection for $1. The Town would allow this connection without requiring Ms. Rubin's property to be annexed, pursuant to Sec. 12-21(c) of the Apex Town Code of Ordinances (See Exhibit 8). The Town would waive payment of sewer capacity or acreage fees. Ms. Rubin would receive sewer service to the property for as long as it remains a single family dwelling of the current size. So sewer service at no charge would "run with the land" if she sells the property, again, as long as the property remains a single family dwelling of the current size.

Each of these alternatives would require an agreement between the parties on the amount of just compensation to be paid for any easement acquired by the Town. In addition, the parties would bear their own attorney's fees.

We hope Ms. Rubin will seriously consider these settlement options and agree to meet with us in person to discuss settlement in more detail. If you have questions about any of the information provided in this letter, please give me a call. We look forward to hearing from you.

Sincerely,

VANDEVENTER BLACK LLP

David P. Ferrell

Enclosures

cc: Town of Apex

4842-7517-3954, v. 2

- Doc. Ex. 5 -

Sec. 12-88. - Damage, etc., to sewer system prohibited.

No person shall obstruct, break, remove or otherwise damage any portion of any manhole, flush-tank or other part of any public sanitary or storm sewer.

(Code 1973, § 21-45)

Sec. 12-89. - Violations of regulatory provisions.

(a) Any person who maliciously damages any part of the sewer system shall be guilty of a misdemeanor and punishable under subsection (b) and in addition, shall be liable to a civil action to be collected under section 12-47.

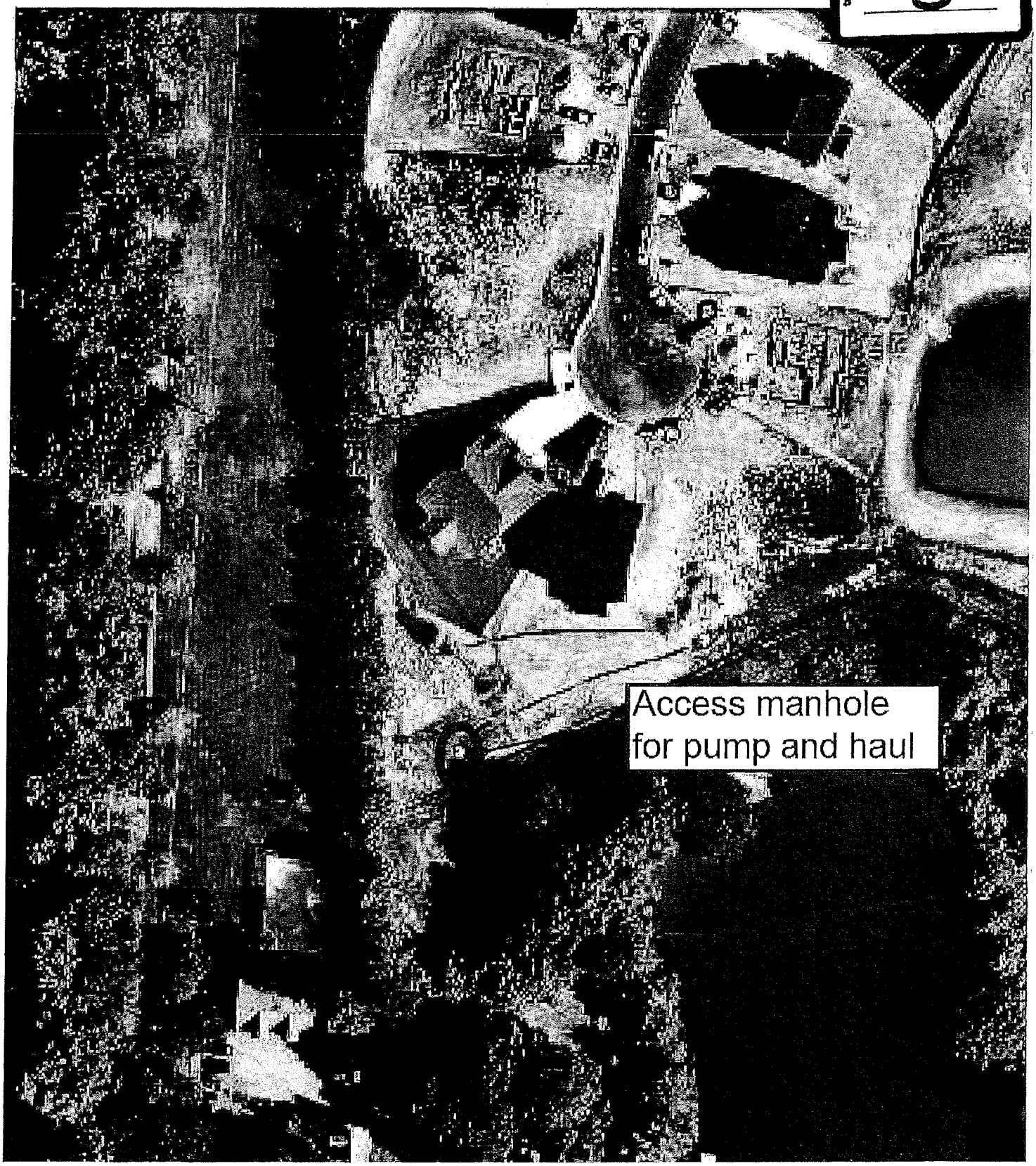
(b) Any person who shall violate any provision of this division shall also be:

(1) Liable to the town for all costs, expenses, loss or damage incurred by the town as the result of such violation.

(2) Subject to immediate disconnection of the sewer serving the property upon or in connection with which the violation occurred, after notice and an opportunity for a hearing.

(Code 1973, § 21-74)

EXHIBIT
3



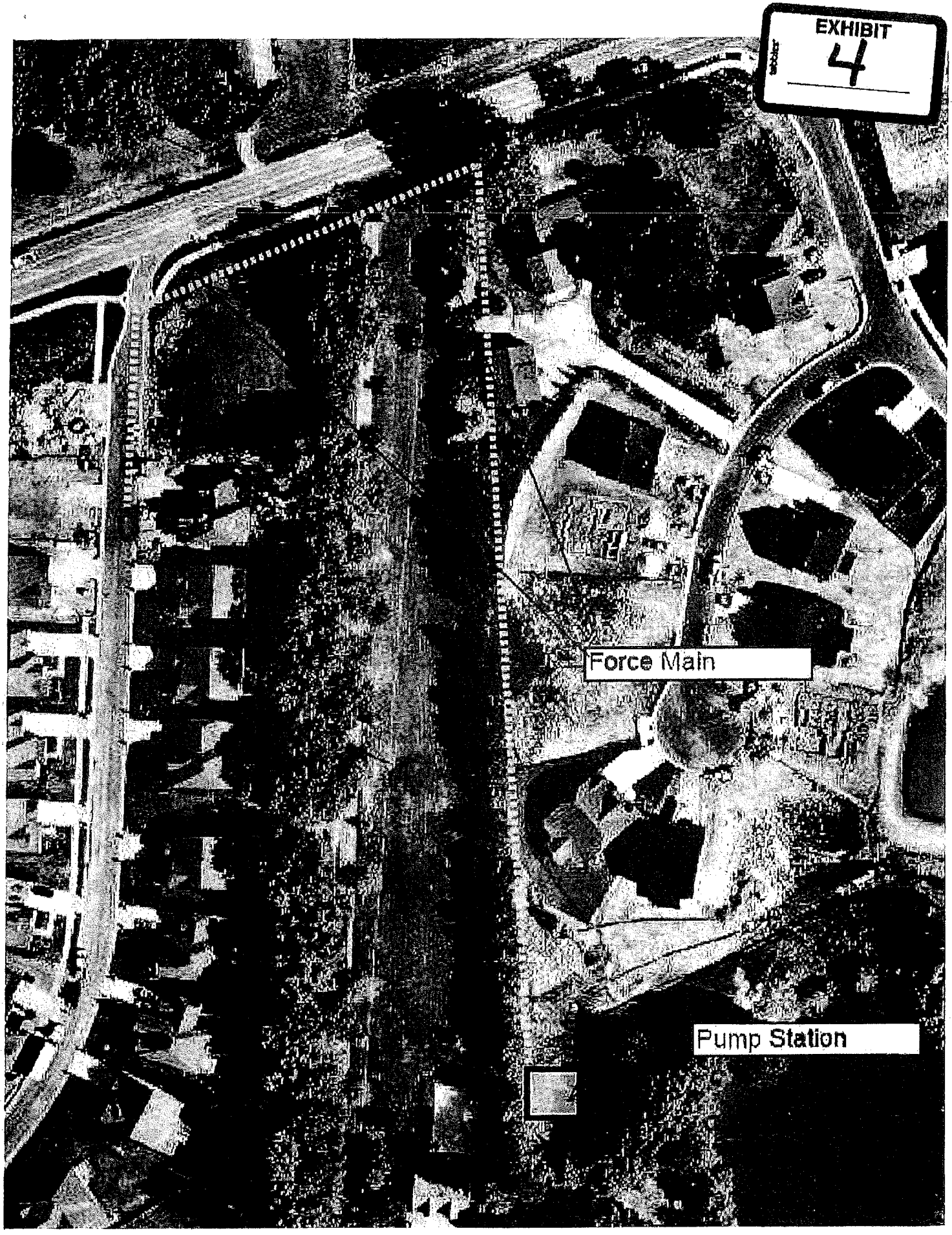
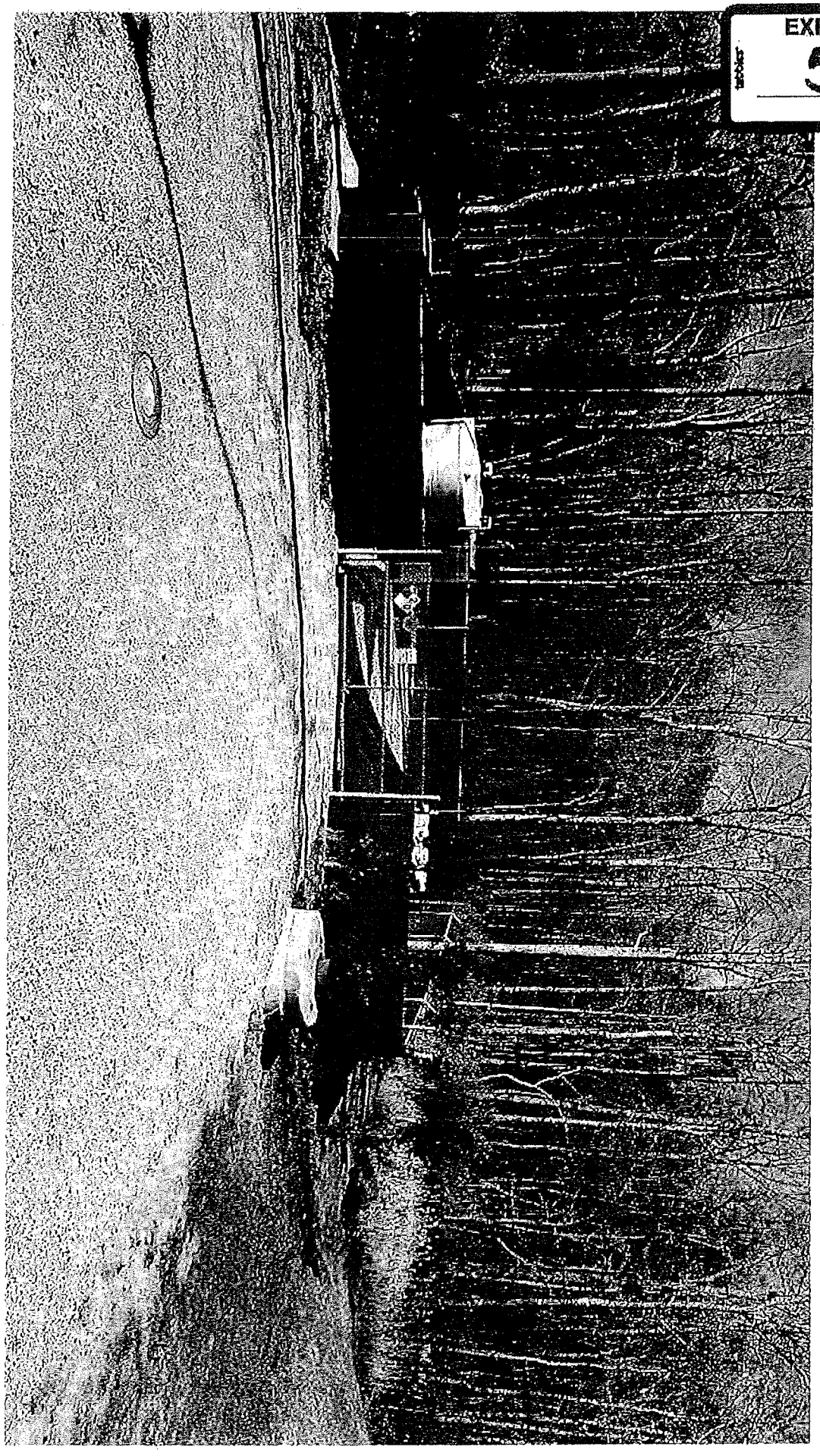


EXHIBIT
4
Force Main
Pump Station

- Doc. Ex. 9 -



- Doc. Ex. 10 -

EXHIBIT
6

- Doc. Ex. 11 -

EXHIBIT
7

Sec. 12-21. - Out of town water and sewer service.

(a) The town shall not provide any new water or sewer service outside of the town's municipal corporate limits, as extended from time to time, after September 7, 1999. Water or sewer service being provided by the town outside of the municipal corporate limits as of September 7, 1999, shall be continued on the same terms and conditions as applied as of September 7, 1999, unless and until such service is terminated by the then existing customer or by the town.

(b) Notwithstanding anything in subsection (a) of this section, the town may offer and provide new utility services to customers located outside of the town's municipal corporate limits, as extended from time to time, as follows:

(1) New water customers may be connected to water lines existing as of September 7, 1999, which are located outside of the town's municipal corporate limits, to the extent that such connections facilitate the reimbursement of acreage fees to a party who constructed the water lines in reliance on a valid acreage fee reimbursement agreement with the town; such customers shall be subject to the same terms and conditions as applied on September 7,1999, and shall submit a covenant to be annexed upon the availability of sewer service; and

(2) The town may provide new municipal water and sewer service to any construction and debris landfill located outside of the town's municipal corporate limits (but within the town's extraterritorial jurisdiction) at the town's then prevailing in-town rates, rents, fees or other charges for such services (other than acreage fees and capacity fees), subject to such terms and conditions as the town deems necessary or desirable as reflected in an agreement approved by the town council, in consideration of the landfill's owner and operator permitting the town, for a period of not less than five years, to deposit, dump or otherwise dispose of at the landfill, unlimited quantities of grass clippings, yard waste, leaves, wood chips and other organic debris collected by the town from properties located within the town's municipal corporate limits and extraterritorial jurisdiction, without charge to the town.

(c) Not withstanding subsection (a) of this section, the town may provide new water or sewer service to a residential dwelling outside of the town's corporate limits if the need for such service is or will be created by a town condemnation action or town infrastructure project. Persons receiving town water or sewer services for these reasons shall be charged the town's normal in-town rates and such persons shall not be charged the acreage and capacity fees that otherwise would be due for connecting the applicable service to the residential dwelling. This subsection does not affect the rates, acreage fees or capacity fees that would be due upon the development or change of use of the parcel upon which the residential dwelling is located. Upon development or change of use of the parcel upon which the residential dwelling is located, annexation would be required to provide new service to the new uses resulting from development or to continue service to the changed use within the structure that was formerly used as the residential dwelling. Whether a residential dwelling qualifies under this subsection shall be determined by the public works director.

(d) Notwithstanding subsection (a), the town shall comply with the *Town of Apex Site 14 Water and Sewer Extension Policy* adopted on August 4, 2009 as clarified and improved by the *Addenda to Clarify and Improve the Implementation of the Town of Apex Site 14 Water and Sewer Extension Policy* adopted on October 19, 2010. The policy and addendum are collectively referred to in this subsection (d) as the "extension policy." A copy of the extension policy shall be kept in the town clerk's office and be made available for inspection and copying by the general public.

(1) Notwithstanding subsection (a), with respect to applications for service submitted to the town on or before January 1, 2012, the town shall provide water or water and sewer service to qualifying property uses and structures located on parcels qualifying as participating properties, as provided in the extension policy, without requiring annexation of the participating properties. The town shall not charge the acreage and capacity fees that would otherwise be due for connecting to the applicable utilities, with respect to town water or water and sewer services provided to qualifying property uses and structures located on parcels qualifying as participating properties. Additionally, the town shall charge its normal in-town rates for the applicable utilities provided to qualifying property uses and structures located on parcels qualifying as participating properties.

(2) Beginning on January 1, 2025, the town shall have the right to annex participating properties that have not been previously annexed, as provided in the extension policy.

(3) Immediately upon the occurrence of a changed condition, as defined in the extension policy, on or at a participating property:

a. The town shall have the right to annex the participating property as provided in the extension policy; and

b. The acreage fees and capacity fees in effect on the date the changed condition occurred and applicable to the development or changed use on or at the participating property shall be due and payable to the town, as provided in the extension policy.

(4) Nothing in subsection (d) shall prevent the town from annexing a participating property upon the request of the owner.

(Ord. of 9-7-00, § 2; Ord. No. 02-1119-44, § 1, 11-19-02; Ord. No. 10-0216-02, § 1, 2-16-10; Ord. No. 2011-0517-04, § 1, 5-17-2011)

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15-CVS-5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS**

NOW COMES the Plaintiff Town of Apex ("Town"), through counsel, and hereby responding in opposition to the Motion To Enforce Judgment And Alternative Petition For Writ Of Mandamus ("Motion") of Defendant Beverly L. Rubin ("Rubin") filed herein on 10 April 2019, and says:

1. The Judgment filed herein on 18 October 2016 does not afford to Rubin any of the relief which she seeks in the Motion. The only relief granted to Rubin by the Judgment is the dismissal of the Town's condemnation claim as null and void. The Judgment rendered the complaint and Declaration of Taking a nullity – it is as if it had not been filed.

2. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure or require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.

3. The Judgment does not order the Town to perform any specific act, including removal of the underground sewer line. Therefore, the Town cannot be held in contempt for failing to remove the underground sewer line. Moreover, the Motion fails to satisfy the statutory

requirement that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).

4. The prior action was not a declaratory judgment action, and therefore N.C. Gen. Stat. § 1-259 is inapplicable.

5. Further, if Rubin is attempting to use the Declaratory Judgment Act to construe and/or broaden the impact of the Judgment, such an attempt should be denied. Further, a declaratory judgment is a separate and independent action, and may not be commenced by a motion in the cause. *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C.App. 257, 362, S.E.2d. 870 (1987), particularly in this action after the entry of a final Judgment.

6. A writ of mandamus is inappropriate because Rubin has failed to show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it. The function of mandamus is to compel the performance of a ministerial act and not to establish a legal right. Manifestly, the Judgment does not state that Rubin has a right to maintain her property without a sewer line, nor does it order the Town to remove the underground sewer line. Removal by the Town is not a remedy available to Rubin under a plain reading of this Judgment.

7. The Judgment is limited to the filed condemnation claim. Only a hearing pursuant to N.C. Gen. Stat. § 136-108 on all other issues contesting the Town's right to take alleged in the original condemnation claim was conducted in this action, where the prior court dismissed the Complaint. No trial on any claim for relief was had by the parties.

8. Rubin did not plead any claim for relief whatsoever entitling her to the additional relief requested in the Motion. Rubin did not allege a claim for inverse condemnation in her

responsive pleading herein. The Court did not address in the Judgment the actual installation, maintenance and use of the sewer pipe under Rubin's property.

9. The Judgment is consistent with settled law that if no condemnation is filed and a municipality physically invades a landowner's property, the landowner's sole remedy is inverse condemnation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). Such remedy would result in a landowner receiving just compensation for the area taken, as well as their reasonable attorney's fees. The Town's prior condemnation action was found to be a nullity – it is as if it was never filed.

10. The existing sewer pipe crossing Rubin's property is properly analyzed under inverse condemnation. Rubin had actual knowledge of the Project on 30 April 2015. Town constructed an underground sewer line across the entire width of a narrow portion of Rubin's property ("Project"). The eight (8) inch gravity flow sewer line was installed on July 20, 27 and 29, 2015 at a depth of eighteen (18) feet. The sewer line was placed inside an eighteen (18) inch steel casing. The Project was completed more than three (3) years ago on 22 February 2016.

11. By the installation of the underground sewer line the Town physically invaded Rubin's property and thereby inversely condemned an underground sewer easement more particularly described as follows:

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

12. The Town has not abandoned the Project. The sewer line remains in place and serves approximately fifty (50) residential homes and/or lots located in a subdivision in the Town.

13. The issue of the Town's inverse condemnation of Rubin's property is properly addressed in a separate declaratory judgment action for it is outside the scope of this prior action.

14. As we have requested the Court determine in a proper Declaratory Judgment Action filed on 13 May 2019, inverse condemnation is Rubin's sole remedy for the physical invasion and inverse taking by the Town. Such relief is not requested by Rubin in her Motion to Enforce Judgment, but this is her sole remedy. Public use or purpose is not an element of an inverse condemnation claim. Inverse condemnation remedy is not dependent upon taking or using for a public use. *Wilkie v City of Boiling Spring Lakes*, 371 N.C. 540, 809 S.E.2d 853 (2018).

15. Given that the Judgment does not afford Rubin the relief she seeks in this Motion, the Motion should be denied.

WHEREFORE, the Town respectfully requests that Rubin's Motion To Enforce Judgment And Alternative Petition For Writ Of Mandamus be denied.

This the 21st day of May, 2019.

David P. Ferrell
N.C. State Bar No. 23097
DFerrell@nexsenpruet.com
Norman W. Shearin
N.C. State Bar No. 3956
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Attorneys for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS** upon the parties by electronic mail and by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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

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

This the 21st day of May, 2019.

David P. Ferrell

- Doc. Ex. 19 -

STATE OF NORTH CAROLINA COUNTY OF WAKE	FILED 2019 SEP -5 P 2:42 WAKE CO. C.S.C. BY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 5836
TOWN OF APEX Plaintiff, v. BEVERLY L. RUBIN Defendant.		**MEMORANDUM OF LAW IN SUPPORT OF BEVERLY RUBIN'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS**

NOW COMES Beverly Rubin, by and through undersigned counsel, and serves this Memorandum of Law in Support of her Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus filed on April 10, 2019, and in support thereof shows unto the Court as follows:

BACKGROUND

Brad Zadell, a private land developer in Apex, convinced the Town of Apex to file a condemnation action against Ms. Rubin so sewer lines could be run across Ms. Rubin's property, thereby increasing the value of the developer's adjacent property. Zadell entered into an agreement with the Town whereby he would cover the expenses incurred if the condemnation action was unsuccessful.

Operating under Chapter 136 of the General Statutes, the Town installed the sewer line over Ms. Rubin's objections and prior to the final judgment from the court on the pending condemnation action. By using Chapter 136 instead of Chapter 40A, the Town avoided the possibility that an injunction—afforded by Chapter 40A but not Chapter 136—might issue before the right to condemn is established. Here, instead of waiting to determine whether Ms.

Rubin's objection to the Town condemning her property for a sewer easement to serve a private purpose on an adjoining tract of land was valid, the Town used its "quick take" authority to immediately take possession of Ms. Rubin's property and install the sewer pipe. The Town even went a step further and began issuing building permits (a completely discretionary act) on the adjoining tract of land as early as April 2016 well before obtaining a decision on whether its taking was lawful. **Then in complete contempt of the Court's ruling that the sewer easement was an unconstitutional taking of Ms. Rubin's property, the Town continued to issue building permits!** The Town continued to issue building permits in an attempt to create a public purpose for its actions—a fact it now uses to shield its earlier misbehavior and to seek denial of Ms. Rubin's motion to enforce.

With the case having been remanded after the dismissal of the Town's appeal, Ms. Rubin has now moved for an injunction ordering the Town to remove the sewer lines on the property. As it stands now, the Town unlawfully possesses a portion of Ms. Rubin's property. That unlawful possession enabled Mr. Zadell to sell his property for $2,500,000 above what he and is company paid for it.

PROCEDURAL POSTURE

On April 10, 2019, Ms. Rubin filed her Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus. Ms. Rubin's motion identified no fewer than *six* bases empowering this Court to order the relief that Ms. Rubin seeks. Ms. Rubin also presented argument in support of those procedures at a hearing in this case held May 23, 2019.

Ms. Rubin now submits this memorandum to provide additional case law support from North Carolina and across the country in support of the proper outcome here.

ARGUMENT

The Town of Apex had no constitutional right to use or possess any of Beverly Rubin's property for the sewage pipe after this Court declared the Town's taking to be unconstitutional. Although the case at bar is the result of an uncommon sequence of events, courts in North Carolina and across the country have addressed similar situations. Courts uniformly eject condemning authorities from land in which the authorities are in unlawful possession.

The North Carolina Supreme Court has already provided the answer of how this Court is empowered to require the removal of the sewage pipe that is part of the unlawful possession of Ms. Rubin's property by the Town. In *Sale v. State Highway,* the Court held that the Fourteenth Amendment applying the Fifth Amendment to the states was *self-executing*, and does not require any law for its enforcement.

> When the provisions of a constitution, as does ours, . . . forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.
>
> The courts of the land to preserve the liberty and rights and property of the people, must adhere to the plain stipulations of the fundamental law, and it will be a tragic day in the history of our democratic constitutional form of government, if the courts should ignore the clear mandates of the organic law.

Sale v. State Highway Comm., 242 N.C. 612, 617-620; 89 S.E.2d 290, 295 (1955) (*Internal citations omitted).*

The Town argues that Ms. Rubin somehow forfeited her land to the Town, but Ms. Rubin could not have forfeited her land because she objected to the Town's taking in a timely manner

and proceeded to argue the validity of the take. Under the doctrine of statutory presumption, a property owner may forfeit his remedy against the wrongful condemnation of his land if the owner fails to object to the taking in a reasonable time. The Supreme Court of North Carolina discussed the doctrine of statutory presumption in *Carolina & Northwestern Railway Co. v. Piedmont Wagon & Manufacturing Co.*, 229. N.C. 695, 51 S.E.2d 301 (1949). "The accepted doctrine," the Court explained, "is that where a railroad company proceeds to build its road upon land to which it has not acquired by condemnation or conveyance, the owner . . . may maintain ejectment or other possessory action, . . . provided he proceeds with reasonable promptitude. . . ." *Id.* at 688, 51 S.E.2d at 306 (quoting 23 A. & E. Enc. of Law 700 (2d ed.)).

Railroads—and municipalities like the Town—are cloaked with the power of eminent domain. The Town acted on that power and built the sewage pipe on private land before a judicial decision had been rendered on the validity of its eminent domain action. Ms. Rubin objected to the Town's use of her property with reasonable promptitude. In fact, on multiple occasions she warned the Town before the pipe was constructed that she was challenging their actions. Therefore, she has not forfeited her rights and this Court has authority to remove the Town from possessing her property.

The Supreme Court of Hawaii addressed a situation similar to the instant case in *Honolulu Memorial Park v. Honolulu*, 436 P.2d 207 (Haw. 1967). In *Honolulu Memorial Park*, the city possessed and maintained a sewage pipe over private property. *Id.* at 208. The city failed to institute a condemnation action and otherwise had no legal right to possession of the property. *Id.* In deciding in favor of the property owner, the Supreme Court of Hawaii held that "the presence of appellant's sewer line albeit underground, has unlawfully deprived the appellee of the unrestricted possession of its premises." *Id.* at 210. Based on the unlawful deprivation of the

property owner's possession, the court explained, "ejectment is the proper remedy for restoration to the appellee of that part of its premises which it has been ousted, notwithstanding the power of eminent domain vested in the appellant-city and county." *Id.* at 210-11.

Honolulu Memorial Park and Beverly Rubin's case are similar in regard to the municipality's unlawful possession of property for underground sewage pipes. In *Honolulu Memorial Park,* the City never instituted condemnation proceedings. Here, the trial court declared the condemnation petition void as if it had never been filed. In both *Honolulu Memorial Park* and the instant case, the municipalities constructed sewage pipes on private property and "ousted" the owners from a portion of their property. Both pipes were underground and both the city in *Honolulu Memorial Park* and the Town here possessed the power of eminent domain. Both the municipality in *Honolulu Memorial Park* and the Town of Apex unlawfully possessed land belonging to a private person. Just as the city was ejected in *Honolulu Memorial Park*, so too here.

In addressing the issue of whether this Court still has the power on equitable grounds to remove the Town from Ms. Rubin's property, the Court can take guidance from the Supreme Court of Minnesota. In *Housing and Redevelopment Authority ex rel. City of Richfield v. Walser Auto Sales, Inc.* 641 N.W.2d 885 (2002) the Minnesota Supreme Court stated that ***"[W]e have recognized that equitable relief may remain available even after the condemning authority has acquired title to the property."*** Elsewhere, that court has explained that, "[a]lthough the taking may be completed when the necessity issue is finally reviewed by this court, the governmental body which took the disputed property can be compelled to return it to its previous owner." *Blue Earth Cty. v. Stauffenberg*, 264 N.W.2d 647, 649-50 (Minn. 1978). Minnesota courts have even held that a property owner can compel the removal of a completed highway, when the highway

constituted an impermissible taking. *In re Rapp*, 621 N.W.2d 781, 784 (Minn. Ct. App. 2001) ("Although Rapp's land has been condemned and a highway constructed across it, Rapp still has relief in the form of the return of his property.").

The Town argues that the presence of the pipe is noninvasive, but any unlawful possession, underground or over-ground, violates a property owner's rights. "The mere fact that the structure sought to be removed is below the surface of the ground is no reason why ejectment is not the proper remedy. Plaintiff is entitled to unrestricted possession of the premises of which he holds the fee." *Peter v. Honolulu*, 35 Haw. 225 (Haw. Terr. 1939). The level of invasiveness is not relevant. What is at issue is the continuing deprivation of Ms. Rubin's property rights.

Just as the level of invasiveness is irrelevant, so is the monetary value of the land in question. The Supreme Court of Oregon highlighted the irrelevancy of the land's monetary value in *Myers v. Clackamas County*, 194 P. 176 (Or. 1921). In enjoining the use of a highway that illegally encroached on a property owner's private land, the court opined, "It is true that the land is of but little value, but the question involved is a constitutional right." *Id.* at 178. The monetary value of the easement is entirely irrelevant when the Town unlawfully took possession of the easement for a private purpose in violation of Ms. Rubin's constitutional rights.

In considering an allegedly unlawful taking, the Supreme Court of Illinois ruled, "When an illegal entry upon private land under the color of the power of eminent domain is attempted, it will be restrained by a court of equity without regard to the usual conditions for the exercise of equitable jurisdiction." *Gulf L.C. R. R. v. Golconda N.R. Co.*, 125 N.E. 357, 360 (Ill. 1919). Under the color of eminent domain, the Town entered into Ms. Rubin's property and took possession thereof. That entry was unlawful based on the lack of public purpose. As such, this Court should restrain the continued entry and return possession to Ms. Rubin. The court in *Gulf*

continued, "The action is based upon the attempted misuse of the sovereign power . . . and the protection of the individual right against the wrong." *Id.* Here, the Town misused the sovereign power of eminent domain. Ms. Rubin brought this action to protect her individual rights against the wrongs the Town committed when it unlawfully took possession of her property and continues to commit by refusing to comply with this Court's judgment.

Courts across the United States have addressed this situation numerous times. Time and time again, courts have ordered condemning authorities to relinquish their unlawful possession of the property and return the property to its rightful owner. To allow a town to use a pipe placed on private property in an unconstitutional manner is fundamentally unfair and encourages condemning entities to disregard property owners' basic constitutional rights. Moreover, complacency towards the Town's unlawful taking and continued unlawful possession encourages municipalities to "sell" their condemnation authority to private developers, like Brad Zadell, who stand to profit substantially from the condemnation.

As our Supreme Court ruled in in *Bradshaw v. Hilton Lumber Co.*, "[i]t is so well settled by the fundamental law that private property cannot be taken for private use that it is always assumed as a postulate, and no argument is needed to sustain it." 179 N.C. 501, 508, 103 S.E. 69, 73 (1920). Although our Supreme Court noted that no argument is needed to sustain Ms. Rubin's position, and multiple courts ruled in her favor throughout her prolonged litigation with the Town, she has been forced to argue against the Town's unconstitutional and unlawful taking for more than four years. To this day, the Town is still in possession of her property and refuses to comply with this Court's judgment.

CONCLUSION

For the foregoing reasons, Ms. Rubin respectfully requests that this Court grant her Motion to Enforce the trial court's judgment and Alternative Petition for Writ of Mandamus.

This the 5th day of September, 2019.

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

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Defendant's Memorandum of Law upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell and Norman W. Shearin, 4141 Parklake Avenue, Suite 200, Raleigh, NC 27612.

This 5th day of September, 2019.

Kenneth C. Haywood

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15-CVS-5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**TOWN OF APEX'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO ENFORCE JUDGMENT and MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT**

NOW COMES Plaintiff Town of Apex ("Town"), by and through the undersigned counsel, and respectfully submits this Supplemental Response in Opposition to Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus filed on 10 April 2019, by Defendant Beverly L. Rubin ("Defendant" or "Rubin"), specifically to address Defendant's subsequent, additional Memorandum of Law submitted on or about 5 September 2019. Further, the Town submits this Memorandum in support of its Motion For Relief From Judgment. [1]

INTRODUCTION & SUMMARY OF ARGUMENT

The relief sought in Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus ("Motion") should be denied. Defendant was entitled to seek injunctive relief before the sewer pipe was installed. Yet at no point did Defendant request injunctive relief, either preliminary or permanent, from the Court to prevent the sewer pipe's construction or to halt or remove the sewer pipe. At no point prior to the construction and installation of the sewer pipe did

[1] The information, arguments and authority contained herein also support the grant of the Town's Motion for Preliminary Injunction and the denial of Defendant's Motion to Dismiss in case no. 19 CVS 6295 considered contemporaneously herewith; and therefore are incorporated into the Town's prior filings in that action by reference.

Defendant request the Court to enjoin the construction and installation of the sewer pipe under Defendant's property. On 8 April 2016, almost a year after the original condemnation complaint was filed and approximately 9 months after the sewer pipe was installed, Defendant filed a motion for an "all other issues" hearing. The only issue raised before the Court was the Town's right to take the sewer easement sought in the original condemnation complaint. Defendant did not request any injunctive relief to halt the construction of or remove the sewer pipe; nor did the Judgment grant Defendant any injunctive relief to halt the construction of or remove the sewer pipe.

The Judgment found the original condemnation complaint null and void and dismissed it; it is as if it had never been filed. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking. Further, the North Carolina Supreme Court has held that injunctive relief to remove the constructed sewer pipe is not available to Defendant.

The Town physically invaded and inversely condemned Defendant's property in order to provide sewer service to a duly annexed, rezoned, and approved single-family residential subdivision within the Town's limits. The Town's physical invasion of Defendant's property occurred on 27 July 2015 well before the entry of the Judgment on 18 October 2016. The Judgment does not prevent the Town's exercise of eminent domain power to inversely condemn an easement.

The application of the Judgment is limited to the original condemnation complaint in 15 CVS 5836. The Town's physical invasion of Defendant's property was a separate exercise of the Town's power of eminent domain from the filing of the original condemnation action. The inverse condemnation of the sewer easement occurred almost fifteen months prior to entry of the Judgment. Dismissal of this condemnation action had no effect on the installation of the sewer pipe or the rights previously inversely taken by the Town. Significantly, the Judgment does not

order the Town to perform any specific act, such as removal of the underground sewer line. The Judgment does not afford Defendant any of the relief she now seeks in the Motion.

Applicable law no longer affords a legal basis for the Judgment, and the Judgment cannot be interpreted to require removal of the sewer pipe. The Judgment dismissed the original condemnation action on the grounds that the primary purpose for the taking was to benefit a private interest and therefore no sufficient public purpose existed for the taking. Since the Judgment was entered, the North Carolina Supreme Court has held that public use or purpose is not an element of an inverse condemnation claim. Since Defendant's property was taken by inverse condemnation, the exclusive remedy to which she is entitled is just compensation. She is not entitled to removal of the sewer pipe. In addition, Defendant's purported constitutional claims fail - the Town deposited and thereby paid compensation prior to the 27 July 2015 inverse taking.

STATEMENT OF FACTS

The Town is a municipal corporation organized and existing under the laws of the State of North Carolina. The Town possesses the powers, duties and authority, including the power of eminent domain, delegated to it by the General Assembly. Pursuant to this power and authority, the Town physically invaded Defendant's property on 27 July 2015 to install a sewer line for use of the sanitary sewer facilities of the Town, and to provide sewer service to a properly annexed, rezoned, approved residential subdivision within the Town's limits.

1. Original Condemnation Action

Prior to the filing of the original condemnation action, Riley's Pond subdivision was voluntarily annexed, properly rezoned, and the subdivision plat was approved by the Town. On 30 April 2015, the Town filed this condemnation action captioned 15 CVS 5836 ("original condemnation action"). Also on 30 April 2015, the Town deposited $10,771 with the Clerk of

Superior Court as an estimate of the compensation for the taking of a 40-foot wide, 151 feet long sewer easement. This amount was based on an appraisal by a qualified appraiser hired by the Town to appraise the property rights taken. The Clerk is still in possession and has control of the $10,771 deposited by the Town for Defendant's benefit for the taking of property.

Several weeks after the original condemnation action was filed, Defendant's attorney sent the Town a letter stating Defendant intended to contest the right to take and "will be filing a motion to be heard by the Court on an expedited basis." See **Exhibit 1**. The letter also stated that "if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim ***for damages***." [emphasis supplied]. Defendant did not state that she requested or expected the sewer pipe to be removed, but just that she expected to receive damages if she was successful with her motion. See Exhibit 1.

The Town responded through counsel, requesting that if Defendant intended to bring a motion, to do so soon since the project needed to proceed. Counsel for the Town and Defendant exchanged correspondence, and ultimately counsel for the Town re-stated the request for Defendant to bring the motion soon or the Town would have to proceed with the project. See **Exhibit 2**. At no point did counsel for Defendant state that they intended to bring a claim for injunctive relief, either preliminary or permanent, to remove the sewer pipe. The only relief requested was damages. See Exhibit 2.

At no point did Defendant file "a motion to be heard by the Court on an expedited basis." At no point prior to the construction and installation of the sewer pipe on 27 July 2015 did Defendant request the Court to enjoin the construction and installation of the sewer pipe under Defendant's property. On 8 April 2016, almost a year after the complaint was filed herein and approximately 9 months after the sewer pipe was installed, Defendant filed a motion for an "all

other issues" hearing ("Section 108 hearing"). The only issue raised was the Town's right to take the sewer easement sought in the complaint herein. Defendant did not request any injunctive relief.

2. Judgment in Original Condemnation Action

An "all other issues" evidentiary hearing was conducted by Judge Elaine M. O'Neal on 1 August 2016. A final judgment was entered herein on 18 October 2016 ("Judgment"). The Court found that the paramount reason for the taking of the sewer easement described in the original condemnation complaint was for a private purpose and the public's interest was merely incidental.

The Judgment dismissed the Town's claim for acquisition of a sewer easement across Rubin's property as null and void. The Judgment rendered the complaint and declaration of taking a nullity. Although the trial court heard evidence that the sewer pipe had been installed a year earlier, the Judgment did not require removal of the sewer pipe. Such Judgment is consistent with North Carolina law in this regard. *State Highway Commission v. Thornton*, 271 N.C. 227, 236, 156 S.E.2d 248, 255 (1967). The Judgment simply states that the "[Town's] claim [in its complaint] to [Rubin's] property by Eminent Domain is null and void."

Application of the Judgment is limited to the original condemnation complaint. Judgment was entered after an all other issues hearing contesting the Town's right to take was conducted by the trial court. The Judgment dismissed the complaint herein and declared the Town's condemnation action null and void—as if the Town had never filed it. Thus, what resulted was a physical invasion by the Town of an underground sewer easement under Defendant's property. If a municipality physically invades a landowner's property without a condemnation action – which under North Carolina law is an inverse taking, the landowner's sole remedy is compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *McAdoo v. City of Greensboro*, 91 N.C.App. 570,

372 S.E.2d 742 (1988). Such sole remedy is a remedy at law and results in a landowner receiving just compensation for the rights taken.

3. Inverse Taking of Modified Sewer Easement

In July 2015, prior to the entry of the Judgment in the original action, the Town decided to use the "bore method" to construct and install a sewer pipe under a narrow portion of Defendant's property. The bore method was employed so as not to disturb the surface of Rubin's property, and eliminate the necessity to access the surface of her property to maintain the sewer pipe. Different in easement size and scope, the eight (8) inch, 156 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. During construction, bore pits were dug on each side of Defendant's property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015. (See Town's Verified Motion for Preliminary Injunction, ¶ 7-10). No manholes were dug or are currently on the Defendant's property. The taking occurred on or about 27 July 2015. A 10-foot wide Town underground sanitary sewer easement was sufficient given the use of the bore method by the Town. The Town was able to avoid taking any access or similar rights in the surface of Defendant's property. The surface of Defendant's property was not disturbed during construction. The Town will not to have to access the surface of her property to maintain the sewer pipe.

The construction of the 18-feet deep sewer pipe constituted a physical invasion and inverse condemnation of a sewer line easement on Defendant's property. The dismissal of the condemnation complaint herein had no effect on the rights inversely taken. The Town acquired ownership of the sewer line easement on 27 July 2015. On 22 February 2016, the Town accepted as complete the sewer line, and it became a part of the Town's public sanitary sewer system. (See Town's Verified Motion for Preliminary Injunction, ¶ 11). The sewer line remains in place, is in

use, and serves approximately 50 residential homes and/or lots located in a properly annexed, rezoned and approved subdivision in the Town. (See Town's Verified Motion for Preliminary Injunction, ¶ 16). In addition, the Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision. (See Town's Verified Motion for Preliminary Injunction, ¶ 16). The inverse taking of an easement for the sewer line occurred approximately 15 months before the Judgment was entered, with the construction and installation of the sewer pipe on 27 July 2015. At no point prior to the physical invasion and construction of the sewer pipe on Defendant's property did Defendant bring any claim or demand for injunctive relief to delay the construction and installation of the sewer pipe. At no point after the physical invasion and construction of the sewer pipe on Defendant's property did Defendant bring a claim for inverse condemnation.

The Riley's Pond subdivision has been fully developed and approximately 50 families/citizens of the Town either own homes and live in the homes, or are building homes on lots in the subdivision. All 50 lots rely on the sanitary sewer pipe and service provided by the Town through the sewer pipe installed on Defendant's property.

4. Defendant's Post-Installation Attempts to Have the Sewer Pipe Removed

Three years and nine months after the installation of the sewer pipe, Defendant filed a motion on 10 April 2019, seeking removal of the sewer line. Defendant's motion, entitled Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus, was filed in this action. Defendant asserts for the first time in this proceeding that she is entitled to mandatory injunctive relief to remove the sewer pipe. However, Defendant did not plead injunctive relief, did not seek an injunction before the sewer pipe was installed, and the Judgment does not require removal of the sewer pipe. Moreover, the Town's power of eminent domain insulates it under North Carolina

law from Defendant's claim that she is entitled to mandatory injunctive relief to remove the sewer pipe. The exclusive remedy to which Defendant is entitled for the inverse condemnation of an underground sewer easement on her property is compensation. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967). Given the Defendant's attempts to misuse the Judgment in her attempt to seek mandatory injunctive relief after the fact, the Town filed a Motion for Relief from Judgment in this action.

Although Defendant's request for removal of the sewer pipe is pending before this Court and has been since the Court took the matter under advisement on or about 23 May 2019, Defendant filed a lawsuit in federal court, Eastern District of North Carolina, on 1 October 2019, requesting the same relief that she requests from this Court – a mandatory injunction to remove the sewer pipe (5:19-CV-449). Defendant filed the federal court lawsuit only after the state court mediation on 7 August 2019 resulted in an impasse and did not settle on terms acceptable to Defendant. The Town has filed a motion to dismiss the federal complaint due to the pending state court actions pursuant to binding United States Supreme Court authority *Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466, 83 L. Ed. 258, 291 (1939)*, which requires dismissal.

5. Town's Declaratory Judgment/Inverse Condemnation Action

The Town's sewer easement serves an entire subdivision within the Town. Removal of the sewer pipe and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm. If the sewer pipe is disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system. The existing sewer pipe is the only sewer pipe or facility touching or connecting the subdivision to Town sewer service. There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots.

In order to protect the Town's interest and the homeowners and citizens of the Town living in the Riley's Pond subdivision, as well as to maintain the status quo, the Town filed the declaratory judgment action in Wake County Superior Court on 13 May 2019 (19-CVS-6295) ("declaratory judgment/inverse condemnation action"), along with a Verified Motion for Preliminary Injunction to enjoin Defendant from taking any action to remove or disturb the sewer line and easement on her property during the pendency of the action. Defendant's inverse condemnation claim is time-barred, however the Town amended its declaratory judgment/inverse condemnation complaint on 30 August 2019, waiving the Town's defense of the statute of limitations as a bar to Defendant's claim for just compensation. The Town requests that the Court, pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, grant supplemental relief, provide Defendant her only available remedy of compensation, and order that a jury trial be held on the issue of the amount of compensation due Defendant for the inverse taking by the Town of the 10-foot wide underground sewer easement under Defendant's property. Granting the Town's Motion for Preliminary Injunction and denying Defendant's Motion to Dismiss allows the declaratory judgment/inverse condemnation action to proceed and grants Defendant a remedy at law – compensation. Otherwise, Defendant's ability to recover compensation will be time barred.

ARGUMENT

Defendant did not plead any claim for relief herein the entitling her to the relief requested in her Motion. Defendant could have requested an injunction prior to the construction of the sewer pipe, but did not do so. *Thornton*, at 236. After the construction of the sewer pipe on Plaintiff's property, she did not bring a claim for inverse condemnation. Moreover, the Court did not address in the Judgment the actual installation, maintenance and use of the sewer pipe under Defendant's property, and did not order the sewer pipe removed.

The Court dismissed the complaint and declared the original condemnation action null and void - it is as if the Town never filed the original condemnation action. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking. The Supreme Court has held that injunctive relief to remove the constructed sewer pipe is not available to Defendant.

The Judgment is consistent with settled law that if a municipality physically invades a landowner's property, an inverse condemnation has occurred and the landowner's sole remedy is compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). The recent North Carolina Supreme Court case of *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018) confirms that the inverse condemnation remedy is available to Defendant, and given the Town's limited waiver of the statute of limitations defense to the inverse condemnation claim available to Defendant, Defendant's claim for compensation would not be time barred. Defendant's sole remedy is just compensation for the Town's physical invasion. Defendant's Motion must therefore be denied.

I. THE BASIS CONTAINED IN DEFENDANT'S MOTION DO NOT SUPPORT REMOVAL OF THE SEWER PIPE

The basis for Defendant's motion to enforce judgement are improper and not applicable to the case at bar. Defendant failed to plead any claim for relief entitling her to the mandatory injunctive relief requested in her Motion. Defendant failed to even allege a claim for inverse condemnation in her responsive pleading herein or any pleading for that matter. The Court did not address in the Judgment the actual installation, maintenance and use of the sewer pipe under Defendant's property, and did not require removal of the sewer pipe. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure or require the return or delivery of real property as per N.C. Gen. Stat. § 1-302. The Court cannot act pursuant

to its inherent authority as Defendant alleges, for there is no "specific act" that the Town failed to do as it relates to the Judgment. The Judgment does not order the Town to perform any specific act, including removal of the underground sewer line. In fact, under *Thornton*, the Court could not have ordered the sewer pipe to be removed since it was already installed and Defendant did not seek injunctive relief to halt or stop the construction. *Id.* at 236. Further, under *Thornton*, mandatory injunctive relief is not available now to Defendant, only monetary compensation for the inverse taking of the sewer easement. *Id.* Therefore, the Town cannot be held in contempt for failing to remove the sewer line.[2]

A. Declaratory Relief Must Be Sought in Separate Action

Defendant asks the Court to use the Declaratory Judgment Act to construe and/or broaden the impact of the Judgment. Such a request is improper in this captioned action and should be rejected. The original condemnation action was not a declaratory judgment action, and therefore N.C. Gen. Stat. § 1-259 is inapplicable in the original condemnation action. A declaratory judgment is a separate and independent action, and may not be commenced by a motion in the cause. *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C.App. 257, 362 S.E.2d 870 (1987). Further, the final determination was made over three years ago rendering the Declaration for Taking and Complaint a nullity. It is as if it never occurred. To allow Defendant to now assert a claim for declaratory relief and specifically to request a mandatory injunction would be improper and contrary to well-established case law governing declaratory judgment actions. As such, Defendant's requests for declaratory relief should be denied. The Town has filed a declaratory judgment/inverse condemnation action (19 CVS 6295) and Defendant is free to raise any claim for declaratory relief she believes she has as a counterclaim in that pending action.

[2] Moreover, the Motion for Contempt fails to satisfy the statutory requirement that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).

B. Writ of Mandamus is Inappropriate

Defendant's Motion requests this Court to issue a writ of mandamus to "the Town or its officers commanding them to remove the sewer lines." Motion, 4. In support of this request, Defendant alleges "the Town has a legal duty to comply with the judgment and remove the sewer lines." Defendant's request rings hollow. The Judgment mandated no such duty or requirement of the Town to remove the sewer lines. In fact, the Judgment imposes no obligations whatsoever upon the Town. Defendant did not plead or request injunctive relief from the Court prior to the installation of the sewer pipe, and thus injunctive relief is no longer available to Defendant. *Thornton,* at 236. The absence of any duty alone warrants denial of Defendant's request for the Court to issue a writ of mandamus.

A writ of mandamus is "an extraordinary remedy which the court will grant only in the case of necessity." *Edgerton v. Kirby*, 156 N.C. 347, 72 S.E. 365, 366 (1911). Defendant's assertions fail to meet this high standard. Defendant cannot show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it. The function of a mandamus is to compel the performance of a ministerial act and not to establish a legal right. *Meares v. Town of Beaufort,* 193 N.C. App. 49, 667 S.E. 2d 224 (2008). Further, a writ of mandamus would not be issued to "enforce an alleged right which is in doubt." *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938). Manifestly, the Judgment does not order the Town to remove the underground sewer line, nor does it state that Rubin has a right to maintain her property without a sewer line. The *Thornton* case provides that removal by the Town is not a remedy available to Rubin under the Judgment. *Id.* at 236. Defendant's request for a writ of mandamus should be denied.

II. DEFENDANT'S *NEW* CLAIM THAT THE JUDGEMENT IN THE ORIGINAL CONDEMNATION ACTION DECLARED THE TOWN'S TAKING TO BE UNCONSTITUTIONAL DOES NOT CHANGE THE ANALYSIS OF DEFENDANT'S MOTION

After the hearing on the pending motions held before Your Honor in May 2019, while the matters were pending under advisement with Your Honor, and after the mediation resulted in an impasse in August 2019, Defendant for the first time raises in support of her Motion the argument that the Judgement in the Original Condemnation Action declared the Town's actions to be unconstitutional. Although the Judgment does not so declare, and certainly does not so declare as it relates to the installation of the sewer pipe and resulting inverse condemnation, such allegation does not change the analysis of Defendant's Motion – Defendant's Motion still must be denied.

First, the Judgment in the original condemnation action did not find the Town's actions in filing the original condemnation action to be unconstitutional. In spite of a a lack of a specific finding, even if the Judgment could be expanded to so hold (which it cannot), the Judgment does not address in any respect the installation of the sewer pipe and resulting inverse condemnation, which pre-dates the Judgment. So the Judgment cannot be read to make any findings as to the constitutionality of the installation of the sewer pipe and corresponding easement. The Judgment simply dismissed the Town's condemnation claim which was the only remedy available to Rubin. *State Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E.2d 248 (1967). As the Supreme Court held in *Thornton*, if the landowner does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – which here is an inverse condemnation claim – but not a mandatory injunction. *Id.* at 240, 241. Posturing the claim as a constitutional claim does

not change this – and certainly does not change the fact that the grounds put forth to support the motion still fail.

Second, no constitutional violation occurred as it relates to the installation of the sewer pipe and inverse condemnation of the easement. The Town did not violate Defendant's Fifth Amendment rights because the Town paid compensation prior to the taking. The sewer easement was inversely taken by the installation of the sewer line on 27 July 2015. Prior to this date, and contemporaneously with the filing of the original condemnation action, the Town deposited money with the Clerk of Court as compensation for the taking, which remains with the Clerk for Defendant's benefit. As a result, there is no taking of private property without the payment of compensation. Therefore, there is no violation of the Fifth Amendment of the United States Constitution. Defendant cites no law supporting her assertion that the Town acted unconstitutionally in constructing and installing the sewer pipe given the pre-payment of compensation.

Defendant's re-packaging of their arguments under a constitutional banner does not change the analysis under the grounds upon which Defendant has moved: Rule 70 of the Rules of Civil Procedure; N.C. Gen. Stat. § 1-302; inherent authority; contempt; Declaratory Judgment Act; and Writ of Mandamus. The Motion should be denied. Again, the Town has filed a declaratory judgment/inverse condemnation action and Defendant is free to raise any claim for relief she believes she has as a counterclaim in that pending action.

III. NORTH CAROLINA LAW PROVIDES THAT DEFENDANT'S ONLY REMEDY IS AT LAW – NAMELY RECEIVING COMPENSATION FOR THE SEWER EASEMENT OBTAINED BY INVERSE CONDEMNATION

The Supreme Court in *Thornton* held that in a condemnation case where the landowner contests the right to take, and the landowner does not seek injunctive relief, the project is installed,

and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – which here is an inverse condemnation claim – but not a mandatory injunction. *Id.* at 240, 241. The facts of *Thornton* are substantially similar to the case at bar. The condemnor in *Thornton* brought a condemnation action to construct a public road across Thornton's property. The construction occurred over a private road and the public road was then widened approximately 30 feet. After the condemnation was filed, the landowner did not file a motion for injunctive relief. When the construction and project were approximately 96% complete, the landowner filed an answer contesting the right to take, requesting that the condemnor be permanently enjoined from appropriating their land for this project, and that the action be dismissed. *Id.* at 230. The trial court agreed with the landowner, found that the taking was not for a public purpose, and granted the permanent injunction requested by the landowner. *Id.* at 232.

The Supreme Court rejected the trial court's reliance on the *State Highway Commission v. Batts*, case and reversed the grant of an injunction. First, the Supreme Court acknowledged that the landowner had the right to request an injunction prior to the construction of the project. The Supreme Court distinguishes between an injunction against a condemnation proceeding and one to restrain construction of the project. The Supreme Court states: "An injunction against the institution or maintenance of condemnation proceedings, as distinguished from an injunction to restrain construction, is not properly issued, …" *Id.* at 236. The Court also noted in reversing the trial court's entry of an injunction *after* the project was constructed that the landowner did not apply for a temporary restraining order to halt construction – thus acknowledging such a motion was available to the landowner. *Id.* As such, Defendant had the opportunity to apply for injunctive relief regarding the construction of the sewer pipe and failed to do so. Defendant knew of the project, was informed by the Town that the project would move forward, yet Defendant chose not

to seek injunctive relief before the sewer line was constructed. In fact, Defendant's first request for injunctive relief was 3 ¾ years after construction of the sewer pipe.

Our Supreme Court further held in *Thornton* that "...where the ground asserted therefor is one which the landowner may assert as a defense in the condemnation proceeding itself, for, in that event, the landowner has an adequate remedy at law." *Id.* at 236. It is settled law that when there is an adequate remedy at law, injunctive relief should not be granted. Under similar facts as the case at bar, the Supreme Court in *Thornton* held that since the construction of the project had occurred, it cannot be restrained and an injunction is not properly issued. *Id.*

The Supreme Court provides the analysis when the Court is examining a challenge to the right to take for lack of public use or benefit and the request for a dismissal of a condemnation action. The Supreme Court states:

> "...we must determine whether the trial court erred in its conclusion that the road in question was not constructed for a public use. ***If that conclusion was correct, the proceeding should have been dismissed.*** If that conclusion was error, the proceeding should be remanded for a further hearing to determine the compensation to be awarded the defendants for the taking of their land. [Emphasis supplied] *Id.* at 241.
>
> "If the premise [the landowner's argument that the taking is not for public purpose] is sound, the conclusion is sound and the trial court should have entered a judgment dismissing the proceeding, ***but not an injunction***." [Emphasis supplied] *Id.* at 236.

The Supreme Court clearly eliminates as a possible remedy an injunction requiring the condemnor to remove the constructed infrastructure from the landonwer's property or otherwise requiring the condemnor to take any affirmative action. The result is a dismissal of the proceeding.

Further, the Supreme Court states:

> "If that [condemnor's] opinion [to enter and construct the project] was erroneous, the defendants are entitled to have this proceeding dismissed, leaving them to whatever rights they may have against those who have trespassed upon their land and propose to continue to do so." *Id.* at 240.

The Supreme Court again directs the landowner to remedies at law, and does not state that a permanent injunction is a remedy to remove already constructed facilities on the property in a condemnation action.

Here, consistent with the Supreme Court's ruling in *Thornton*, the Court heard evidence that the sewer pipe had been installed under Defendant's property, and the Judgment did not require removal of the sewer pipe. The Judgment simply states that the "[Town's] claim [in its condemnation action] to [Defendant's] property by Eminent Domain is null and void." The only relief granted to Defendant by the Judgment is the dismissal of this condemnation action.

The analysis turns to what rights do landowners have against municipal governments that physically invade their properties not under a condemnation complaint. Under North Carolina law the power of eminent domain insulates the Town from trespass actions. *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). The exclusive remedy for a physical invasion of private property by a municipality is inverse condemnation and the payment of compensation. *Id.* None of the equitable remedies discussed in the cases cited in Defendant's Memo are available to Defendant herein. *State Highway Commission v. Thornton, supra.*

The inverse taking by the Town of the sewer easement on 27 July 2015 transferred title to the Town for the benefit of the Town and its residents. It is undisputed that the Town owns and operates the sewer pipe and easement. No sewer easement was conveyed to a private individual. The Town acquired title to the easement on 27 July 2015 for the benefit of its citizens. No easement was conveyed to the owner of the adjoining residential subdivision. Only the homeowners in the adjoining subdivision and nearby properties that are suitable for development received sewer service through the easement. None of those homeowners were conveyed or own

any easement rights in Rubin's property. Consequently, the sewer pipe exists for the use and benefit of the Town and its citizens. *State Highway Commission v. Thornton, supra.*

Following the analysis under *Thornton*, the next question is whether compensation for the inverse condemnation is an available claim for Defendant in his case. Before the Supreme Court reversed the Court of Appeals in *Wilkie,* it appeared Defendant may not have an avenue to receive compensation for the inverse taking. But the Supreme Court reversal and ruling clarified that Defendant has a remedy at law – compensation for the inverse condemnation of the sewer easement, as public use or benefit is not a requirement to maintain an inverse condemnation claim. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018).

In *Wilkie*, Justice Ervin framed the issue as whether the landowners were entitled to seek compensation under the state's inverse condemnation statutes where the physical invasion of their property by a municipality was for a private purpose. Justice Ervin, writing for an unanimous Supreme Court, held that the landowner does have a claim for compensation pursuant to the inverse condemnation statutes. The condemnor in *Wilkie* had raised the lake level flooding and physically invaded plaintiff's property. The landowners brought an inverse condemnation lawsuit and also specifically raised certain constitutional claims. At an all other issues hearing, the trial court held that the taking "was for private use", held the plaintiff's property was taken without just compensation being paid, and that plaintiff had proven their inverse condemnation claim. *Id.* at 542. The trial court ordered the case to proceed to the just compensation phase. The condemnor appealed and argued that inverse condemnation does not lie unless the property is taken for a public use or purpose. *Id.* at 542. The Court of Appeals agreed, and reverse the trial court's determination that an inverse condemnation had occurred.

The Supreme Court analyzed municipal inverse condemnation statutes in reaching the conclusion that public use or benefit are not necessary for a landowner to maintain an inverse condemnation claim and seek just compensation. The Supreme Court finds that compensation is allowed even if the property could not have been acquired by eminent domain. The Supreme Court held that the plain meaning of the reference to entities that have eminent domain power for public use and benefit in N.C.G.S. § 40A-3(b) and (c) contained in N.C. Gen. Stat. § 40A-51(a) is to specify the entities against whom a statutory inverse condemnation claim can be asserted and nothing more. *Id.* at 548, 809 S.E.2d at 859. The Court stated that:

> In light of these fundamental principles and the manner in which N.C.G.S. § 40A-51(a) is worded, we cannot conclude that the General Assembly intended to make the availability of the statutory inverse condemnation remedy provided by N.C.G.S. § 40A-51 dependent upon the purpose which led to the infliction of the injury for which the affected property owner seeks redress.

Id. at 552-553, 809 S.E.2d at 862. As a result the Supreme Court reversed the Court of Appeals' ruling and specifically held that public use or benefit are not necessary for a landowner to maintain an inverse condemnation claim and seek just compensation. *Id.*

Defendant did not bring a claim for inverse condemnation within the applicable limitations period. Although the Defendant's inverse condemnation claim is time-barred, the Town by and through its declaratory judgment/inverse condemnation action (19 CVS 6295) has provided Defendant with a limited waiver of its statute of limitations defense regarding her claim for just compensation for the inverse condemnation. (See First Amended Complaint, ¶ 22, 27). As a result, the remedy of just compensation for the inverse taking remains available to Defendant. As this is Defendant's only remedy, a remedy that has been deemed sufficient by North Carolina appellate courts, Defendant's Motion should be denied.

IV. DEFENDANT'S RELIANCE ON INAPPLICABLE AND OUT-OF-STATE CASE LAW IGNORES NORTH CAROLINA CASE LAW DIRECTLY ON POINT

Defendant cites in her *new* Memo a number of case law opinions unrelated to the disputed issue in this action, including many out-of-state, non-controlling opinions based upon other states' condemnation statutes. The cited cases involve ouster, ejectment, railroad disputes, and equitable actions based upon a variety of states' unique statutory schemes – fundamentally different from the relief Defendant seeks from the Court. These decisions should be disregarded because North Carolina's appellate courts have rendered several opinions directly on point, addressing what is at issue herein, including *Thornton*, *McAdoo*, and *Wilkie*. Further, the cases cited by Defendant cannot convert or change the text and import of the Judgment and make it into something its not.

First, Defendant cites *Sale v. State Highway* for the proposition that the Fourteenth Amendment applying the Fifth Amendment to the states is self-executing. 242 N.C. 612, 617-620; 89 S.E.2d 290, 295 (1955). Implying this case provides a remedy for every wrong, Defendant omits a key condition – namely that North Carolina's statutes provide Defendant a remedy – an inverse condemnation claim and compensation. Further, the *Sale* case focuses on providing just compensation for the taking of property – and ultimately holds that the landowner in *Sale* was able to pursue a remedy at law – damages – not mandatory injunctive relief. Further, Defendant ignores the fact that the Town deposited money with the Clerk of Court – foreclosing the possibility of a compensation-related 5th Amendment constitutional violation. Prior to the Town's inverse condemnation, on 30 April 2015, the Town deposited $10,771 as an estimate of the compensation for the taking. This amount was based on an appraisal done by a qualified appraiser hired by the Town to appraise the property rights taken. The Supreme Court in *Sale* highlighted how "when a person has been deprived of his private property for public use nothing short of actual payment, or

its equivalent, constitutes just compensation." *Id.* at 619, 89 S.E.2d 290, 296. The Town's deposit renders Defendant's constitutional claims baseless and contrary to the undisputed facts.

Next, Defendant cites a 1949 railroad case entitled *Carolina & Northwestern Railway Co. v. Piedmont Wagon & Manufacturing Co.*, to support its theory that because Defendant acted with "reasonable promptitude" in contesting the Town's condemnation action, she somehow also contested the Town's physical invasion and inverse taking of the sewer easement. 229 N.C. 695, 51 S.E.2d 301 (1949). Equitable and injunctive relief was specifically pled in *Carolina & Northwestern Railway Co Carolina & Northwestern Railway Co* – Defendant did not so plead in this case. At no point prior to the construction and installation of the sewer pipe on 27 July 2019 did Defendant request the Court to enjoin the construction and installation of the sewer pipe under Defendant's property. Defendant did not later plead injunctive relief. Prior to or at the time of the physical invasion on 27 July 2015, Defendant never requested that the sewer pipe be removed, only indicating that she expected to receive ***damages***. [Emphasis supplied] (See Exhibit 1). On 8 April 2016, almost a year after the complaint was filed herein and approximately 9 months after the sewer pipe was installed, Defendant filed a motion for an "all other issues" hearing ("Section 108 hearing"). The only issue raised was the Town's right to take the sewer easement sought in the complaint herein. Defendant did not request any injunctive relief. Finally, the Judgement did not order that the sewer pipe be removed. As stated above, the only remedy for inverse condemnation is just compensation. Setting aside the fact that the Town deposited money with the Clerk of Court, Defendant was required to assert an inverse condemnation claim in this action or a separate action, but failed to do so. *Carolina & Northwestern Railway Co* does not provide Defendant any relief.

Finally, in the context of addressing the exercise of eminent domain for an alleged private purpose, Defendant submits that "no argument is needed to sustain [Defendant's constitutional] claim" (Memo, 7), based upon the North Carolina Supreme Court's opinion in *Bradshaw v. Hinton*, 179 N.C. 501, 508, 103 S.E. 69, 73 (1920). Defendant's suggestion is unfounded and ignores recent North Carolina Supreme Court precedent directly on point. Critically, it is important to note that the condemnation proceeding in *Bradshaw* involved a private company as opposed to a governmental entity. It was determined that the railroad right-of-way taken pursuant to a railroad charter was ultimately leased to the defendant (Hilton Lumber) for its own private use. Hilton Lumber had no right of eminent domain, or right of condemning the plaintiff's land or any other private property for its own use. The case involves no local governmental entity physically invading property. Here, the Town did not convey or lease the easement to a private party. Further, the case was decided 98 years before the North Carolina Supreme Court's opinion in *Wilkie*.[3]

Ignoring North Carolina law on point, Defendant rests her claims on inapplicable out of state case law based on different legal theories and different statutory schemes than North Carolina law. Defendant cites *Honolulu Memorial Park v. Honolulu*, as authority for this Court to mandate the removal of the sewer line. 50 Haw. 189, 436 P.2d 207 (Haw. 1967). The facts in the *Honolulu* ejectment action are fundamentally different from those present in this dispute. There, the basis for the claim was that the registered certificate of title did not include or mention a sewer easement that was on the property. The court held that the purchaser of "registered land for value and in good faith shall hold the land free from all encumbrances except those noted on the certificate . . . ." *Id.* at 191, 436 P.2d 209. The *Honolulu* ejectment action, in addition to being controlled

[3] *See Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018) (finding that the Court of Appeals erred in holding that taking for a public use or benefit is an element of an inverse condemnation action)(discussed in more detail in Section III above).

exclusively by Hawaiian law, is not about a local government's authority to inversely take property – but rather, whether a good faith purchaser can hold property free from all unregistered encumbrances, legal or equitable, except therein provided.

Defendant disregards the factual details of the *Honolulu* ejectment action, and instead focuses on the fact that the encumbrance at issue relates to a sewer line, comparing the similarities in "regard to the municipality's unlawful possession of property for underground sewage pipes." Memo, 5. Claiming both local governments "ousted" property owners from portions of their properties, Defendant ignores North Carolina's express statutory scheme and case law. The opinion's determination that "ejectment is the proper remedy" rests exclusively on a Hawaiian state statute (Sec. 342-42, R.L.H.1955), and the case does not indicate an inverse condemnation process was even available at that time to the property owner in the state of Hawaii.

Defendant next turns to Minnesota law to argue the Court should, on equitable grounds, "remove the Town" from Defendant's property, despite Defendant's failure to raise equitable or injunctive relief claims prior to the construction of the sewer pipe, in its answer, or at the Section 108 hearing. Defendant cites three Minnesota appellate court decisions for the proposition that equitable relief may be available to a property owner even after the condemning authority has acquired title to the property. Under Minnesota law, where a condemning authority's right to take is challenged, the taking is not final and is subject to reversal until the decision on the right to take is finally decided in favor of the condemnor on appeal. To challenge the right to take, a pre-taking judicial determination of necessity and other procedures alien to North Carolina law is required. A successful appeal of the condemnor's right to take can result in remedies such as return of the land taken. These cases should all be disregarded. Minnesota appellate decisions interpreting Minnesota state condemnation procedures – which are entirely different from North Carolina's

processes – have no bearing on Defendant's Motion to Enforce the Judgment. Further, Defendant failed to seek injunctive relief, and the Judgment imposed no duties upon the Town, nor required removal of the sewer line.

Defendant essentially acknowledges the lack of invasiveness of the underground sewer pipe on her property. Specifically, Defendant argues that the lack of invasiveness of the sewer pipe is immaterial to the alleged violation of Defendant's property rights. In support of this proposition, Defendant cites a 1939 Supreme Court of the Territory of Hawaii decision. The case involves another ejectment action, where the court held that plaintiff failed to adequately describe the right-of-way sought to be recovered and therefore was not entitled to relief. Again, Defendant provides no analysis on the Town's statutory authority under North Carolina condemnation statutes. Instead, Defendant cites Hawaiian Territory law examining ouster and ejectment actions under a wholly different statutory scheme.

Citing a 1921 Oregon case, Defendant notes how the "value of the easement" is inconsequential when a condemning authority takes possession of an easement "for a private purpose." Memo, 6. Oregon law is not controlling, nor persuasive in North Carolina – especially given the Supreme Court's recent ruling in *Wilkie*. As mentioned above, no constitutional violation arises from the inverse taking because the Town deposited money and thereby paid compensation prior to the inverse taking.

Defendant cites the 1919 Illinois case of *Gulf Lines Connecting R.R. of Ill. v. Golconda Northern Ry.*, 125 N.E. 357 (Ill. 1919) in support of its mandatory injunction request for removal. There, a railroad company brought an injunction suit against another railroad. The court held that the railroad which owned the right of way (but lost its franchise to build and operate as a railroad), was entitled to be paid compensation or relief would lie to enjoin non-owner railroad from

operating a railroad on the right-of-way. This case is entirely unrelated to the effect that a North Carolina Superior Court Judgment, which declared a specific Declaration of Taking and Complaint a nullity, has on the parties involved. In addition, the Town deposited compensation and Defendant has an adequate remedy at law.

Defendant cites no controlling authority to support her argument that the sewer pipe should be removed. North Carolina cases such as *Thornton*, *McAdoo* and *Wilkie* support the Town's position herein and result in a denial of Defendant's Motion.

V. THE TOWN'S MOTION FOR RELIEF FROM JUDGMENT SHOULD BE GRANTED

The Town is not seeking relief from the Judgment as it relates to the application of the Judgment to the original condemnation complaint. Given the Defendant's misuse of the Judgment in her attempt to seek mandatory injunctive relief after the fact, the Town requests the Court exercise its discretion under Rule 60 and grant the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property.

"Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order '[o]n motion and upon such terms as are just[.]'" *North Carolina Department of Transportation v. Laxmi Hotels of Spring Lake, Inc.*, 817 S.E.2d 62, 69 (2018) (citing N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017)). North Carolina Rule of Civil Procedure Rule 60(b) provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (4) [t]he judgment is void…(6) [a]ny other reason justifying relief from the operation of the judgment." "'The broad language of clause (6) gives the

court ample power to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* at 71 (citing *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971)).

It would be just and equitable to allow the Town relief from the prospective application of the Judgment as it relates to the underground sewer pipe and corresponding easement. Defendant did not seek injunctive relief in the original condemnation action, did not seek an injunction before the sewer pipe was installed, did not request injunctive relief at the Section 108 hearing, and the Judgment did not include an award of injunctive relief. The Supreme Court in *Thornton* has specifically excluded injunctive relief from the relief available to Defendant under the circumstances of this case. As such, the Court should under Rule 60(b)(6) grant the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding easement on Defendant's property. Defendant's failure to seek and obtain injunctive relief prior to the construction of the sewer pipe and the Town's acquisition of the sewer easement by inverse condemnation renders the Judgment moot as to the installation of the sewer pipe and corresponding easement. The Judgment's dismissal of the condemnation proceeding had no effect on the rights inversely taken. *Nicholson v. Thom*, 236 N.C.App. 308, 317, 763 S.E.2d 772, 779 (2014) (Issue is moot when question in controversy is no longer at issue). In *Nicholson* the Court stated:

> In North Carolina, an issue is moot [w]henever[] during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[. In those circumstances,] the case should be dismissed [as moot], for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

Id. at 317, 763 S.E.2d at 779 (citing *In re Hamilton*, 220 N.C.App. 350, 353, 725 S.E.2d 393, 396 (2012)).

When the trial court entered the Judgment, the Town had already constructed the sewer pipe and taken the sewer easement by inverse condemnation. When the easement was taken on 27 July 2015, all rights therein were acquired by the Town and removal was no longer an option for Defendant. *Thornton, supra*. At the time of entry of the Judgment, the question of whether the Town had the authority to condemn the sewer easement described in the original condemnation action was moot – specifically as to the installation of the sewer pipe and inversely condemned easement. Therefore, since the Judgment against the Town is moot, the Town should be granted the relief from the Judgment pursuant to Rule 60(b)(6).

The Judgment is void because the trial court did not have jurisdiction over the subject matter of the condemnation at the time of the entry of the Judgment. The issue of whether the Town could maintain a sewer line across Defendant's property no longer existed at the time that Judgment was entered. Defendant did not seek an injunction prior to construction and the Town had already constructed the sewer easement. *Thornton*. Further, the Judgment found the original condemnation complaint null and void and dismissed it; it is as if it was never filed. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking. Prior to the entry of the Judgment on 18 October 2016, the Town had already inversely taken and owned the sewer easement across Defendant's property on 27 July 2015. Since the sewer easement had been inversely taken prior to the entry of the Judgment, the court lacked subject matter jurisdiction to enter the Judgment.

The absence of jurisdiction means the Judgment is void. A void judgment is a legal nullity. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E.2d 20 (1925); *Woodleif, Shuford NC Civil Practice and Procedure* § 60:7 (2017). "A lack of jurisdiction or power in the court entering the

judgment always avoids the judgment." *Clark v. Carolina Homes, supra.* at 23. Therefore, since the Judgment against the Town is void as to the installed sewer pipe and corresponding easement, the Town should be granted the relief from the Judgment pursuant to Rule 60(b)(4).

An additional reason to grant the Town relief from judgment pursuant to Rule 60(b)(6) exists because there was a subsequent change in the law. In the Judgment, the Court stated that the paramount reason for the taking of the sewer easement was for a private interest and that the public's interest was merely incidental. However, prior to entry of judgment, the Town had already constructed the sewer pipe and acquired the sewer easement by inverse condemnation. In 2018, the North Carolina Supreme Court reversed the Court of Appeals and ruled that public use or purpose is not an element of an inverse condemnation claim. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. *McNeil v. Hicks*, 119 N.C.App. 579, 580-81, 459 S.E.2d 47, 48 (1995); *Hamby v. Profile Products*, LLC, 197 N.C.App 99, 676 S.E.2d 594 (2009)).

As a result of the *Wilkie* decision from the Supreme Court, the legal basis for the Judgment no longer exists. Defendant alleges that the Town took the sewer easement on her property for a private purpose and thus lacked authority to take her property. However, public purpose is not an element of inverse condemnation. Moreover, Town acquired ownership of the sewer easement on 27 July 2015 prior to entry of the Judgment. All easement rights in the property transferred to the Town and were owned by it prior to entry of Judgment. Consequently, Town should be granted relief from Judgment.

Futher, *Thornton* provides that no injunctive relief is available to Defendant, only remedies provided for at law. *Id.* at 236, 240. Before the Supreme Court reversed the Court of Appeals in

Wilkie, it appeared Defendant may not have an avenue to receive compensation for the inverse taking. But the Supreme Court reversal and ruling clarified that Defendant has a remedy at law – compensation for the inverse condemnation of the sewer easement, as public use or benefit is not a requirement to maintain an inverse condemnation claim. *Wilkie, supra*

CONCLUSION

For these reasons, Plaintiff Town of Apex respectfully requests that Defendant Beverly L. Rubin's Motion Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus be **DENIED** and the Town's Motion for Relief from Judgment be **GRANTED**.

Respectfully submitted, this the 8th day of January, 2020.

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Attorneys for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **TOWN OF APEX'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO ENFORCE JUDGMENT and MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT** upon the parties by electronic mail and depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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

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

This the 8th day of January, 2020.

David P. Ferrell

- Doc. Ex. 58 -

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May 19, 2015

MAY 2 2 2015

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

VIA FACSIMILE AND
U.S. MAIL

Re: Town of Apex v. Beverly L. Rubin

Dear David:

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

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

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

With best regards, I am

Sincerely yours,

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

Kenneth C. Haywood

KCH/lbf
cc: Beverly Rubin

EXHIBIT
tabbies
1

David Ferrell

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

Kenneth,

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

David

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

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

David,

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

Kenneth

Kenneth C. Haywood

Boxley, Bolton, Garber & Haywood, L.L.P.
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khaywood@bbghlaw.com
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From: David Ferrell [mailto:DFerrell@vanblk.com]
Sent: Wednesday, June 10, 2015 3:49 PM
To: Kenneth Haywood
Subject: RE: Town of Apex / Rubin

Kenneth,

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

David

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

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

David,

I have signed the acceptance and it is being mailed back. Given that the Town decided to go under 136 and not issue a 30 day letter and we received the complaint out of the blue we will move this matter along at the required pace.

Kenneth

Kenneth C. Haywood

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

Kenneth

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

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

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

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

David

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dferrell@vanblk.com
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