

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

**VOLUME II**

(Cited as R S (II) pp-pp)

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August 9, 2019

Honorable G. Bryan Collins, Jr.  
Wake County Superior Court  
300 S. Salisbury Street.  
Raleigh, North Carolina 27601  
Via Email Only

Re: Town of Apex v. Rubin (Wake Cty 19-CVS-6295 and 15-CVS-5836)

Of Counsel  
Edwin P. Friedberg  
(Deceased 2009)

Dear Judge Collins,

I am writing to report to you on the results of the mediation you ordered at the conclusion of the May 23, 2019 hearing in this matter.

The parties held a mediation on July 12 before Bob Beason. The parties then resumed that mediation on August 7. Consistent with your Order, we are reporting that the mediation ended in impasse.

The second purpose of my letter is to inquire where we go from here. We are available to meet in your chambers or in open court for another hearing, or can take whatever other action you direct.

In addition, after our original hearing, we conducted further research on the issue of what other courts have done across the county when presented with this issue. We have prepared a memorandum in support of our request to have the Town's possession of Ms. Rubin's property terminated, restoring full rights of ownership to the property owner. We would like to submit that memorandum to the Court, and seek your leave to do so.

Copied on this email are all counsel that appeared at the hearing. We look forward to hearing from you on this matter.

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**OTHER LOCATIONS**

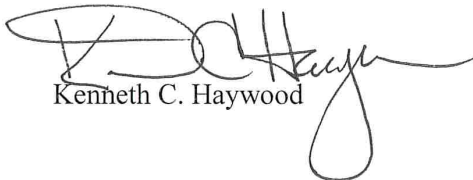
New Bern, NC  
Morehead City, NC

August 9, 2019  
Page 2 of 2

With best regards, I am

Sincerely yours,

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



Kenneth C. Haywood

cc: David Ferrell (via email only)  
Norm Shearin (via email only)  
Matt Leerberg (via email only)

NEXSEN|PRUET

David P. Ferrell  
Member

August 12, 2019

*Via Electronic Mail Only*

Honorable G. Bryan Collins, Jr.  
Wake County Superior Court  
300 S. Salisbury Street  
Raleigh, North Carolina 27601

Re: Town of Apex v. Beverly L. Rubin  
Wake County File Nos: 19-CVS-6295; 15-CVS-5836

Dear Judge Collins:

I hope you are doing well. We write to respond to Counsel for Rubin's August 9, 2019 letter to Your Honor in the above referenced cases.

We suggest that a meeting in chambers to chart a future course would be more productive than additional briefing or a hearing at this time. However, we will proceed however you prefer.

We believe the additional argument that Rubin wants to present based on out-of-state court action which would not be controlling authority would be best suited for a subsequent hearing on the underlying merits of the Declaratory Judgment action - not at this stage - where we have pending our motion for preliminary injunction to maintain the status quo pending the Court's consideration of the inverse condemnation and similar claims in the Declaratory Judgment action related to the existing in-service sewer pipe. We expect the parties will have ample opportunity to brief and argue the merits of the actual controversies raised in the Declaratory Judgment action at a subsequent hearing on the merits.

Alternatively, if the Court is inclined to receive additional argument on the pending motions before ruling, we would respectfully request the opportunity to provide the court a response to Rubin's new memorandum within 30 days after our receipt of the memorandum.

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**Attorneys and Counselors at Law**

NPRAL1:1360066.1

Honorable G. Bryan Collins, Jr.  
August 12, 2019  
Page 2

Thank you for your consideration of this matter. If you need anything else from us at this time, please let us know.

Sincerely,



David P. Ferrell

cc: Kenneth C. Haywood, Esq.  
Matthew Nis Leerberg, Esq.

NEXSEN|PRUET

David P. Ferrell  
Member

September 3, 2019

*Via Electronic Mail Only*

Honorable G. Bryan Collins, Jr.  
Wake County Superior Court  
300 S. Salisbury Street  
Raleigh, North Carolina 27601

Re: Town of Apex v. Beverly L. Rubin  
Wake County File No: 15-CVS-5836

Town of Apex v. Beverly L. Rubin  
Wake County File No: 19-CVS-6295  
Our File No: 049433-00010

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear Judge Collins:

I hope you are doing well. Enclosed please find pleadings filed recently in the above-referenced matters. We are glad to discuss these in an in-chamber meeting with all counsel, or if you would prefer we schedule the motion in 15 CVS 5836 for hearing, we can do that as well. Just let us know. Thank you.

Sincerely,



David P. Ferrell

Enclosures

cc: Kenneth C. Haywood, Esq.  
Matthew Nis Leerberg, Esq.

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STATE OF NORTH CAROLINA

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

FILED

2019 AUG 30 PM 3:10  
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
WAKE COUNTY, C.S.C. 19-CVS-6295

BY

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**FIRST AMENDED COMPLAINT**

[AMND]

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

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

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

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

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



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

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

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

8. The Town had constructed an underground sewer line ("Project") across the entire width of a narrow portion of Rubin's property, more particularly described in paragraph 19 hereof ("Property"). The eight (8) inch, 151 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. No manholes are on the Property.

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

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

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

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

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

14. The Town has not abandoned the Project.

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

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

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

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

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

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

20. The Property which is affected by the inverse taking of a sewer easement is more particularly described as follows:

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

Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

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

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

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

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

23. Public use or purpose is not an element of an inverse condemnation claim. Inverse condemnation statutory remedy is not dependent upon taking or using for a public use. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018).

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

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

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

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

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

WHEREFORE, Town requests judgment against Rubin as follows:

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

This the 30<sup>th</sup> day of August, 2019.



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*Attorneys for Plaintiff Town of Apex*

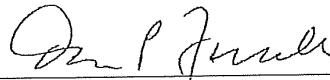
**CERTIFICATE OF SERVICE**

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

Matthew Nis Leerberg  
Fox Rothschild LLP  
PO Box 27525  
Raleigh, North Carolina 27611  
Fax: 919-755-8800  
*Attorneys for Defendant Beverly L. Rubin*

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

This the 30<sup>th</sup> day of August, 2019.



David P. Ferrell

FILED

STATE OF NORTH CAROLINA AUG 30 PM 1:11 IN THE GENERAL COURT OF JUSTICE  
WAKE COUNTY WAKE COUNTY C.S.C. SUPERIOR COURT DIVISION  
15-CVS-5836

BY 

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

MOTION FOR RELIEF FROM  
JUDGMENT

[OTHR]

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

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

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



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

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

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

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

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

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

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

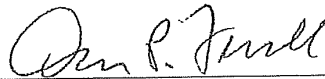
9. By motion filed herein on 10 April 2019, Rubin seeks, *inter alia*, removal of the Town's sewer line. (Motion is incorporated by reference.). Rubin asserts in her motion that the Judgment entitles her to such mandatory injunctive relief. However, the Town's power of eminent domain insulates it from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

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

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

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

Respectfully submitted, this the 30<sup>th</sup> day of August, 2019.



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


**CERTIFICATE OF SERVICE**

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

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

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

This the 30<sup>th</sup> day of August, 2019.



David P. Ferrell



HOWARD, STALLINGS,  
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Nicholas C. Brown  
Douglas D. Noreen  
Robert H. Jessup  
Elizabeth C. Buckley  
Rebecca Huffman Ugolick

September 10, 2019

Honorable G. Bryan Collins, Jr.  
Wake County Superior Court  
300 S. Salisbury Street.  
Raleigh, North Carolina 27601  
Via Email Only

Re: Town of Apex v. Rubin (Wake Cty 15-CVS-5836 and 19-CVS-6295)

Of Counsel  
Edwin P. Friedberg  
(Deceased 2009)

Dear Judge Collins,

Attached to this letter is a Memorandum of Law in support of the pending Motion To Enforce Judgment And Alternative Petition For Writ of Mandamus that you are considering. Discussion took place during the May 23 hearing involving how other courts have handled similar matters where a government placed improvements on property where it was later determined their possession of the property was unlawful. There was also discussion as to the law in North Carolina for the removal of the sewer line once installed.

To answer these questions, we have reviewed the law across the country and present this Memorandum to illustrate how the Supreme Courts in several different states have addressed these questions. We also have included the citation for *Sale v. State Highway Comm.*, 242 N.C. 612, 89 S.E.2d 290 (1955), where the North Carolina Supreme Court held that where there has been a constitutional violation and there is no statutory remedy then the constitutional provision is self-executing. Meaning that "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance". This decision is relevant to the present case where the sewer line was installed before there was a judicial determination of whether such taking was constitutional.

Had the Town of Apex waited to install the sewer line until the Court had ruled on the constitutionality of the easement like the City of Statesville did in *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985) (where the Court held the proposed sewer line to be for a private purpose) then the *Sale* holding that there will

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**OTHER LOCATIONS**  
New Bern, NC  
Morehead City, NC

**- R S (II) 467 -**

September 10, 2019

Page 2 of 2

always be a remedy for a constitutional violation would not have arisen in this case.

We look forward to hearing from you on this matter.

With best regards, I am

Sincerely yours,

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



Kenneth C. Haywood

cc: David Ferrell (via email only)  
Norm Shearin (via email only)  
Matt Leerberg (via email only)

---

**From:** Ferrell, David P. <DFerrell@nexsenpruet.com>

**Sent:** Friday, January 17, 2020 9:22 AM

**To:** wake.civil.superior.orders@nccourts.org

**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org) <kellie.z.myers@nccourts.org>; Kenneth C. Haywood <KHaywood@hsfh.com>; Leerberg, Matt <MLeerberg@foxrothschild.com>; jdavis@hsfh.com; Shearin, Norman W. <NShearin@nexsenpruet.com>

**Subject:** [EXT] Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295

To Whom It May Concern / Ms. Myers:

I represent the Plaintiff Town of Apex ("Town") in the above referenced matters and am submitting proposed orders to Judge Collins for his consideration. At the January 9, 2020 hearing on pending motions in the above referenced matters, in case no. 19 CVS 6295, Judge Collins denied Defendant's Motion to Dismiss and granted the Town's Motion for a Preliminary Injunction. Judge Collins asked that we prepare proposed orders for his consideration. The attached proposed orders were provided to counsel for Defendant on Thursday midday prior to our submitting them to the Court. Attached are:

- Town's proposed Order denying Defendant's motion to dismiss 19 CVS 6295
- Town's proposed Order granting the Town's motion for preliminary injunction 19 CVS 6295

In case no. 15 CVS 5836, Judge Collins took both pending motions under advisement, and asked the parties to provide proposed decisions for his consideration. Therefore, attached are:

**- R S (II) 469 -**

-Town's proposed Order denying Defendant's motion to enforce judgment or alternative petition for writ of mandamus 15 CVS 5836

-Town's proposed Order granting the Town's motion for relief from judgment 15 CVS 5836

It is our understanding that counsel for Defendant will be transmitting to the Court their proposed order related to the 2015 case on the Motion to Enforce Judgment.

Also, at the January 9, 2020 hearing counsel, for Defendant read to the Court excerpts from a 13 February 2017 confidential settlement letter counsel for the Town sent counsel for Defendant, provided the Court an exhibit from that letter (Exhibit 4), and made certain statements about the exhibit. Defendant did not provide the court the entire document. As I reported to the Court at the hearing, given that Defendant took certain things from the letter out of context, such as omitting that the alternative sewer easement shown in Exhibit 4 was not gravity and would require the construction of a pump station and still required an sewer easement across Defendant's property, we are submitting the complete letter and all exhibits to the Court, so the record will be complete. (See attached).

As orders are signed in these matters, we are glad to pick them up, file them with the Clerk's office, and serve the orders on the parties. Just let us know. Thanks.

David

**David P. Ferrell**

Member

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**NEXSEN | PRUET**



STATE OF NORTH CAROLINA  
WAKE COUNTY

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

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

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

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THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon motion of the Defendant Beverly L. Rubin ("Defendant"), to dismiss Plaintiff's first amended complaint ("complaint") and all claims alleged therein pursuant to Rule 12 (b)(6) on the grounds that the complaint and claims are barred or precluded by the doctrines of *res judicata* and/or prior action pending, and that the claims and issues were resolved or precluded by the original condemnation action having case number 15-CVS-5836. Plaintiff, Town of Apex, was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from arguments of counsel, a review of the first amended complaint, consideration of the prior condemnation action having case number 15-CVS-5836, and the legal authorities provided to the Court by counsel for the parties, that the Motion to Dismiss should be DENIED;

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

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

This the \_\_\_\_ day of January, 2020.

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G. Bryan Collins  
Superior Court Judge Presiding

STATE OF NORTH CAROLINA  
WAKE COUNTY

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

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

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**PRELIMINARY INJUNCTION**

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THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon the verified motion of the Plaintiff Town of Apex (“Plaintiff” or “Town”) for a preliminary injunction to enjoin and restrain the Defendant Beverly L. Rubin (“Defendant” or “Rubin”) *pendente lite* from taking any action to remove, disturb, or impair the use of the existing underground sewer line which crosses Defendant’s Property. Plaintiff was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from a review of the verified motion, the complaint and first amended complaint filed herein, the pleadings, Defendant’s motion to enforce judgment and alternative petition for a writ of mandamus and the parties’ memoranda related thereto in the prior condemnation action bearing case number 15 CVS 5836, and legal memoranda and arguments of counsel for the parties, that the Motion should be GRANTED. The Court makes the following:

### **FINDINGS OF FACT**

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

2. The Town constructed, owns, maintains, and operates a sewer line under Defendant's property. The sewer line serves approximately fifty (50) residential homes and/or lots in the Riley's Pond Subdivision, a duly annexed, rezoned, and approved single-family residential subdivision within the Town's limits. The Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. Defendant did not request injunctive relief from the Court prior to the installation of the sewer line to prevent construction, did not request injunctive relief to close or remove the sewer line in her answer in the original

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

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

20. Given the Court's dismissal of the original condemnation complaint as null and void, the installation of the underground sewer line was a physical invasion and taking of Defendant's property by the Town not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement. A determination of the extent of the Town's rights in its inversely condemned easement will be determined in this proceeding.

21. Inverse condemnation is Defendant's sole remedy for the physical invasion and inverse taking by the Town. Public use or purpose is not an element of an inverse condemnation claim. Inverse condemnation statutory remedy is not dependent upon taking or using for a public use. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018).

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

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

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

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

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

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

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

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

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

#### **CONCLUSIONS OF LAW**

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

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



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

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

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

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

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

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

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

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

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

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

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

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

13. No bond is required of the Town herein.

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

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

This the \_\_\_\_day of January, 2020.

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G. Bryan Collins  
Superior Court Judge Presiding

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

TOWN OF APEX,

Plaintiff,

V.

BEVERLY L. RUBIN,

Defendant.

**ORDER DENYING DEFENDANT'S  
MOTION TO ENFORCE JUDGMENT AND  
ALTERNATIVE PETITION FOR WRIT OF  
MANDAMUS**

THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon motion of the Defendant Beverly L. Rubin (“Defendant” or “Rubin”) to enforce judgment and alternative petition for writ of mandamus (“Motion”). Plaintiff Town of Apex (“Plaintiff” or “Town”) was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from a review of the pleadings, the judgment, legal memoranda and arguments of counsel for the parties, that the Motion should be DENIED. The Court makes the following:

## FINDINGS OF FACT

1. Defendant asks the Court to enforce the 18 October 2016 Judgment by entering an order requiring the Town to permanently remove the sewer line the Town installed under Defendant's property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**CONCLUSIONS OF LAW**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

This the \_\_\_\_\_ day of January, 2020.

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G. Bryan Collins  
Superior Court Judge Presiding

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.

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

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

### **FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the \_\_\_\_\_ day of January, 2020.

---

G. Bryan Collins  
Superior Court Judge Presiding



# VANDEVENTER BLACK LLP

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434 Fayetteville Street • Suite 2000 • Raleigh, NC 27601 • O: 919.754.1171 • F: 919.754.1317

## CONFIDENTIAL COMMUNICATION FOR SETTLEMENT PURPOSES ONLY

February 13, 2017

Kenneth C. Haywood  
Boxley, Bolton, Garber, & Haywood, LLP *Via Electronic & US Mail*  
Post Office Drawer 1429  
Raleigh, North Carolina 27602

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

February 13, 2017

Page 2

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).

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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.

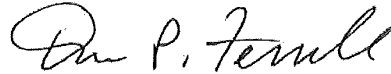
February 13, 2017

Page 4

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

A handwritten signature in black ink, appearing to read "David P. Ferrell". The signature is fluid and cursive, with the first name "David" and last name "Ferrell" clearly distinguishable.

David P. Ferrell

Enclosures

cc: Town of Apex



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)

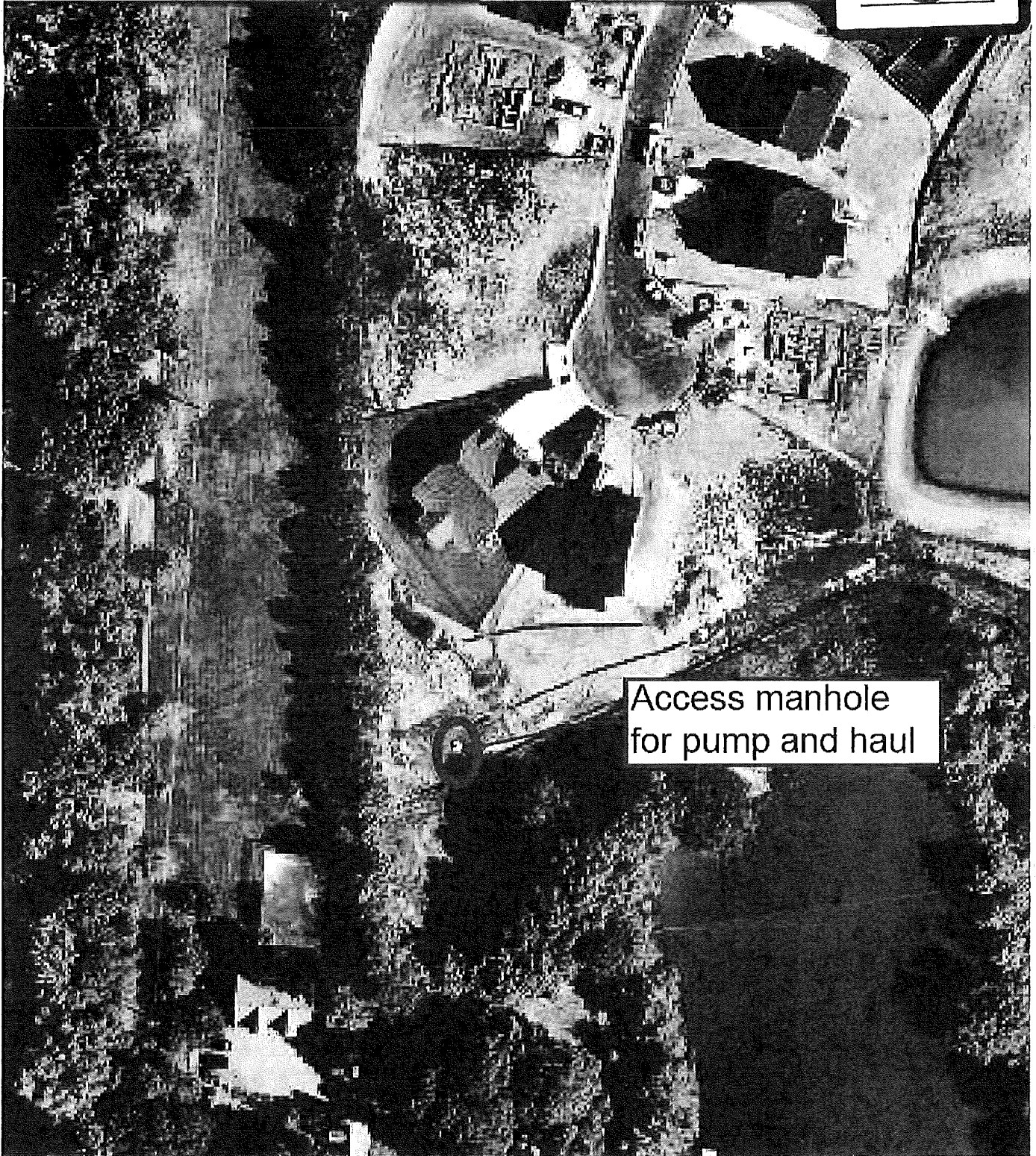


Sec. 12-89. - Violations of regulatory provisions.

- (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)

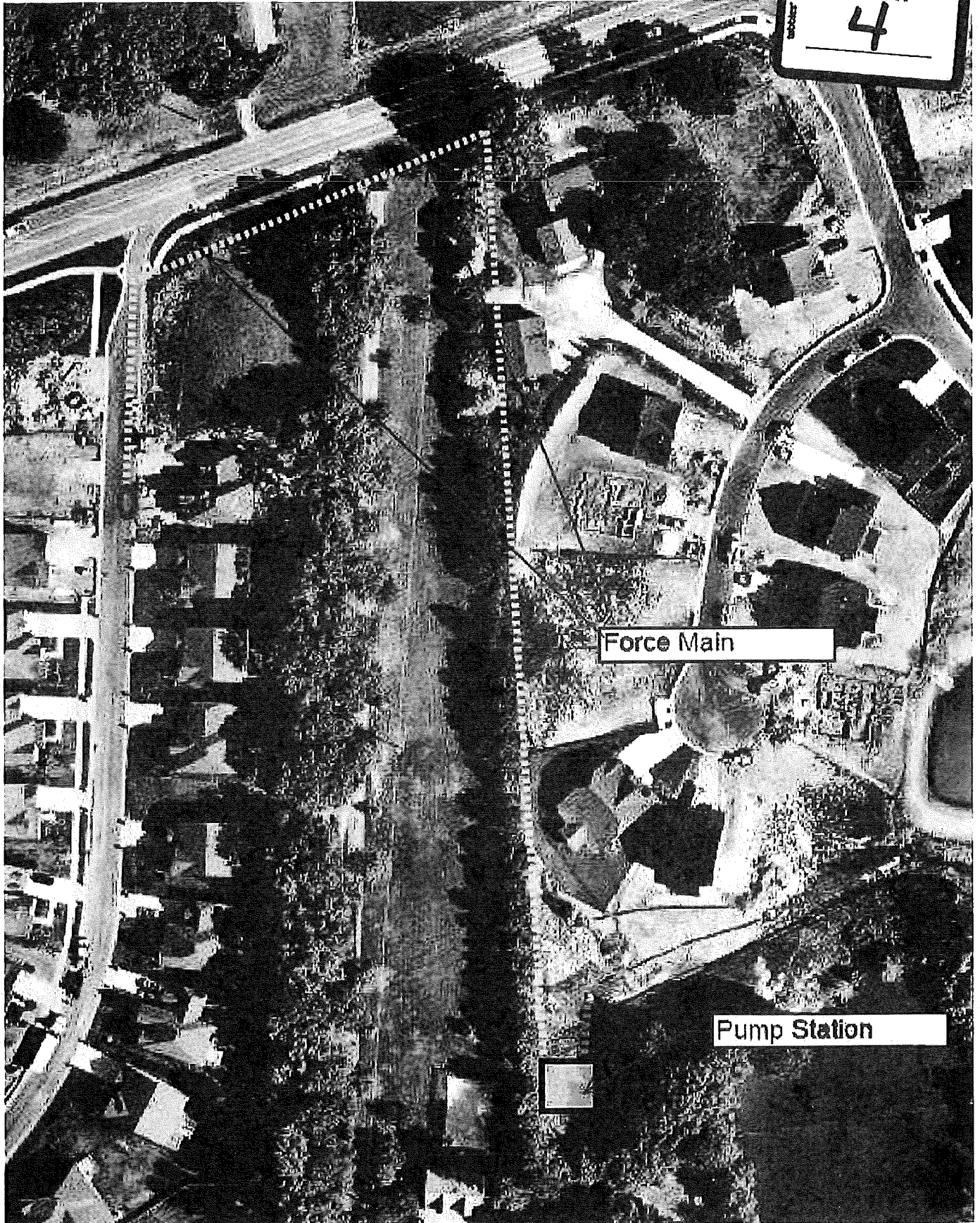
EXHIBIT  
**3**



Access manhole  
for pump and haul



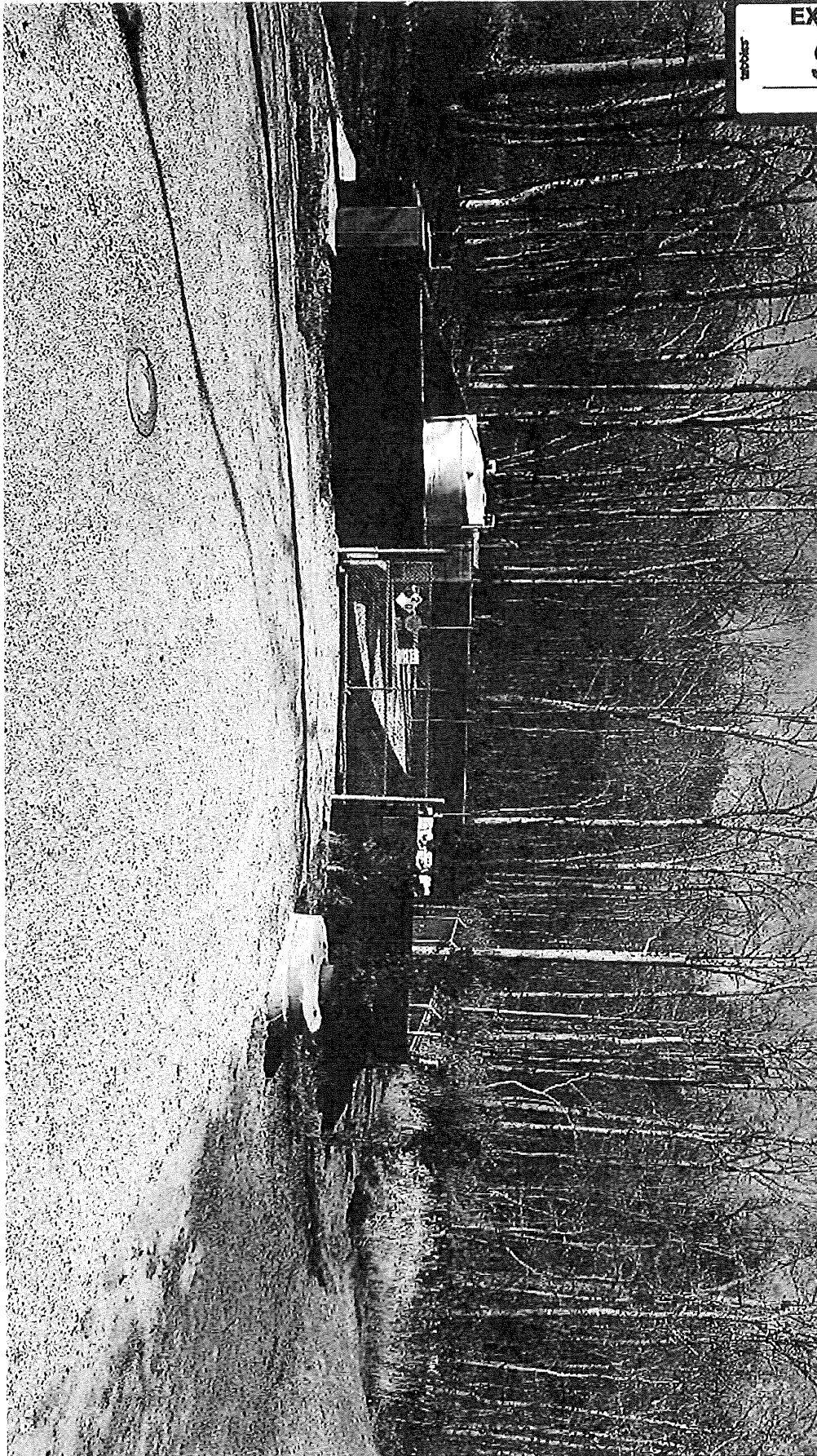
EXHIBIT  
**4**



Force Main

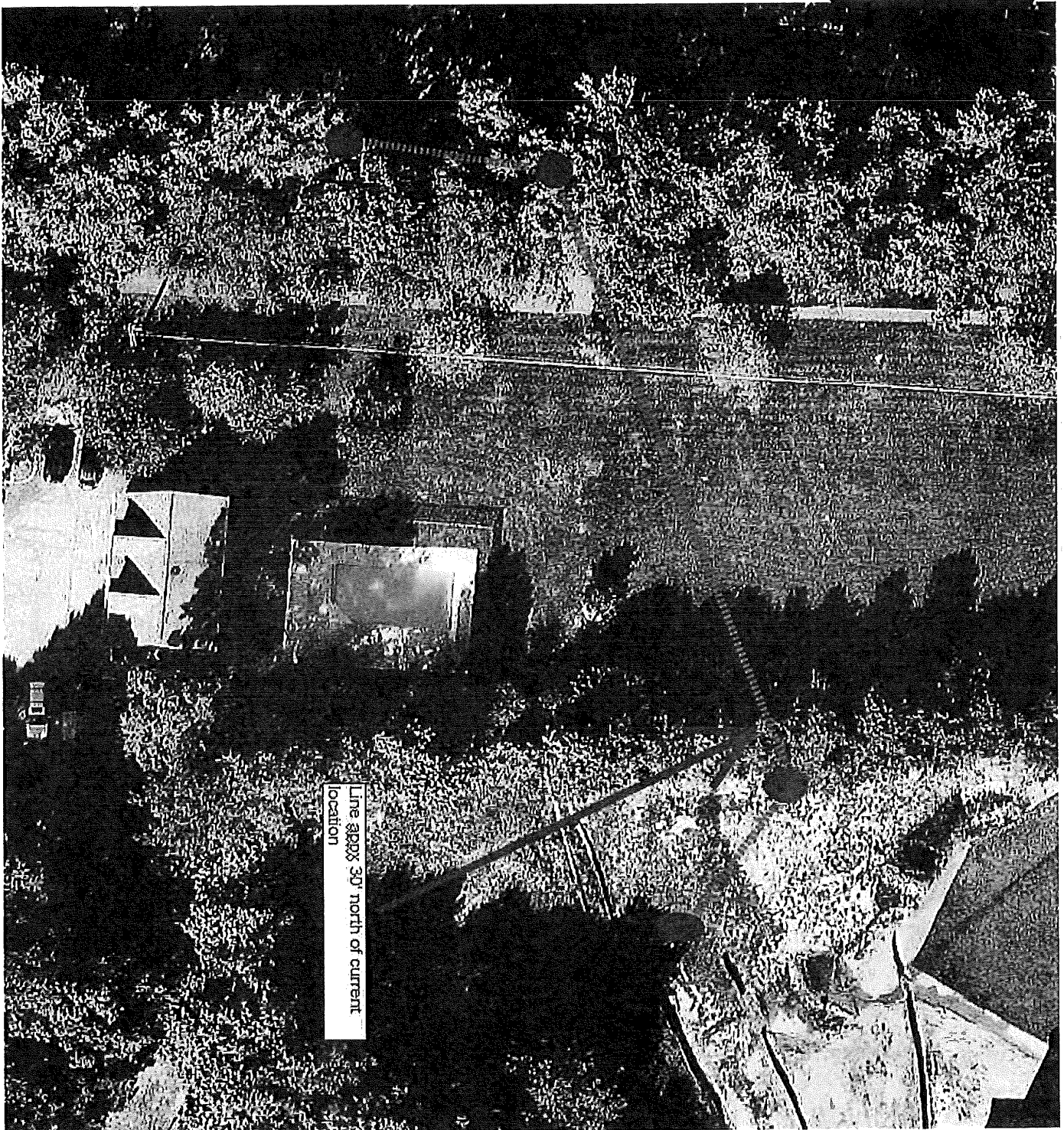
Pump Station





EXHIBIT

6

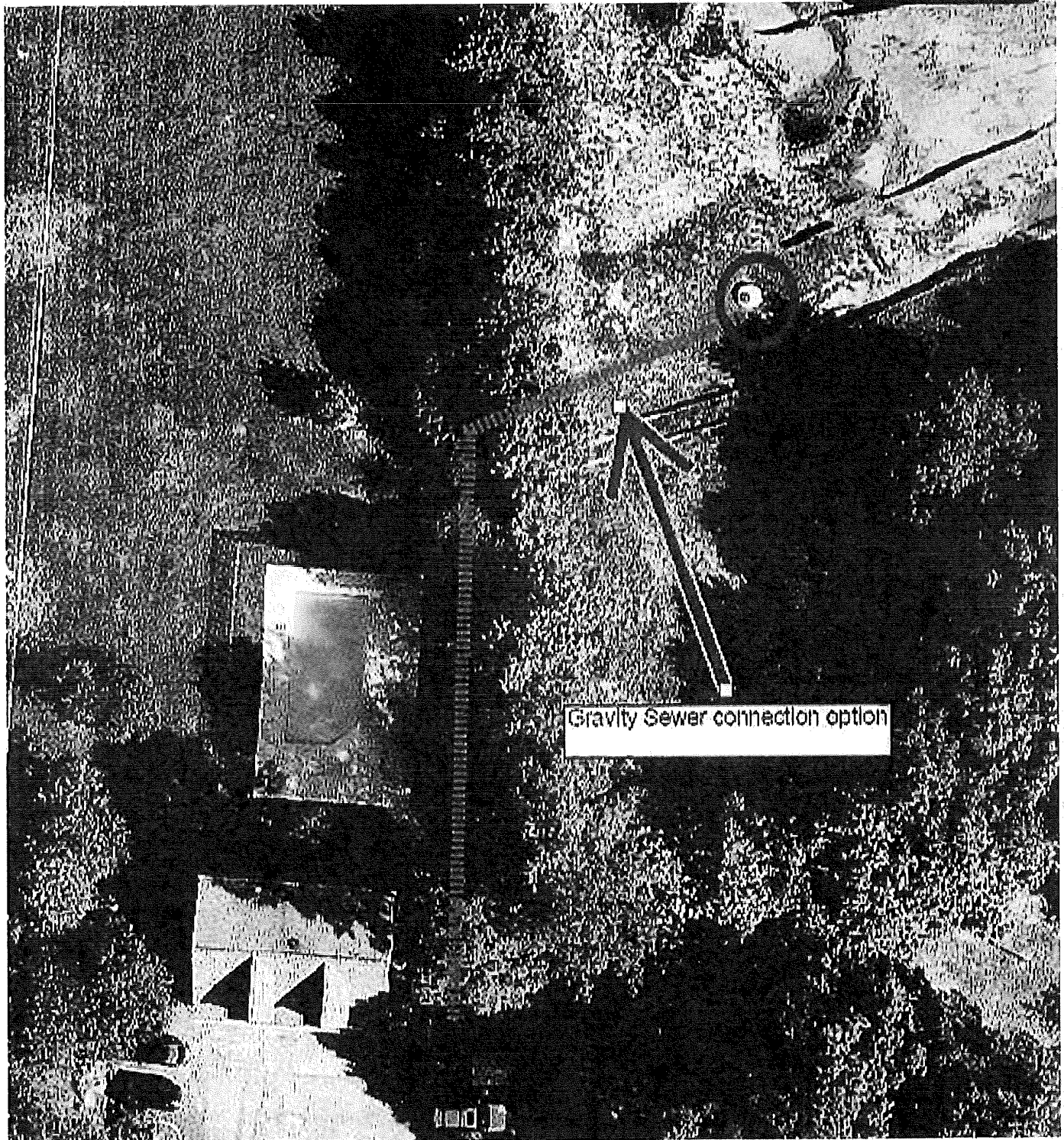


Line approx 30' north of current location



**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) Notwithstanding 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.

**- R S (II) 506 -**

- (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)

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**From:** Leerberg, Matt  
**Sent:** Friday, January 17, 2020 9:39 AM  
**To:** Ferrell, David P.; wake.civil.superior.orders@nccourts.org  
**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org); Kenneth C. Haywood; jdavis@hsfh.com; Shearin, Norman W.  
**Subject:** RE: Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295

Ms. Myers and Ms. Tucker:

Counsel for Ms. Rubin is still reviewing the proposed orders prepared by the Town. We ask that the orders submitted by the Town this morning not be transmitted to Judge Collins until we have had an opportunity to lodge any objections. We will proceed expeditiously and will be back in touch shortly.

Thanks,  
Matt

**Matthew Nis Leerberg** | Office Managing Partner  
*North Carolina Board Certified Specialist in Appellate Practice*  
Author, *North Carolina Appellate Practice & Procedure* © 2019 LexisNexis  
[Appellate Practice Blog](#)

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**From:** Ferrell, David P. <DFerrell@nexsenpruet.com>  
**Sent:** Friday, January 17, 2020 9:22 AM  
**To:** wake.civil.superior.orders@nccourts.org  
**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org) <kellie.z.myers@nccourts.org>; Kenneth C. Haywood <KHaywood@hsfh.com>; Leerberg, Matt <MLeerberg@foxrothschild.com>; jdavis@hsfh.com; Shearin, Norman W. <NShear@nexsenpruet.com>  
**Subject:** [EXT] Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295

To Whom It May Concern / Ms. Myers:

I represent the Plaintiff Town of Apex ("Town") in the above referenced matters and am submitting proposed orders to Judge Collins for his consideration. At the January 9, 2020 hearing on pending motions in the above referenced matters, in case no. 19 CVS 6295, Judge Collins denied Defendant's Motion to Dismiss and granted the Town's Motion for a Preliminary Injunction. Judge Collins asked that we prepare proposed orders for his consideration. The attached proposed orders were provided to counsel for Defendant on Thursday midday prior to our submitting them to the Court. Attached are:

- Town's proposed Order denying Defendant's motion to dismiss 19 CVS 6295
- Town's proposed Order granting the Town's motion for preliminary injunction 19 CVS 6295

In case no. 15 CVS 5836, Judge Collins took both pending motions under advisement, and asked the parties to provide proposed decisions for his consideration. Therefore, attached are:

-Town's proposed Order denying Defendant's motion to enforce judgment or alternative petition for writ of mandamus 15 CVS 5836

-Town's proposed Order granting the Town's motion for relief from judgment 15 CVS 5836

It is our understanding that counsel for Defendant will be transmitting to the Court their proposed order related to the 2015 case on the Motion to Enforce Judgment.

Also, at the January 9, 2020 hearing counsel, for Defendant read to the Court excerpts from a 13 February 2017 confidential settlement letter counsel for the Town sent counsel for Defendant, provided the Court an exhibit from that letter (Exhibit 4), and made certain statements about the exhibit. Defendant did not provide the court the entire document. As I reported to the Court at the hearing, given that Defendant took certain things from the letter out of context, such as omitting that the alternative sewer easement shown in Exhibit 4 was not gravity and would require the construction of a pump station and still required an sewer easement across Defendant's property, we are submitting the complete letter and all exhibits to the Court, so the record will be complete. (See attached).

As orders are signed in these matters, we are glad to pick them up, file them with the Clerk's office, and serve the orders on the parties. Just let us know. Thanks.

David

**David P. Ferrell**

Member

Nexsen Pruet, PLLC

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**NEXSEN PRUET**

**Leerberg, Matt**

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**From:** Kenneth C. Haywood <KHaywood@hsfh.com>  
**Sent:** Friday, January 17, 2020 2:23 PM  
**To:** wake.civil.superior.orders@nccourts.org  
**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org); Leerberg, Matt; B. Joan Davis; Shearin, Norman W.; Ferrell, David P.; Tucker, Lisa R.  
**Subject:** [EXT] RE: Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295  
**Attachments:** Letter to Judge Collins 1-17-20.pdf; Order on Preliminary Injunction.docx

Ms. Myers and Ms. Tucker,

We represent Beverly Rubin and are writing in response to the email sent earlier today which is stated below.

We disagree with the language in the order as submitted by counsel for the Town of Apex in 19 CVS 6295 on the Motion for Preliminary Injunction and therefore have attached a cover letter to Judge Collins and are submitting our own order for his consideration. We would appreciate these attachments being sent to Judge Collins.

I will be transmitting to you for Judge Collins a separate email on Tuesday with our proposed order in the 15 CVS 5836 on our request to end the Town's occupation of Ms. Rubin's property.

Kenneth C. Haywood

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Phone: (919) 821-7700 | Fax: (919) 821-7703

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IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or



**- R S (II) 510 -**

matter addressed in this communication (or in any attachment).

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---

**From:** Ferrell, David P. <DFerrell@nexsenpruet.com>

**Sent:** Friday, January 17, 2020 9:22 AM

**To:** wake.civil.superior.orders@nccourts.org

**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org) <kellie.z.myers@nccourts.org>; Kenneth C. Haywood <KHaywood@hsfh.com>; Leerberg, Matt <MLeerberg@foxrothschild.com>; B. Joan Davis <jdavis@hsfh.com>; Shearin, Norman W. <NShearin@nexsenpruet.com>

**Subject:** Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295

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- Town's proposed Order granting the Town's motion for relief from judgment 15 CVS 5836

It is our understanding that counsel for Defendant will be transmitting to the Court their proposed order related to the 2015 case on the Motion to Enforce Judgment.

Also, at the January 9, 2020 hearing counsel, for Defendant read to the Court excerpts from a 13 February 2017 confidential settlement letter counsel for the Town sent counsel for Defendant, provided the Court an exhibit from that letter (Exhibit 4), and made certain statements about the exhibit. Defendant did not provide the court the entire document. As I reported to the Court at the hearing, given that Defendant took certain things from the letter out of context, such as omitting that the alternative sewer easement shown in Exhibit 4 was not gravity and would require the construction of a pump station and still required an sewer easement across Defendant's property, we are submitting the complete letter and all exhibits to the Court, so the record will be complete. (See attached).

As orders are signed in these matters, we are glad to pick them up, file them with the Clerk's office, and serve the orders on the parties. Just let us know. Thanks.

David

**David P. Ferrell**

Member

Nexsen Pruet, PLLC

4141 Parklake Avenue, Suite 200

Raleigh, NC 27612

T: 919.573.7421, F: 919.573.7467

[DFerrell@nexsenpruet.com](mailto:DFerrell@nexsenpruet.com)

[www.nexsenpruet.com](http://www.nexsenpruet.com)

--



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

Telephone: 919.821.7700 | Facsimile: 919.821.7703 | PO Box 12347, Raleigh, NC 27605

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I. Allan From  
Joseph H. Stallings  
Beth F. Atkins  
James B. Angell  
B. Joan Davis  
Kenneth C. Haywood  
Brian E. Moore  
Kathleen B. Coyle  
Brooke L. Dalrymple  
Nicholas C. Brown  
Douglas D. Noreen  
Robert H. Jessup  
Elizabeth C. Buckley  
Rebecca Huffman Ugolick

January 17, 2020

Honorable G. Bryan Collins, Jr.  
Wake County Superior Court  
300 S. Salisbury Street.  
Raleigh, North Carolina 27601  
Via Email Only

Re: Town of Apex v. Rubin (Wake Cty 15-CVS-5836 and 19-CVS-6295)

Dear Judge Collins,

At the conclusion of the hearing on Beverly Rubin's Motion to Dismiss the 2019 Declaratory Judgment case, you denied her Motion and granted the Town's request for a Preliminary Injunction. We have no objection to the Town's proposed order on the Motion to Dismiss.

The Town's proposed order on its Motion for Preliminary Injunction includes a number of findings and conclusions that are not supported by evidence or law and are inconsistent with the final Judgment entered in the 2015 case, as upheld by the appellate courts. While you granted the preliminary injunction to maintain the status quo during the litigation, you did not make any findings of fact or conclusions of law. Ms. Rubin expressly objects to entry of the Town's proposed order for these and all the reasons set forth in her written and oral submissions to this Court. While Ms. Rubin continues to believe that the issuance of a preliminary injunction is improper, she would have no objection to the form of an alternative proposed order, attached. Our proposed order tracks what you stated and eliminates numerous findings of fact and conclusions of law in the Town's proposed order.

As to the original action 15-CVS-5836 in which we filed a motion to order the Town to end its occupation of Ms. Rubin's property, you requested each side to send to you its proposed order. Today the Town submitted its proposed order. We plan to submit to you our proposed order by Tuesday, January 21.

**RALEIGH OFFICE**

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**OTHER LOCATIONS**

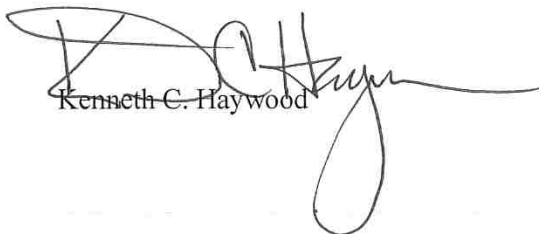
New Bern, NC  
Morehead City, NC

January 17, 2020  
Page 2 of 2

With best regards, I am

Sincerely yours,

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



Kenneth C. Haywood

cc: David Ferrell (via email only)  
Norm Shearin (via email only)  
Matt Leerberg (via email only)

STATE OF NORTH CAROLINA

WAKE COUNTY

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN,

Defendant.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

19-CVS-6295

**PRELIMINARY INJUNCTION**

---

THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon the verified motion of the Plaintiff Town of Apex ("Plaintiff" or "Town") for a preliminary injunction to enjoin and restrain the Defendant Beverly L. Rubin ("Defendant" or "Rubin") *pendente lite* from taking any action to remove, disturb, or impair the use of the existing underground sewer line which crosses Defendant's Property. Plaintiff was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from a review of the verified motion, the complaint and first amended complaint filed herein, the pleadings, Defendant's motion to enforce judgment and alternative petition for a writ of mandamus and the parties' memoranda related thereto in the prior condemnation action bearing case number 15 CVS 5836, and legal memoranda and arguments of counsel for the parties, that the Motion should be GRANTED. The Court makes the following:

**FINDINGS OF FACT**

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

2. The Town constructed a sewer pipe under Defendant's property on 29 July 2015 after filing an eminent domain action on 30 April 2015 in Wake County Superior Court in *Town of Apex v. Rubin*, 15 CVS 5836.

3. A final judgment was entered on 18 October 2016 in the 15 CVS 5836 civil matter. The Judgment ordered that the Town's claim to the Defendant's property by Eminent Domain is null and void and is dismissed.

4. The Town believes the sewer pipe properly exists on Defendant's property and should remain. Defendant asserts that she is entitled to an order requiring the Town to remove the sewer pipe or prohibit the Town from continued use of the sewer pipe. Defendant has formally sought such an order by written motion filed on 10 April 2019 in the original condemnation action having case number 15-CVS-5636.

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

6. An injunction is necessary to preserve the status quo by restraining Defendant from interfering with the operation and use of the sewer pipe.

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

**CONCLUSIONS OF LAW**

1. The Town's Declaratory Judgment Complaint alleges an actual controversy between the parties regarding the parties' rights to a portion of Beverly Rubin's property.
2. The Town is likely to succeed on the merits of its claims for declaratory and injunctive relief.
3. An injunction is necessary to protect the Town's rights and preserve the status quo during the course of this litigation.
4. An injunction is necessary to prevent Defendant from blocking or removing the sewer pipe during the litigation.
5. No bond is required of the Town herein.

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

This the \_\_\_\_ day of \_\_\_\_\_, 2020.

---

G. Bryan Collins, Jr.  
Superior Court Judge Presiding

**Leerberg, Matt**

---

**From:** Kenneth C. Haywood <KHaywood@hsfh.com>  
**Sent:** Tuesday, January 21, 2020 4:01 PM  
**To:** wake.civil.superior.orders@nccourts.org  
**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org); Leerberg, Matt; B. Joan Davis; Shearin, Norman W.; Ferrell, David P.; Tucker, Lisa R.  
**Subject:** [EXT] RE: Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295  
**Attachments:** Order on motion to enforce judgment in 15 CVS 5836.doc; Order Denying Plaintiff's Motion For Relief From Judgment.doc; Letter to Judge Collins January 21 2020.pdf

Ms. Myers and Ms. Tucker,

I am transmitting to you our letter to Judge Collins and the two proposed orders he requested we prepare as I stated I would do in my email below sent on Friday. I would appreciate you forwarding this email including all attachments to Judge Collins for his consideration.

Kenneth C. Haywood

**Howard, Stallings, From, Atkins, Angell & Davis, P.A.**  
5410 Trinity Road, Suite 210, Raleigh, NC 27607  
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Phone: (919) 821-7700 | Fax: (919) 821-7703

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IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

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---

**From:** Kenneth C. Haywood <KHaywood@hsfh.com>  
**Sent:** Friday, January 17, 2020 2:23 PM



**- R S (II) 518 -**

**To:** wake.civil.superior.orders@nccourts.org

**Cc:** Kellie Z. Myers (kellie.z.myers@nccourts.org) <kellie.z.myers@nccourts.org>; Leerberg, Matt <MLeerberg@foxrothschild.com>; B. Joan Davis <jdavis@hsfh.com>; Shearin, Norman W. <NShear@nxsenpruet.com>; Ferrell, David P. <DFerrell@nxsenpruet.com>; Tucker, Lisa R. <Lisa.R.Tucker@nccourts.org>

**Subject:** RE: Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295

Ms. Myers and Ms. Tucker,

We represent Beverly Rubin and are writing in response to the email sent earlier today which is stated below.

We disagree with the language in the order as submitted by counsel for the Town of Apex in 19 CVS 6295 on the Motion for Preliminary Injunction and therefore have attached a cover letter to Judge Collins and are submitting our own order for his consideration. We would appreciate these attachments being sent to Judge Collins.

I will be transmitting to you for Judge Collins a separate email on Tuesday with our proposed order in the 15 CVS 5836 on our request to end the Town's occupation of Ms. Rubin's property.

Kenneth C. Haywood

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5410 Trinity Road, Suite 210, Raleigh, NC 27607  
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NOTICE: Before sending any wire to our firm, call our office to verify the instructions using contact information that you verify from an independent source, such as the internet. We will not change wiring instructions. If you thereafter receive wiring instructions for a different bank, branch location, account name or account number, they should be presumed to be fraudulent. Do not send any funds and contact our office immediately. Failure to follow this procedure endangers your funds.

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**From:** Ferrell, David P. <[DFerrell@nexsenpruet.com](mailto:DFerrell@nexsenpruet.com)>

**Sent:** Friday, January 17, 2020 9:22 AM

**To:** [wake.civil.superior.orders@nccourts.org](mailto:wake.civil.superior.orders@nccourts.org)

**Cc:** Kellie Z. Myers (<[kellie.z.myers@nccourts.org](mailto:kellie.z.myers@nccourts.org)> <[kellie.z.myers@nccourts.org](mailto:kellie.z.myers@nccourts.org)>); Kenneth C. Haywood <[KHaywood@hsfh.com](mailto:KHaywood@hsfh.com)>; Leerberg, Matt <[MLeerberg@foxrothschild.com](mailto:MLeerberg@foxrothschild.com)>; B. Joan Davis <[jdavis@hsfh.com](mailto:jdavis@hsfh.com)>; Shearin, Norman W. <[NShearin@nexsenpruet.com](mailto:NShearin@nexsenpruet.com)>

**Subject:** Town of Apex v Rubin - proposed orders - 15 CVS 5836 & 19 CVS 6295

To Whom It May Concern / Ms. Myers:

I represent the Plaintiff Town of Apex ("Town") in the above referenced matters and am submitting proposed orders to Judge Collins for his consideration. At the January 9, 2020 hearing on pending motions in the above referenced matters, in case no. 19 CVS 6295, Judge Collins denied Defendant's Motion to Dismiss and granted the Town's Motion for a Preliminary Injunction. Judge Collins asked that we prepare proposed orders for his consideration. The attached proposed orders were provided to counsel for Defendant on Thursday midday prior to our submitting them to the Court. Attached are:

- Town's proposed Order denying Defendant's motion to dismiss 19 CVS 6295
- Town's proposed Order granting the Town's motion for preliminary injunction 19 CVS 6295

In case no. 15 CVS 5836, Judge Collins took both pending motions under advisement, and asked the parties to provide proposed decisions for his consideration. Therefore, attached are:

- Town's proposed Order denying Defendant's motion to enforce judgment or alternative petition for writ of mandamus 15 CVS 5836
- Town's proposed Order granting the Town's motion for relief from judgment 15 CVS 5836

It is our understanding that counsel for Defendant will be transmitting to the Court their proposed order related to the 2015 case on the Motion to Enforce Judgment.

Also, at the January 9, 2020 hearing counsel, for Defendant read to the Court excerpts from a 13 February 2017 confidential settlement letter counsel for the Town sent counsel for Defendant, provided the Court an exhibit from that letter (Exhibit 4), and made certain statements about the exhibit. Defendant did not provide the court the entire document. As I reported to the Court at the hearing, given that Defendant took certain things from the letter out of context, such as omitting that the alternative sewer easement shown in Exhibit 4 was not gravity and would require the construction of a pump station and still required an sewer easement across Defendant's property, we are submitting the complete letter and all exhibits to the Court, so the record will be complete. (See attached).

As orders are signed in these matters, we are glad to pick them up, file them with the Clerk's office, and serve the orders on the parties. Just let us know. Thanks.

David

**David P. Ferrell**

Member

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Elizabeth C. Buckley  
Rebecca Huffman Ugolick

January 21, 2020

Honorable G. Bryan Collins, Jr.  
Wake County Superior Court  
300 S. Salisbury Street.  
Raleigh, North Carolina 27601  
Via Email Only

Re: Town of Apex v. Rubin (Wake Cty 15-CVS-5836)

Dear Judge Collins,

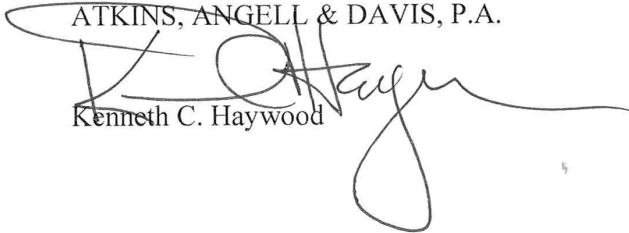
At the conclusion of the hearing on the 15 CVS 5836 case for Beverly Rubin's motion to enforce judgment, you took the matter under advisement and requested both sides to transmit their order to you for consideration.

Included with this letter are Ms. Rubin's proposed orders in the 15 CVS 5836 case. The first order addresses the motion to enforce judgment. The second order denies the Town's motion for relief from judgment. Thank you for consideration of this order.

With best regards, I am

Sincerely yours,

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

  
Kenneth C. Haywood

**RALEIGH OFFICE**  
5410 Trinity Road  
Suite 210  
Raleigh, NC 27607  
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Toll Free: 800.822.4182

cc: David Ferrell (via email only)  
Norm Shearin (via email only)  
Matt Leerberg (via email only)

**OTHER LOCATIONS**  
New Bern, NC  
Morehead City, NC

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

TOWN OF APEX,

Plaintiff,

V.

BEVERLY L. RUBIN

Defendant.

ORDER

This cause came before the undersigned Superior Court Judge for hearing during the January 6, 2020 Civil Session of Wake County Superior Court on Beverly Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus. The Court has reviewed the motion and memoranda of law filed by both parties and has heard arguments of Counsel. The Court makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. Plaintiff, Town of Apex, filed a Complaint on April 30, 2015, claiming that its right of eminent domain allowed it to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house for sanitary sewer and facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

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

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

4. Upon learning that Ms. Rubin intended to challenge the right of the Town to take a sewer easement close to her home, the Town, prior to expending any public funds to install a sewer pipe in the sewer easement, had the statutory right to seek a judicial determination of whether its taking of Ms. Rubin's property was for a public use or benefit.

5. Instead, the Town chose to install a sewer pipe in the forty foot wide area across Ms. Rubin's property before having the challenge to its right resolved by the courts.

6. Ms. Rubin engaged in a lengthy period of discovery to gather the facts necessary to mount a challenge to the Town's taking of her property.

7. In response to Ms. Rubin's motion to determine whether the taking by the Town of Ms. Rubin's property was constitutionally valid, this Court heard the matter during the week of August 1, 2016.

8. This Court entered a Judgment on October 6, 2016. Within the Judgment, the Court in paragraphs 4 and 5 of the Conclusions of Law held that the state and federal constitutions require that a condemnor take property only for a public purpose. In paragraph 6 of the Conclusions of Law, the Court explained that the "paramount reason for the taking of the sewer easement is for a private interest and the public's interest is merely incidental." The court further stated that the need for the sewer easement was "not from any expansion of the Town's infrastructure or public need." The Judgment dismissed the Town's claim to the Rubin Property and declared the Town's easement "null and void."

9. This matter is back before this Court, after all appellate litigation has been concluded in favor of Ms. Rubin, upon the Court of Appeals' Order to this Court entered on April 10, 2019.

10. While more than three years has elapsed since this Court concluded that the Town's occupation of Ms. Rubin's property was unlawful, the Town has refused to remove the sewer pipe from Ms. Rubin's property, and the Town has threatened Ms. Rubin with criminal prosecution if she attempts to remove it herself.

11. No matter how deep or noninvasive the sewer pipe is alleged to be, this Court has already fully adjudicated the question of whether the Town had any legal right to use the private property of Ms. Rubin for a sewer line to benefit another private property owner for its exclusive benefit.

12. Faced with continued unlawful occupation of her property rights, Ms. Rubin seeks and order in aid of execution of the prior Judgment in this proceeding determining that the Town had no legal right to take her private property for a sewer easement.

#### CONCLUSION OF LAW

1. N.C. Gen Stat. §1-298 provides that after a case is remanded to the trial court by an appellate court, the trial court "shall direct the execution [of the judgment] to proceed." The certification of the appeal to this Court has been received and it is proper to proceed with execution and enforcement of the Judgment.

2. At the time of the Judgment the sewer pipe was already in place. Despite the presence of the sewer pipe, this Court ordered that the Town's claim to take a portion of Ms. Rubin's property for a sewer easement across Ms. Rubin's property to be null and void. This is in accord with *Town of Midland v. Morris*, 209 N.C. App. 208, 704 S.E.2d 329 (2011) ("We are

wholly unpersuaded by Midland's argument that, even where a city flagrantly violates the statutes governing eminent domain, that city can obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment on the validity of condemnation is rendered.")

3. The construction and installation of the sewer pipe does not prohibit Ms. Rubin from asserting ownership of her property free and clear of any encroachment by the Town. "The defendants are not estopped to assert the land in question still belongs to them free of any right of way across it." *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

4. The Judgment in this matter dismissed the claims by the Town to take Ms. Rubin's property for a sewer easement. As aptly stated by the Court of Appeals in a similar case involving a sewer easement in the Town of Apex: "By its very definition, a 'taking' can only occur if an entity with the power of eminent domain appropriates property which is to be devoted 'to a public use[.]' . . . If Apex attempted to condemn the defendants' property for a private use, then the use would be improper and Apex would have no authority to take the property under the power of eminent domain, thus ending the inquiry." (Emphasis added). *Town of Apex v. Whitehurst*, 213 N.C. App. 579, 712 S.E.2d 898 (2011).

5. This Court has the power both inherent and otherwise to make any orders necessary to enforce the Judgment of this Court. *Sale v. State Highway Comm.*, 242 N.C. 612, 89 S.E.2d 290 (1955).

6. The Town asserts the "doctrine of inverse condemnation" (and the passage of the two-year statute of limitations since the installation of the sewer pipe) to assert an interest in the Property despite the Judgment. However, this argument fails for two reasons: 1) the "doctrine of 'inverse condemnation' .... has no application where, as here, the contention is that the power of eminent domain does not extend to the taking in question"(Emphasis added). *State Highway*

*Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967); and 2) a property owner may only institute a claim for “inverse condemnation” under N.C. Gen. Stat. § 136-111 as a remedy when “no complaint and declaration of taking has been filed” by the taking authority. Where, as here, the Town filed a Complaint and Declaration of Taking, there is no claim for inverse condemnation.

7. Further the Town asserts that Ms. Rubin has another adequate remedy at law in that she may pursue a claim for compensation. This argument also fails. As the U.S. Supreme Court has consistently held, “if a government action is found to be impermissible — for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process — that is the end of the inquiry. *No amount of compensation can authorize such action.*” (Emphasis added). *Hawaii v. Chevron U.S.A, Inc.* 544 U.S. 528 (2005).

8. Here, the Town filed a Complaint and Declaration of Taking, and the rights of the Parties and their respective interests in the Property have been fully adjudicated, and it has been determined by this Court that the power of eminent domain does not extend to the taking in question such that the Town’s claim to the Property has been dismissed upon a final Judgment. Ms. Rubin is entitled to the enforcement of that Judgment against the Town’s illegal and unauthorized occupation of her Property.

#### ENFORCEMENT OF THE JUDGMENT

1. The Town of Apex shall take all steps necessary to discontinue its use and occupation of Beverly Rubin’s property for a sanitary sewer easement. Such steps shall include locating another route that does not involve Beverly Rubin’s property for the transmission of sewer from what has been referred to in this case as the Arcadia East property. The Court in its



discretion will allow the Town to have three months from the date of this Order to locate, engineer and construct a new route for the transmission of sewer from the Arcadia East property. Upon a showing of good cause that additional time is necessary, the Town may apply for an additional time up to a maximum of three additional months to fully comply with this Order. Such application for extension shall specify all actions already undertaken by the Town and its representatives.

2. The existing pipe located under Beverly Rubin's property shall be abandoned by the Town once the alternative route for sewer has been implemented within the time established herein. After such abandonment of the sewer line, Ms. Rubin can exercise her legal right to remove the sewer pipe. If Ms. Rubin proceeds to remove the sewer lines, the Town shall reimburse her for all reasonable expenses and costs incurred in the removal.

3. This Order does not disturb or modify the Court's Judgment preserving the right of Defendant to submit a petition for her costs and attorney's fees as provided in Chapter 136 of the General Statutes and N.C. Gen. Stat. § 6-21.7, which ruling is reserved for later adjudication upon Defendant's submitting a motion in support of such request.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2020.

---

Superior Court Judge G. Bryan Collins

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

TOWN OF APEX,

Plaintiff,

V.

BEVERLY L. RUBIN

Defendant.

# ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing during the January 6, 2020 Civil Session of Wake County Superior Court on the Plaintiff's Motion For Relief From Judgment with Plaintiff represented by David P. Ferrell and Norman W. Shearin of Nexsen Pruet PLLC, and Defendant represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP.

And the Court, having reviewed the motion, the file in this matter, the arguments of counsel, and the record, hereby finds that Plaintiffs' Motion should be **DENIED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that Plaintiff's Motion  
For Relief From Judgment is **DENIED**.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2020.

Superior Court Judge G. Bryan Collins

**CERTIFICATE OF SERVICE**

This is to certify that I have this date served a copy of the foregoing Order 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 \_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
Kenneth C. Haywood

---

**From:** Ferrell, David P. <DFerrell@nexsenpruet.com>  
**Sent:** Monday, April 27, 2020 9:44 AM  
**To:** Brogan, Tammy; Shearin, Norman W.  
**Cc:** Leerberg, Matt; Shelton, Troy D.  
**Subject:** [EXT] RE: Town of Apex v. Beverly Rubin

Matt and Troy

I hope you are doing well. To respond to the question in your letter on the proposed record (paragraph 1 of your letter), our question about the record from the first appeal in the 2015 case was an objection, so please include those items in the Rule 11(c) filing. And please include this email in the record for 2015 case only. Thank you.

David

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**NEXSEN PRUET**

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**From:** Brogan, Tammy <TBrogan@foxrothschild.com>  
**Sent:** Wednesday, April 22, 2020 5:09 PM  
**To:** Ferrell, David P. <DFerrell@nexsenpruet.com>; Shearin, Norman W. <NShearin@nexsenpruet.com>  
**Cc:** Leerberg, Matt <MLeerberg@foxrothschild.com>; Shelton, Troy D. <TShelton@foxrothschild.com>  
**Subject:** Town of Apex v. Beverly Rubin

{EXTERNAL EMAIL}

Attached please find a letter from Matt Leerberg in connection with the above-referenced matter.

**Tammy Brogan**  
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