

NORTH CAROLINA COURT OF APPEALS

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TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

**From Wake County**

**15-CVS-5836**

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

**From Wake County**

**19-CVS-6295**

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**DEFENDANT-APPELLANT'S CONSENT MOTION FOR LEAVE TO  
EXTEND WORD COUNT LIMIT FOR APPELLANT'S BRIEF**

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Defendant-Appellant Beverly Rubin moves this Court to extend the word count limit for her opening brief. In support of this motion, Defendant-Appellant shows the Court as follows:

1. This dispute involves the Town of Apex's repeated attempts to take Ms. Rubin's private property for an illegal purpose.

2. In a condemnation action filed by the Town, a final judgment was entered in favor of Ms. Rubin. The judgment declared the Town's taking to be unconstitutional, and its claim to her property to be "null and void." This Court upheld the judgment in an earlier appeal. *See Town of Apex v. Rubin*, No. COA17-955, 821 S.E.2d 613, 616 (N.C. Ct. App. 2018) (Bryant, J., authoring; Stroud, J. and McGee, C.J., concurring).

3. The current dispute between the parties centers on the nature of the judgment that was entered and its consequences.

4. On remand, Ms. Rubin moved in the original condemnation action to enforce the judgment and end the Town's illegal occupation of her property. The Town responded by seeking to have the judgment vacated. The Town also filed an entirely new lawsuit, seeking to declare itself the owner of Ms. Rubin's property, notwithstanding the final judgment. Ms. Rubin moved to dismiss that new lawsuit.

5. Each of the parties moved for relief in each of the two cases, and all four of the motions came on for hearing before the same superior court judge. All of the Town's motions were granted, and all of Ms. Rubin's were denied.

6. Ms. Rubin is now appealing from all of the superior court's orders because they have eviscerated the final judgment that she already won and which was already upheld by this Court on appeal. The appeal from the two

orders entered in the Town's original condemnation action is before the Court as docket number COA20-304. The appeal from the two orders entered in the Town's second lawsuit is before this Court as docket number COA20-305.

7. Ms. Rubin's theory of the case is simple: the remedy for an unconstitutional taking—the unlawfulness of which no party disputes—is the return of the property. But the trial court adopted the Town's novel theories of eminent domain law, never before accepted by any other jurisdiction in the country. Those theories are much more convoluted and require more extensive briefing.

8. According to the Town and the trial court, when the government takes private property in violation of the state and federal constitutions (because it lacks a public purpose), the government is not required to return the land that it stole. Instead, the government need only pay just compensation, even though compensation is the remedy for takings that *comport* with the constitution.

9. The trial court also adopted the Town's theory that it gets to keep Ms. Rubin's property because, by the time the final judgment was entered, the Town had already converted her property to its own use. The final judgment, in the Town's reading, had the effect of declaring the Town's conduct as unconstitutional, but, at the same time, approving the Town's misconduct.

10. In addition, each of the four orders entered in this dispute has multiple, particular defects that must also be addressed in Ms. Rubin's briefs.

11. In the 2015 case, for instance, Ms. Rubin provided six independent procedural bases authorizing the trial court to enforce the final judgment and force the Town to return her property. Because the trial court rejected all of those procedures, however, they must now all be addressed on appeal. Likewise, the trial court vacated the final judgment by relying on two different subsections of Rule 60(b), each of which has its own procedural requirements that were misapplied by the trial court.

12. So too in the 2019 case. Ms. Rubin's motion to dismiss the Town's second lawsuit not only challenged the Town's unsupported theories of eminent domain law, but also raised the defenses of res judicata (due to the final judgment in the 2015 case) and, alternatively, prior action pending (due to Ms. Rubin's pending motion to enforce the final judgment). These alternative grounds for reversal must also fit into Ms. Rubin's brief.

13. Finally, the trial court also entered a preliminary injunction in the 2019 case. There are multiple requirements for a preliminary injunction, each of which Ms. Rubin must also address in her brief.

14. For these reasons, these appeals require Ms. Rubin to respond to the Town's two novel, complex arguments, as well as a host of additional

particular issues, all of which must fit into Ms. Rubin's opening briefs.<sup>1</sup> And just recounting the long history of this dispute—leading up to the final judgment and after remand—is complex.

15. Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure limits Ms. Rubin's opening brief to 8,750 words. For the reasons just explained, Ms. Rubin believes that adherence to this limit would hinder her ability to adequately brief the issues before the Court.

16. Accordingly, Ms. Rubin requests that the Court enter an order enlarging the length limitations applicable to Ms. Rubin's Appellant brief up to 12,500 words. Enlarging the word limit will not unreasonably delay this action or prejudice any party. On the contrary, it will enhance the ability to adequately brief the issues before the Court, thereby aiding the Court's consideration of these issues.

17. Ms. Rubin has conferred with the Town regarding her request to increase the word limit for her opening brief to 12,500 words. The Town consents to this request.

WHEREFORE, Defendant-Appellant moves the Court for an order allowing her to file her appellant's brief of up to 12,500 words.

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<sup>1</sup> To be clear, Ms. Rubin is not seeking to address all of these issues in a single opening brief. Rather, she seeks to address the orders in the 2015 case in her opening brief in docket number 20-304, and to address the orders in the 2019 case in docket number 20-305. Ms. Rubin previously moved to consolidate the briefing, but that motion was denied.

This the 3rd day of June, 2020.

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Electronically submitted

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N.C. R. App. P. 33(b) Certification: I  
certify that all of the attorneys listed  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing motion was served on the opposing party by placing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 3rd day of June, 2020, addressed as follows:

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