

No. COA 20-304

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

DEFENDANT-APPELLANT'S BRIEF

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INTRODUCTION

The Town of Apex and private developers have trampled upon Ms. Rubin's constitutional rights long enough. When she refused to sell her home to a wealthy developer, the developer paid the Town to condemn a sewer easement across her property for his financial gain. Instead of waiting on the court to decide whether the taking was constitutional, the Town went ahead with the project during the condemnation, installing a sewer pipe across Ms. Rubin's rural homestead. Thankfully, the trial court saw through the ruse and dismissed the condemnation as unconstitutional, reverting title of the land back to Ms. Rubin. The Town appealed, and this Court upheld the judgment.

Even then, the Town wouldn't leave. On remand, Ms. Rubin asked the trial court to make the Town obey the judgment issued by the prior superior court judge. The court refused. In fact, it went further and vacated Ms. Rubin's hard-won judgment. Led astray by the Town's argle-bargle, the trial court adopted four lengthy, Town-drafted orders in these two companion cases, declaring that:

- the government can take private property with or without a public purpose, and the remedy is always just compensation;
- when the government takes private property without a public purpose, that's just an inverse condemnation;
- the government can moot a public-purpose challenge through its quick-take authority;
- if the government loses its first condemnation case, it can just file a second one, couched as a declaratory-judgment action, and win that way.

The trial court's orders are wrong under the state and federal constitutions, the General Statutes, and controlling case law. For over five years now, Ms. Rubin has spent her own money begging the courts to enforce the law and protect her rights against a corrupt deal struck between the developer and the Town. Ms. Rubin asks that the trial court's orders all be reversed, and the

cases be remanded with instructions that Ms. Rubin's motion to enforce the judgment be granted and the Town's second action be dismissed.

ISSUES PRESENTED

1. When the government takes private property *for* a public purpose, the landowner's remedy is just compensation. But the federal and state constitutions prohibit any taking *without* a public purpose. When the government attempts to take without a public purpose, is the remedy just compensation again, or return of the property?

2. Inverse condemnation is only appropriate when the government takes property *without* filing a direct-condemnation proceeding. The Town took Ms. Rubin's property *during* a direct-condemnation proceeding. To have her land returned, was Ms. Rubin required to file a redundant claim for inverse condemnation?

3. When a litigant refuses to comply with a final judgment, the superior court can and should enforce its judgment. Here, Ms. Rubin won a judgment rejecting the Town's claim to her property, which was upheld on appeal, but the Town refused to comply with it. Did the trial court err by refusing to enforce its own judgment?

4. Did the trial court err when it vacated the judgment entered in Ms. Rubin's favor?

STATEMENT OF THE CASE

On 30 April 2015, the Town commenced this case by filing a direct-condemnation action against Ms. Rubin. (R p 3.) On 18 October 2016, after an evidentiary hearing, the Honorable Elaine M. O’Neal, superior court judge, entered a final judgment, determining that the Town’s taking of Ms. Rubin’s property was unconstitutional because it lacked a public purpose. (R pp 36-37.)

The Town appealed. On 16 October 2018, this Court issued a published opinion dismissing the Town’s appeal because it was too late. *Town of Apex v. Rubin*, 262 N.C. App. 148, 153, 821 S.E.2d 613, 616 (2018), *review denied*, 372 N.C. 107, 825 S.E.2d 253 (2019). The Town petitioned the Supreme Court for discretionary review, but that was denied on 9 April 2019. (R p 136.)

On 10 April 2019, the same day that the case was certified back to the superior court, Ms. Rubin moved to enforce the final judgment since the sewer pipe was still on her property. (R p 122.) The Town responded by filing a new lawsuit. (App. 1-15.)¹ In the original case, the Town then moved to vacate the final judgment on 30 August 2019. (R p 145.) In the new lawsuit, Ms. Rubin

¹ For the convenience of the Court, Ms. Rubin is inserting relevant filings from the record on appeal in the 2019 case in the appendix of this brief. This Court can “take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.” *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981).

moved to dismiss the complaint and the Town moved for a preliminary injunction. (App. 16-60, 114-39.)

After a hearing on 17 January 2020, the Honorable G. Bryan Collins entered orders denying each of Ms. Rubin's motions in the two cases, and granting each of the Town's motions. (R pp 155-168; App. 140-49.)

On 29 January 2020, Ms. Rubin timely appealed from all four of these orders, two in each case. (R p 169-70.) The orders from the 2019 case are pending before this Court in docket number 20-305.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court entered an order denying Ms. Rubin's motion to enforce the judgment she had won, and granting the Town's motion for relief from that judgment. These orders constitute final judgments because they "dispose[d] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). These orders also, in effect, determined the action and prevented a further judgment from issuing. *See Banks v. Hunter*, 251 N.C. App. 528, 530, 796 S.E.2d 361, 365 (2017); *In re E.H.*, 227 N.C. App. 525, 528, 742 S.E.2d 844, 847 (2013). Thus, this Court has jurisdiction over the appeal. N.C. Gen. Stat. § 7A-27(b)(1), (b)(3)(b).

STATEMENT OF THE FACTS

This saga began over five years ago. A private land developer and the Town of Apex entered into a deal to take Ms. Rubin's land away from her. Our courts rejected their scheme as unconstitutional, but the Town refuses, to this day, to leave Ms. Rubin's property.

A. The Developer strikes a deal to steal Ms. Rubin's land.

This case involves a private developer, Bradley Zadell, who wanted to enhance the value of vacant land he owned next to Ms. Rubin's homestead by connecting it to the Town sewer system. Mr. Zadell was hoping to "flip" the land, selling it at a premium once it had sewer access. He tried to convince Ms. Rubin to sell her land—or an easement across it—to him. Ms. Rubin refused. So, Mr. Zadell and his company contracted with the Town to use its condemnation powers to install a sewer pipe across Ms. Rubin's home.

Ms. Rubin has been living at her Wake County home since 2010. (5-23-19 T p 6, 63.) At that time, her home was in a rural part of Wake County. Then, and now, her home was not in Apex. Like many others in her area, Ms. Rubin has always used a septic system instead of sewer. (R S (I) p 201.)

Mr. Zadell, a real estate speculator, had dreams to develop the countryside around Ms. Rubin's home. In 2012 and 2013, he began buying up and developing land around her home. (R S (I) pp 269-76.) Since the surrounding

properties did not have sewer access, Mr. Zadell bought all of these properties cheaply. (R S (I) 200-02.)

But the empty land Mr. Zadell was buying would be worth much more if it had sewer access. The cheapest way for Mr. Zadell to run sewer to the vacant land was to install a sewer pipe that would bisect Ms. Rubin's rural homestead. (R S (I) 201-02.) He repeatedly asked Ms. Rubin to sell her land, or at least an easement, to him, but she refused. *Town of Apex*, 262 N.C. App. at 149, 821 S.E.2d at 614.

Unable to get what he wanted through negotiation, Mr. Zadell turned to compulsion. He went to the Town of Apex, "pressuring" it to use its eminent domain power to condemn a sewer easement across Ms. Rubin's property. (R p 34 (judgment ¶ 9).) The Town eventually relented. Mr. Zadell, through his development company, signed a contract with the Town in which they agreed to pay all just compensation, expenses, costs, and attorney's fees that the Town would incur in acquiring a sewer easement across Ms. Rubin's home. (R pp 35-36.)

B. The Courts Reject the Town's Unconstitutional Taking.

On 30 April 2015, the Town filed a direct-condemnation action (the "2015 case") against Ms. Rubin. (R p 3.) The Town estimated the compensation due to Ms. Rubin as \$10,771. (R p 13.) Shortly after the complaint was filed, Mr. Zadell sold the vacant property for a \$2.5 million profit. (R p 35.)

On 7 July 2015, Ms. Rubin answered, contesting the Town's ability to use its eminent domain power for the financial gain of a private developer. (R pp 20-22.) Ms. Rubin asked the court to declare that the Town's taking was illegal. (R p 21.) Through the answer and a letter, Ms. Rubin warned the Town that, if it began construction of its sewer pipe while the case was pending, the risk was on the Town if the taking turned out to be unconstitutional. (R pp 21, 34.)

The Town ignored the warning and constructed the sewer pipe anyway, while its condemnation action was pending, using its statutory "quick-take" powers. (R p 163-64; 5-23-19 T p 6.) The pipe bisects Ms. Rubin's property, creating significant development challenges should Ms. Rubin or a subsequent owner later choose to subdivide the property. (R S (I) 202.) The Town had the option of installing a sewer pipe that wouldn't interfere with Ms. Rubin's property, but it instead chose a more disruptive option because that was cheapest for the Town. (R S (I) 201-02.)

On 1 August 2016, the Honorable Elaine M. O'Neal, superior court judge, conducted an evidentiary hearing on whether the Town's taking was unconstitutional because it lacked a public purpose. (R p 33.) Afterward, on 18 October 2016, Judge O'Neal entered a final judgment, concluding that "[t]he paramount reason for the taking of the sewer easement is for a private interest and the public's interest [is] merely incidental." (R p 37.) The court determined

that the Town's taking violated the state and federal constitutions. (R p 37.) Thus, the judgment declared the Town's claim to Ms. Rubin's property to be "null and void," and dismissed the Town's claim. (R p 38.)

After the Town lost, rather than appeal, it filed a motion for reconsideration, purportedly under Rules 59 and 60 of the Rules of Civil Procedure. (R p 40.) The trial court found the motion improper and meritless and denied it on 24 January 2017. (R p 101.)

On 30 January 2017, the Town gave notice of appeal. (R p 103.) But because the Town's motion for reconsideration was improper, it did not toll the time for the Town to appeal from the final judgment. This Court, therefore, dismissed the appeal as untimely in a published opinion. *Town of Apex*, 262 N.C. App. at 153, 821 S.E.2d at 616. The Court went further, though, and noted "for [the Town's] benefit" that it had also reviewed the merits, finding no error in the superior court's judgment. *Id.* at 153 n.2, 821 S.E.2d at 617 n.2.

The Town then petitioned our Supreme Court for discretionary review of this Court's decision. On 9 April 2019, the Supreme Court denied that petition, certifying the case back to this Court. (R p 136.) On the next day, this Court certified the case back to the superior court. (R p 139.)

C. The Town Refuses to Return Ms. Rubin's Property and End Its Occupation.

Throughout the appeal, the Town refused to end its occupation of Ms. Rubin's property. In fact, it threatened to throw Ms. Rubin in jail if she disturbed the sewer pipe. Response at 17, *Rubin v. Town of Apex*, No. 410P18 (N.C. Dec. 3, 2018), available at https://www.ncappellatecourts.org/show-file.php?document_id=238460.

So, on the same day as the remand, Ms. Rubin moved to enforce the final judgment. (R p 122.) Months later, the Town responded by moving to vacate the final judgment. (R p 145.)

Meanwhile, the Town filed a new, parallel action against Ms. Rubin on 13 May 2019. In that action, the Town has asked the superior court to declare *the Town* the rightful owner of the sewer easement and that Ms. Rubin's sole remedy is just compensation. App. 4-5. After the complaint was amended, Ms. Rubin moved to dismiss it. App. 69-113. The Town also moved to enjoin Ms. Rubin from interfering with the sewer pipe, even though the superior court had already found its installation to have been unconstitutional. App. 114-39.

With Judge O'Neal having retired from the bench, all the motions in both cases were heard at the same time by the Honorable G. Bryan Collins. Judge Collins first stayed the cases and ordered the parties to mediate. (R p 143.) When the mediation impasssed, all motions in both cases were heard together

before Judge Collins. (1-9-20 T pp 3-7.) Judge Collins denied both of Ms. Rubin's motions and granted both of the Town's. Judge Collins:

- denied Ms. Rubin's motion to enforce the final judgment in the original condemnation action (R pp 155-61);
- granted the Town's motion to vacate Judge O'Neal's final judgment in the original condemnation action (R pp 162-68);
- denied Ms. Rubin's motion to dismiss the Town's new, 2019 lawsuit (App. 148-49); and
- granted the Town a preliminary injunction, ordering Ms. Rubin not to remove the sewer pipe that the Town unconstitutionally installed (App. 140-47).

Ms. Rubin appeals from all of these orders. The appeal of the orders entered in the 2019 case is docketed with this Court as case number 20-305.

ARGUMENT²

I. When the Government Unconstitutionally Takes Private Property Without a Public Purpose, the Remedy Is Return of the Property.

In these overlapping cases, the Town asked the trial court to ignore centuries of constitutional law and find that the remedy for a governmental taking

² Arguments I and II address the same errors made by the trial court in both cases before this Court. Arguments III and IV address particular problems with the orders in this case.

for a private purpose is the same as the remedy when the taking is for a public purpose—just compensation. The trial court accepted the Town’s invitation, becoming the first court in the country to have ever done so, to the best of counsel’s knowledge.

The Town’s theory would erase the Fifth Amendment from the U.S. Constitution and the parallel provision from the North Carolina Constitution. Of course, had the final judgment determined that the Town acted constitutionally by taking Ms. Rubin’s property *for a public purpose*, then the remedy would have been just compensation. But—as has been conclusively determined already—the Town took the property *without* a public purpose, making it unconstitutional. The prescription for that kind of constitutional ailment is stronger medicine: return of the property in the condition it existed before the unconstitutional taking. It could be no other way if the constitutions’ “public use” requirement is to have any meaning.

A. The state constitution requires the Town to return Ms. Rubin’s property and end its occupation.

The federal and state constitutions protect the rights of property owners. One way they do that is by guaranteeing the payment of just compensation whenever the government takes private property for a public purpose. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019); *N.C. Dep’t of Transp. v. Laxmi Hotels of Spring Lake, Inc.*, 259 N.C. App. 610, 624, 817 S.E.2d 62, 72 (2018).

The other way our constitutions protect property rights is by returning property that's been taken improperly. That's the remedy when the taking itself was improper because it lacked a public purpose. And that was the right remedy here.

As our Supreme Court has explained, just compensation is never enough when the government deprives a person of their property for a private purpose. *See State Highway Comm'n v. Thornton*, 271 N.C. 227, 241, 156 S.E.2d 248, 259 (1967). To deprive a property owner of her property, "for a non-public use, even though he be paid its full value, is a violation of Article I, § 17, of the Constitution of this State and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." *Id.* The government can't take one person's property to give to another, no matter the compensation it pays. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005). That kind of misconduct is "against all reason and justice." *Calder v. Bull*, 3 U.S. 386, 388 (1798).

Since money can't make the landowner whole, the only other remedy is return of the property. Return of the property is the only remedy that makes sense because, without a public use, the government was powerless to condemn in the first place. *Ferrell v. Dep't of Transp.*, 104 N.C. App. 42, 46, 407 S.E.2d 601, 604 (1991) (holding that "public use is a prerequisite to the exercise of the power of eminent domain"), *aff'd*, 334 N.C. 650, 435 S.E.2d 309 (1993). So

courts must put the parties back into the same position they were in before the government violated the constitution.

That commonsense remedy is what this Court and the Supreme Court have repeatedly required for takings that lack a public purpose. *See, e.g., Nelson v. Town of Highlands*, 358 N.C. 210, 210, 594 S.E.2d 21, 22 (2004), *adopting dissenting opinion*, 159 N.C. App. 393, 400, 583 S.E.2d 313, 318 (2003) (Hudson, J., dissenting); *State Highway Comm'n v. Batts*, 265 N.C. 346, 361, 144 S.E.2d 126, 137 (1965) (holding that the taking was for an unconstitutional, private purpose, and the trial court “should have issued an injunction permanently restraining plaintiff from proceeding with the condemnation and appropriation of their lands”); *Cozad v. Kanawha Hardwood Co.*, 139 N.C. 283, 51 S.E. 932, 937 (1905); *Fisher v. Town of Nags Head*, 220 N.C. App. 478, 481, 725 S.E.2d 99, 103 (2012); *Town of Midland v. Morris*, 209 N.C. App. 208, 213-14, 704 S.E.2d 329, 334-35 (2011); *City of Statesville v. Roth*, 77 N.C. App. 803, 806, 336 S.E.2d 142, 143 (1985) (affirming judgment finding lack of public use and ordering that “petitioner is enjoined and restrained from appropriating the respondents’ land and from going upon and maintaining lines across respondents’ property and they are ordered to remove the same from the property and to restore the same to its former condition”); *Greensboro-High Point Airport Auth. v. Irvin*, 2 N.C. App. 341, 345, 163 S.E.2d 118, 121 (1968); *In re Rapp*, 621 N.W.2d 781, 784 (Minn. Ct. App. 2001) (“Although Rapp’s land has been

condemned and a highway constructed across it, Rapp still has relief in the form of the return of his property.”).

The trial court rejected all of this. It ordered, in both cases, that the Town gets to keep Ms. Rubin’s land, and Ms. Rubin gets to litigate just compensation. (R p 168 (“Defendant has an adequate remedy at law—i.e. compensation.”); App. 144.) There is no legal theory able to upend centuries of American constitutional law and justify that result.

In its orders, the trial court said that it was relying on *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), to deny Ms. Rubin a remedy for the violation of her constitutional rights. But *Thornton* doesn’t—and couldn’t—support the government-sponsored theft of Ms. Rubin’s property.

In *Thornton*, the state wanted to condemn part of the property owner’s land so that it could build a road connecting a factory to the highway. *Id.* at 229, 156 S.E.2d at 250. The state started the condemnation by filing a complaint against the landowner, and it began construction while the lawsuit was pending, under quick-take powers. *Id.* at 229-30, 156 S.E.2d at 250-51. Seven months after the complaint was filed, the landowners filed a timely answer, claiming that the taking lacked a public purpose, and requesting an injunction against the construction (which was, at the point, virtually complete). *Id.* at

230, 156 S.E.2d at 251. The trial court determined that the taking lacked a public purpose and enjoined the construction. *Id.* at 232, 156 S.E.2d at 252.

The Supreme Court reversed, holding that the state had properly condemned the property for a public purpose. *Id.* at 245, 156 S.E.2d at 261. Before reaching that holding, the Court explained that the government could not take private property without a public purpose, even if the landowner were “paid the full value of his land.” *Id.* at 241, 156 S.E.2d at 259. The Court explained that, when the government files a condemnation action and loses because the proposed taking lacks a public purpose, then the trial court should dismiss the condemnation action. *Id.* at 236-37, 156 S.E.2d at 255-56. That dismissal has the same functional effect and benefit to the landowner as granting an injunction against the government. *Id.* at 236-37, 156 S.E.2d at 255. As the Supreme Court later explained *Thornton*, those “defendants could have derived no benefit from the entry of an injunction which they would not have gained by the entry of a judgment dismissing the condemnation proceeding.” *Pelham Realty Corp. v. Bd. of Transp.*, 303 N.C. 424, 432, 279 S.E.2d 826, 831 (1981).

The trial court misinterpreted *Thornton*, taking its language out of context in some places, and ignoring its holdings in others. For instance, the trial court held that *Thornton* means “no injunctive relief is available to [Ms. Rubin].” (R p 168.) But just a few paragraphs earlier, the trial court said that

the rule of *Thornton* was that Ms. Rubin *had to* seek injunctive relief. (R p 166.) Neither of these “heads-I-win-tails-you-lose” propositions is correct.

First, the government can’t use its quick-take powers to moot a public-purpose challenge to the condemnation. *See infra* Argument § I.B; *Thornton*, 271 N.C. at 237, 156 S.E.2d at 256 (“The [government] may not, by precipitate entry and construction, enlarge its own powers of condemnation . . .”).

Second, *Thornton* didn’t address the type of injunction sought here. *Thornton* focused on what a final judgment should say to give full relief to a landowner in a case where the government lacks a public purpose to condemn. That’s not the issue here at all; the judgment in *Rubin I* was entered years ago, appealed, and upheld. Instead, the question here is what relief the landowner should get when the government *refuses to abide* by a judgment declaring that the government lacked a public purpose for its proposed taking. When *Rubin I* was remanded, the Town flouted the judgment by refusing to leave. So Ms. Rubin asked the trial court to order the Town to leave, since the judgment had already reverted title to her. The trial court erred by denying this relief in the 2015 case and blessing the Town’s continued occupation in the 2019 case.

Finally, *Thornton* and *Pelham* held that the dismissal of a direct-condemnation action due to the lack of a public purpose has exactly the same effect as enjoining the taking. *Thornton*, 271 N.C. at 236-37, 156 S.E.2d at 255; *Pel-*

ham, 303 N.C. at 432, 279 S.E.2d at 831. Those holdings are based on an assumption that is almost always true—that a North Carolina municipality will comply with a final judgment that has been issued by the courts of this state and upheld on appeal. Neither case addressed what a court should do when the government refuses to obey a judgment. And neither case offers any support for what the trial court did here, erasing the effect of the dismissal of the direct-condemnation action by vacating the judgment (in the 2015 case) and entering the preliminary injunction (in the 2019 case).

B. The Town couldn't “moot” Ms. Rubin's constitutional rights by violating them.

The trial court also tried to circumvent Ms. Rubin's constitutional rights by declaring her remedy moot. The Town convinced the trial court that any claim for injunctive relief was moot before the final judgment was entered, since the sewer pipe was already installed at that point. But this Court has already rejected that precise argument.

In *Town of Midland v. Morris*, the town wanted to construct a pipeline. When Midland tired of negotiating for easements, it condemned property. 209 N.C. App. 208, 212, 704 S.E.2d 329, 334 (2011). The landowners argued that the pipeline project lacked a public purpose. The trial court found for Midland, and the landowners appealed.

On appeal to this Court, Midland argued that it had mooted the case by constructing the pipeline without waiting for the outcome of the direct-condemnation action. But this Court rejected that argument. *Id.* at 213, 704 S.E.2d at 334. The appeal was not moot because, if the landowners could prove the lack of public use, then they would “be entitled to relief both in the form of reimbursement for their costs in the action, as well as in the form of return of title to the land.” *Id.* at 213-14, 704 S.E.2d at 334. Indeed, this Court held that Midland’s argument was anathema to the rule of law: “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.” *Id.* at 214, 704 S.E.2d at 335; *see also Rapp*, 621 N.W.2d at 784 (holding that landowner’s claim was not moot even though a highway was built on the land because the court could require return of the land).

Here, the trial court held the exact opposite, vacating the condemnation judgment as moot because the Town’s unconstitutional taking mooted Ms. Rubin’s remedy. (R p 165.) This determination is just a rejection of *Midland*.

C. The federal constitution also requires the return of Ms. Rubin's property and the end of the Town's occupation.

Alternatively, the federal constitution required the Town to return Ms. Rubin's property. The Town's condemnation action violated the state *and* federal constitutions. (R p 37.) Neither the trial court nor the Town explained how federal law doesn't *independently* require the return of the property.

The U.S. constitution guarantees Ms. Rubin the right to the return of her property and the end of the Town's occupation. As the Supreme Court of the United States has explained, "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984). A private taking is void "even though compensation be paid." *Id.* at 241. That's because the federal takings clause "presupposes that the government has acted in pursuit of a valid public purpose." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). So, "if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement . . . that is the end of the inquiry. No amount of compensation can authorize such action." *Id.*

Because compensation is never enough for an unconstitutional taking, federal courts have uniformly held that the remedy is the return of the prop-

erty. Anything less is legalized theft: “A plaintiff that proves that a government entity has taken its property for a private, not a public, use is entitled to an injunction against the unconstitutional taking, not simply compensation.” *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 308 (3d Cir. 2008); *accord Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 17 (1st Cir. 2010); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1522-23 (D.C. Cir. 1984), *rev’d on other grounds*, 471 U.S. 1113 (1985).

Here, Judge O’Neal entered a final judgment, determining that the Town’s action lacked a public purpose, in violation of the federal constitution. That determination of the parties’ rights entitles Ms. Rubin to an injunction under federal law.

* * *

The trial court’s remedial errors infected all of its orders. In the 2015 case, the trial court denied Ms. Rubin’s motion to enforce the judgment, determining that the judgment didn’t require the return of Ms. Rubin’s property, but allowed the Town to keep its unconstitutional taking in exchange for paying Ms. Rubin “compensation.” (R pp 156 ¶ 8, 160 ¶ 14.) Likewise, the order vacating the judgment determined that Ms. Rubin wasn’t entitled to a return of her property, since that remedy was “moot”; she had to accept “compensation” for an unconstitutional taking. (R p 166-68 ¶¶ 6, 17.)

II. This Case Has Nothing to Do with Inverse Condemnation.

The Town has persistently confused this case with inverse condemnation. The Town led the trial court to believe that Ms. Rubin had to file a redundant inverse-condemnation action to defeat the Town's 2015 condemnation action and its taking pursuant to quick-take powers. Inverse condemnation, however, has nothing to do with the parties' dispute.

A. Direct- and inverse-condemnation actions are distinct.

Takings law starts with the constitution, and the principles explained above: a taking is unconstitutional unless it is for a public purpose *and* just compensation is paid. The constitution—not any state or federal statute—creates those rights. The statutes merely provide *procedures* for the processing of takings claims. Those statutory procedures cannot limit individual constitutional rights.

In North Carolina, as in many other jurisdictions, our legislature has provided different procedures for processing condemnation and so-called “inverse-condemnation” actions. There are several key differences between these two procedures.

First, the procedures are initiated by different parties to address different kinds of takings.

A condemnation action is a *prospective* action filed by the government against a landowner. In a condemnation action, the government asks the

Court to transfer the landowner's property to the government in exchange for just compensation.

By contrast, an inverse-condemnation action is a *retrospective* action filed by the landowner against the government. *See Knick*, 139 S. Ct. at 2168 11A *McQuillen's The Law of Municipal Corporations* § 32:164 (3d ed. Westlaw). In inverse condemnation, the landowner asks the Court to force the government to pay just compensation for a taking that has already occurred. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 552, 809 S.E.2d 853, 861-62 (2018); *Wagner v. City of Charlotte*, 840 S.E.2d 799, 803 (N.C. Ct. App. 2020).

Here, the Town filed its 2015 action as a condemnation action, under chapter 136 of the General Statutes. (R p 3.)³ Both the 2015 and 2019 cases were filed by the Town; neither of them is an inverse-condemnation action filed by a landowner.

Second, the two procedures treat the “public purpose” requirement differently. A “public purpose” is a prerequisite to a direct-condemnation action. *Wilkie*, 370 N.C. at 552, 809 S.E.2d at 862. But landowners aren't required to prove a “public purpose” to prevail in an inverse-condemnation action. *Id.* A

³ The Town relied on the condemnation procedures created for the Department of Transportation. (R pp 15-16.) That's not the usual mechanism for a municipality to commence a condemnation action. Usually, municipalities must use the procedures created specifically for municipalities. N.C. Gen. Stat. § 40A-1. But the Town has specific statutory authority to use the mechanisms created for the Department of Transportation. (R p 12.)

landowner who wants compensation, rather than return of the land, need not litigate the propriety of the government's purpose in taking his property. *See id.* at 552-53, 809 S.E.2d at 862. The public-purpose requirement "is for the landowner's protection." *Id.* (quoting *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 490 (Fla. Dist. Ct. App. 1975) (per curiam)). The inverse-condemnation remedy gives the landowner flexibility because, where the taking lacks a public purpose, the remedy lets the landowner "elect to claim damages as if the taking had been lawful." *Thornton*, 271 N.C. at 241, 156 S.E.2d at 258.

B. Ms. Rubin did not have to file an inverse-condemnation claim or counterclaim when the sewer pipe was installed.

The Town contends that Ms. Rubin should have filed an inverse-condemnation claim or counterclaim as a response to the original condemnation action. But an inverse-condemnation action makes no sense when the government has filed a direct-condemnation action. There is no need to "compel" the government to exercise the power of eminent domain through an inverse action when the government is already trying to do so in a direct action.

In general, the statutory cause of action for inverse condemnation only accrues if the condemnor has "taken" property but "no complaint and declaration of taking has been filed by [the condemnor]." N.C. Gen. Stat. § 136-111 (App. 152); *accord Wagner*, 840 S.E.2d at 803. Based on the plain terms of these statutes, this Court has explained that an inverse condemnation, filed

independently or as a counterclaim, should be dismissed as “unnecessary and redundant” when the government has already filed a direct-condemnation claim. *Dep’t of Transp. v. Mahaffey*, 137 N.C. App. 511, 516, 528 S.E.2d 381, 384 (2000).

Here, the Town filed a complaint and declaration of taking to condemn a sewer easement across Ms. Rubin’s home in 2015. (R pp 3-17.) Thus, the statutory prerequisite for an inverse action—that no direct-condemnation had been filed—was not met. Ms. Rubin’s *only* opportunity to challenge the Town’s taking was in the direct-condemnation action.

There is one exception to the general rule, whereby a landowner can respond to a condemnation action with an inverse-condemnation claim. A landowner can file a separate action or counterclaim for an inverse condemnation “when there is a further taking by the State after the initiation of the original condemnation action.” *N.C. Dep’t of Transp. v. Cromartie*, 214 N.C. App. 307, 311, 716 S.E.2d 361, 365 (2011). Procedurally, the landowner can raise the issue through her answer as well, without ever filing a separate action or counterclaim. *City of Greensboro v. Pearce*, 121 N.C. App. 582, 587-88, 468 S.E.2d 416, 420 (1996).

Here, though, Ms. Rubin has never claimed that the Town’s actual taking exceeded the taking set out in the Town’s condemnation complaint. Rather,

Ms. Rubin contended that the *original* taking was unconstitutional. The exception doesn't apply.

C. The Town's illegal taking of Ms. Rubin's property didn't retroactively become an "inverse taking" when the final judgment was entered against the Town.

The Town led the trial court to announce a new takings doctrine known nowhere else in the law. The trial court decided that, when Judge O'Neal entered the final judgment in the condemnation action, it was the *proceeding itself*, rather than the Town's claim, that became "null and void." As the Town repeatedly proclaims, without authority, it became "as if" the condemnation action had never been filed. (R p 164; 1-9-20 T p 47.) And because the condemnation action never happened, the Town argues, its quick-take action was just a taking never accompanied by the filing of a complaint and declaration. So Ms. Rubin's only remedy was to file an inverse-condemnation action.

Or so the theory appears to be. It's difficult to follow, since it's not supported by of any legal authority and runs contrary to the law. The proposal is also unfair.

The Town's taking—the physical invasion of Ms. Rubin's property—occurred *because of*, not *in spite of*, the Town's direct-condemnation action. For condemnations under Chapter 136, like the one here, title and the right of possession passes immediately to the condemnor upon the filing of the government's complaint, declaration of taking, and deposit of estimated compensation

for the taking. N.C. Gen. Stat. § 136-104 (App. 150); *City of Charlotte v. Univ. Fin. Properties, LLC*, 260 N.C. App. 135, 147, 818 S.E.2d 116, 124-25 (2018), *aff'd by an equally divided court*, 373 N.C. 325, 837 S.E.2d 870 (2020). This type of condemnation authority is known as “quick-take” power.

The trial court ignored that the quick-take power was what temporarily authorized the taking of the sewer easement. In its orders, the trial court determined that the installation of the sewer pipe through its quick-take authority was the “inverse condemnation” of a sewer easement. (R p 164 ¶¶ 9, 11; App. 144.) That statement is nonsensical because the taking happened *with* the filing of a complaint and deposit. An inverse condemnation, on the other hand, is defined as a taking *without* the filing of a complaint and deposit.

Quick-take is a great power, and with it comes great responsibility. Quick-take authority gives the condemnor a mandatory preliminary injunction, assuming that the proceeding will show that the condemnation serves a public purpose. The power has its downsides, though, as a condemnor exercising its quick-take power may be sorely disappointed if it turns out that its taking was unconstitutional. That’s this case.

After an evidentiary hearing, Judge O’Neal determined that the Town’s taking violated the state and federal constitutions because it was for an improper private purpose rather than a public purpose. (R pp 33, 37-38.) Thus, the court rejected the Town’s *claim* to Ms. Rubin’s property: “The [Town’s]

claim to [Ms. Rubin's] property by Eminent Domain is null and void." (R p 38.) But the court did not declare the *proceeding* itself to be null and void, whatever that would mean. Rather, the trial court's determination was a final judgment on the merits that fixed the rights of the parties. With the dismissal of the Town's action, title and possession reverted to her. Indeed, even Judge Collins admitted that much. (1-9-20 T p 86.) It was not, as the Town says, "as if" the Town didn't lose.

Indeed, the Town itself used to admit the permanent effect of the judgment. That's why, in the last appeal, the Town petitioned the Supreme Court to "stay enforcement of the judgment." Petition for Writ of Supersedeas at 1, *Town of Apex v. Rubin*, No. 410P18, available at https://www.ncappellate-courts.org/show-file.php?document_id=238566. The Town acknowledged, "If any action is taken on the Judgment in the trial court, it could cause prejudice to Apex and the citizens of Apex as it relates to the provision of sewer service to properly annexed areas of the town." *Id.* at 6. By the time of the January 2020 hearing, however, the Town had changed its tune, insisting that it still held title to the sewer easement. (1-9-20 T p 68.)

But title has reverted to Ms. Rubin. That is why the Court's preliminary injunction in the 2019 case and Rule 60(b) order in the 2015 case are hopelessly flawed. They deny Ms. Rubin this minimal remedy. If Judge Collins's orders

are allowed to absolve the Town of its wrongdoing, then Judge O’Neal’s judgment for Ms. Rubin is just a piece of paper. Such a “parchment barrier” isn’t the kind of fundamental right we enshrined in our constitutions. The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

D. *Wilkie* is not a barrier to the vindication of Ms. Rubin’s constitutional rights.

The Town has also pursued a tortured reading of a 2018 opinion from the Supreme Court of North Carolina, *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). The Town persuaded the trial court that *Wilkie* changed the law applicable to the original condemnation action, limiting Ms. Rubin’s remedy to compensation for an unconstitutional taking. In reality, *Wilkie* affirmed the rights of landowners against government overreach, but otherwise said little that impacts this case.

The issue in *Wilkie* was whether a landowner who filed an inverse-condemnation action seeking just compensation for a taking had to prove that the government had a public purpose for the taking. *Id.* at 546, 809 S.E.2d at 858. If the government takes private property without a public purpose, then the taking is unconstitutional. *See supra* Argument § I. Thus, it would make no sense to force *the landowner* to prove that the government had a public purpose—and acted constitutionally—when it took private property. It’s the *government* that “must establish that a proposed taking will further a public

purpose before a condemnation can be authorized.” *Wilkie*, 370 N.C. at 552, 809 S.E.2d at 862. And there is “no reason why” a landowner must be the one to prove that the government didn’t violate the constitution. *Id.* If a landowner only had a remedy for a *constitutional* taking, that result would “shock the consciences of fair-minded men.” *Id.* at 549, 809 S.E.2d at 860 (quoting *Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E.2d 497, 500 (1952)).

When a landowner files an inverse-condemnation action and seeks just compensation for a taking that *lacks* a public purpose, she is electing her preferred remedy. The law allows the landowner to “consent[] to a taking of his property, when no legal right or power to do so exists,” and it puts her in the same place as the landowner that seeks compensation where the taking “power does exist.” *Id.* at 552, 809 S.E.2d at 862 (quoting *Lloyd v. Town of Venable*, 168 N.C. 531, 535, 84 S.E. 855, 857 (1915)); *see also Thornton*, 271 N.C. at 241, 156 S.E.2d at 258 (“[W]here there is a taking not within the power of eminent domain the landowner may elect to claim damages as if the taking had been lawful . . .”).

The *Wilkie* case discussed in the trial court’s orders here is unrecognizable from the *Wilkie* opinion issued by the Supreme Court. The trial court vacated the original condemnation judgment because *Wilkie* held that landowners don’t have to prove the lack of public purpose in inverse-condemnation cases, and so, the trial court held, the Town was allowed to take her

property for an unconstitutional private purpose. (R pp 167-68 ¶¶ 15-16; App. 144.)

This head-scratching logic contradicts *Wilkie* and the constitution. *Wilkie* isn't a shield for government misbehavior. The public purpose requirement "is not placed in the Constitution as a sword to be used against the landowner when the state has summarily taken his property without due process." *Wilkie*, 370 N.C. at 552-53, 809 S.E.2d at 862 (quoting *Kirkpatrick*, 312 So. 2d at 490).

Anyway, this case has never involved inverse condemnation, and *Wilkie* was only about inverse condemnation. *See supra* Argument §§ II.A-C. And even if inverse condemnation *had* played a role, *Wilkie* made the inverse-condemnation remedy *more favorable* to landowners, not *less so*, such that the trial court could vacate the pro-landowner judgment awarded to Ms. Rubin.

Indeed, if the Town's rewriting of *Wilkie* were correct, then the inverse-condemnation statute would be unconstitutional. By the Town's reading, *Wilkie* means that landowners deprived of their property without a public purpose, in violation of the state and federal constitutions, are only entitled to just compensation, not return of their property. The state and federal constitutions, however, *require* the return of the property. *See supra* Argument § I. If the *Wilkie* court had misinterpreted the inverse-condemnation statutes in the way the Town suggests, then those statutes would be unconstitutional, a result

that should be resisted. *See Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985).

* * *

The trial court's misunderstanding and misapplication of inverse-condemnation law infected all of its orders. Judge Collins denied Ms. Rubin's motion to enforce the final judgment because he determined that the Town's taking was retroactively transformed into "an inverse condemnation" when the Town lost its direct-condemnation action. (R p 159 ¶ 11.) He repeated that error when he vacated the final judgment. (R p 166 ¶¶ 9-11.) And both orders relied on the trial court's misinterpretation of *Wilkie*. (R pp 160 ¶¶ 167 ¶¶ 15-16.)

III. The Trial Court Erred by Refusing to Order the Town to End Its Occupation of Ms. Rubin's Property.

In the final judgment, Judge O'Neal determined that the Town's taking was unconstitutional. That determination required the Town to leave. When the Town refused, Ms. Rubin sought the trial court's assistance. And when the trial court refused to order obedience, it erred. This refusal to enforce constitutional rights is reviewed de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

After the Town's appeal of Judge O'Neal's judgment ended in defeat, the Town was still trespassing on Ms. Rubin's property because it had not removed

the sewer pipe. So Ms. Rubin sought judicial assistance to force the Town to comply with the final judgment. When condemnors refuse to comply with condemnation judgments, private landowners are entitled to judicial relief compelling obedience. 29A C.J.S. Eminent Domain § 516.

Virtually any procedure sufficed for this constitutionally compelled remedy. To show the trial court that it had the power to give this relief, Ms. Rubin identified many overlapping procedures that would let the trial court order the Town to leave.

Condemnation procedure. Our condemnation statutes recognize that condemnation actions are unique, and that not every circumstance has been addressed by the legislature. Thus, the legislature has given courts “the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter.” N.C. Gen. Stat. § 136-114 (App. 154). These powers are “broad.” *See Chappell v. N.C. Dep’t of Transportation*, 841 S.E.2d 513, 519 (N.C. 2020).

Judge Collins erred by limiting these powers. Chapter 136 gives condemnors like the Town a quick-take power, which lets title transfer immediately upon the filing of a condemnation complaint and deposit. N.C. Gen. Stat. § 136-104. Nowhere, however, does Chapter 136 explain how property that’s been “quickly”—but unconstitutionally—taken should be returned to the landowner. Legal title itself reverted back to Ms. Rubin when the Town’s claim to

her property was dismissed in the final judgment. But the trial court still needed to exercise its authority under section 136-114 to put Ms. Rubin in actual possession of her own land after remand. (1-9-20 T pp 10-11.)

The trial court refused this request. (R p 158 ¶ 6.) It decided that Ms. Rubin's request was "not procedural in nature," and that the judgment hadn't ordered the Town to leave, so section 136-114 couldn't be used. But Ms. Rubin's request was entirely procedural; substantive constitutional law required actual return of the property, and the judgment returned legal title. *See, e.g., Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334; *supra* Argument § I. The *only* question was, therefore, procedural: how should the Town be made to end its occupation? Section 136-114 was the answer to that question.

Writ of assistance. Under N.C. Gen. Stat. § 1-302, when a judgment requires the return of real property, a court can compel the return. This is known as a writ of assistance, which is the "means of [a court for] enforcing its decree." *Hill v. Resort Dev. Co.*, 251 N.C. 52, 54, 110 S.E.2d 470, 473 (1959). Rule 70 of the Rules of Civil Procedure provides for the same. *Dabbondanza v. Hansley*, 249 N.C. App. 18, 20, 791 S.E.2d 116, 119 (2016).

The trial court refused to follow these procedures because it didn't think the judgment required the return of Ms. Rubin's property. (R p 158.) But the final judgment had already dismissed the Town's claim to Ms. Rubin's property, and thus reverted title of the land to Ms. Rubin. (R pp 37-38); *Midland*,

209 N.C. App. at 213-14, 704 S.E.2d at 334. The Town no longer had a right to have its sewer pipe on Ms. Rubin's land, and the trial court erred by letting the Town defy the judgment.

Mandamus. Mandamus covers trial-court orders to governmental entities commanding the performance of their official duties. *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008). When the requirements for mandamus are met, a trial court has "no discretion" to refuse it. *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971).

Mandamus was appropriate here because all the elements identified in *T.H.T.* were satisfied:

- (1) The final judgment gave Ms. Rubin a clear right to have her property cleared of the Town's occupation.
- (2) The Town's duty to leave was clear under the state and federal constitution.
- (3) The Town's duty to end its occupation left nothing to the Town's discretion.
- (4) Because the judgment had become final, and the Town's temporary appellate stay was dissolved, (R p 136), the Town's time for removing the pipe had passed.

- (5) Ms. Rubin had no other legal remedy available, given the trial court's rejection of all other procedures for ensuring the Town's compliance with the judgment.

362 N.C. at 453-54, 665 S.E.2d 59.

The trial court denied mandamus just because it didn't believe that landowners have a right to end an unconstitutional taking. (R pp 158-59.) But that is not the law.

Inherent authority. The trial court correctly recognized that it had the inherent authority to enforce its own judgments. (R p 159); *Wildcatt v. Smith*, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984). But then it refused to exercise that authority because the judgment didn't use magic words ordering the Town to end its occupation.

Trial courts have the "inherent authority to enforce their own orders," and even make new factual and legal determinations to decide whether a party has disobeyed a prior order. *Pachas ex rel. Pachas v. N.C. Dep't of Health & Human Servs.*, 372 N.C. 12, 24, 822 S.E.2d 847, 854 (2019).

The final judgment left no doubt that the Town had to pack its bags. The Town had unconstitutionally taken Ms. Rubin's property, so its claim to her property was rendered "null and void," and the dismissal reverted title to Ms. Rubin. (R p 38.) When the Town refused to leave, it disobeyed the judgment.

Respect for judicial authority required the trial court to exercise its inherent power to enforce the final judgment.

Ultimately, though, the precise procedural theory doesn't matter.⁴ The state and federal constitutions required the Town to return Ms. Rubin's property and end its occupation. Even if no statutory procedure existed to make the Town comply with our constitutions, the trial court was *still* required to enforce Ms. Rubin's constitutional rights. Her rights aren't dependent on legislative "grace," but the Constitution. *Maryland v. Wilson*, 519 U.S. 408, 424 (1997) (Kennedy, J., dissenting). The trial court's refusal to protect these rights by enforcing its own judgment was reversible error.

IV. The Trial Court Erred by Vacating the Judgment in Ms. Rubin's Favor.

When our appellate courts rejected the Town's late-filed appeal, the Town looked for other avenues to avoid the consequences of its misconduct. At first, it tried filing another lawsuit. But sensing that it needed a backup plan, the Town then also filed a Rule 60(b) motion for relief from the judgment. This third effort to take Ms. Rubin's property fails like the rest.

⁴ "The label or description that a party puts on its motion does not control whether the party should be granted or denied relief . . ." *Inland Greens HOA, Inc. v. Dallas Harris Real Estate-Constr. Inc.*, 127 N.C. App. 610, 614, 492 S.E.2d 359, 362 (1997) (citation omitted) (affirming relief under N.C. Gen. Stat. § 1-259 when movant only sought relief under Rule 60(b)).

A Rule 60(b) order should be reversed when the trial court abuses its discretion or applies the wrong standard. *Pope v. Pope*, 247 N.C. App. 587, 590, 786 S.E.2d 373, 376-77 (2016). The trial court’s conclusions of law get no deference. *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998). And when a trial court misunderstands whether a judgment is void, it necessarily abuses its discretion. *Connette, ex rel. A.M.R. v. Jones*, 196 N.C. App. 351, 354, 674 S.E.2d 751, 753 (2009).⁵

A. The original condemnation judgment was not void.

Although Rule 60(b)(4) gives a trial court discretion to relieve a party from a void judgment, Judge O’Neal’s judgment wasn’t void.

In the order on appeal, the trial court explained that the lack of jurisdiction to enter a judgment renders that judgment void. (R p 166 ¶ 11.) The court then reasoned that the issue of condemnation was “moot” by the time the judgment was entered because the Town had already physically taken the easement and installed the sewer pipe. (R p 165 ¶ 4.) Based on mootness, the court concluded that the judgment was void because the original court lacked jurisdiction to enter it. (R pp 165-66 ¶¶ 4-11.)

⁵ The “findings of fact” in both trial-court orders do not insulate the orders from appellate review, and should not be afforded any deference. (R pp 156-57 (findings 2-10, 12-13); R pp 163-64 (findings 2-3, 5-6, 8-12)); *State v. Johnson*, 837 S.E.2d 169, 174 (N.C. Ct. App. 2019); *Blair Investments, LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 325, 752 S.E.2d 524, 530 (2013).

This was wrong for three reasons.

First, as already explained above, *supra* Argument § I.B, the government's physical invasion of private property during a condemnation action does not moot a landowner's argument that the exercise of eminent domain is unconstitutional because it lacks a public purpose. This Court was "wholly unpersuaded" by the same argument in *Midland*.

Second, the Town's condemnation action couldn't have been moot before the judgment was entered. The requirements for mootness weren't met: Ms. Rubin had received no relief and the original questions in controversy were still at issue. *See Friends of Mt. Vernon Springs, Inc. v. Town of Siler City*, 190 N.C. App. 633, 635, 660 S.E.2d 657, 659 (2008). Before judgment was entered, the trial court hadn't determined whether the Town had the authority to take Ms. Rubin's property, and Ms. Rubin hadn't received relief to which she was entitled—return of the land. *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334.

Third, mootness can't render a judgment void because our state's mootness doctrine doesn't implicate subject-matter jurisdiction. "[A] judgment is not void where the court which renders it has authority to hear and determine the questions in dispute and control over the parties to the controversy." *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987) (cleaned up). Our Supreme Court recently confirmed the longstanding law that "[i]n state

court, mootness is a form of judicial restraint, rather than a jurisdictional concern, as it is in federal court.” *Chambers v. Moses H. Cone Mem’l Hosp.*, No. 147PA18, 2020 WL 3026039, at *6 (N.C. June 5, 2020) (to be published) (cleaned up).

For any of these reasons, Rule 60(b)(4) does not apply.

B. There are no other extraordinary circumstances to warrant relief from the original judgment.

The trial court’s other basis for granting the Town relief from the judgment was Rule 60(b)(6), which allows relief for “[a]ny other reason justifying relief from the operation of the judgment.”

Despite its broad language, Rule 60(b)(6) isn’t a “catch-all.” *Milton M. Croom Charitable Remainder Unitrust v. Hedrick*, 188 N.C. App. 262, 269, 654 S.E.2d 716, 721 (2008). Rather, a court applying this provision must find three prerequisites to be satisfied: (1) “extraordinary circumstances exist”; (2) “justice demands relief”; and (3) the movant “has a meritorious defense.” *In re George*, 825 S.E.2d 19, 24-25 (N.C. Ct. App. 2019).

The trial court’s order didn’t apply any of these standards, (R pp 162-68), which was itself an abuse of discretion warranting reversal.

The trial court’s only basis for granting relief was that there had been an intervening change in law. (R p 167 ¶ 13.) That legal determination is subject

to de novo review. *Sen Li v. Zhou*, 252 N.C. App. 22, 26, 797 S.E.2d 520, 523 (2017).

The trial court explained the change in law that it perceived:

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. . . .

(R p 167 ¶ 16.)

As already explained, *Wilkie* doesn't contradict the judgment. *See supra* Argument § II.D. *Wilkie* held that a landowner who files an inverse-condemnation action can get just compensation without proving public purpose. 370 N.C. at 553, 809 S.E.2d at 862. That pro-landowner decision doesn't help government entities. Nor is it even relevant here, where there is no inverse-condemnation claim or request for compensation. *See supra* Argument § II.A-B. At no point during the 2015 case did any party ever rely on the law as it existed before *Wilkie*. Thus, *Wilkie* has never been the answer to any question in this case.

C. The second Rule 60(b) motion shouldn't have been allowed.

Finally, Rule 60(b) can't be used to raise an argument available before judgment was entered. *Piedmont Rebar, Inc. v. Sun Const., Inc.*, 150 N.C. App.

573, 576, 564 S.E.2d 281, 284 (2002); *Concrete Supply Co. v. Ramseur Baptist Church*, 95 N.C. App. 658, 660, 383 S.E.2d 222, 223 (1989).

As the order itself acknowledges, when the judgment was entered, the Town could have asked the trial court to find mootness, since the physical invasion had already occurred. (R p 164 ¶¶ 7, 9.) And the Town could have made its arguments about inverse condemnation. But the Town never raised either argument in its first Rule 60(b) motion, in either the trial court or its appeal of the order to this Court. Therefore, it was improper for the trial court to even consider the Town's *second* Rule 60(b) motion. *See S. Seeding Serv., Inc. v. Martin's Grading & Const.*, No. COA10-180, 2010 WL 3466603, at *3 (N.C. Ct. App. 2010) (unpublished) [Add. 1]; *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1204 (5th Cir. 1993).

* * *

For these reasons, the trial court erred by granting relief from the judgment.

CONCLUSION

Ms. Rubin respectfully requests that this Court reverse the trial court's orders and remand with instructions to grant Ms. Rubin's motion to enforce the judgment and deny the Town's Rule 60 motion. Given the complexity and importance of the interests at stake, Ms. Rubin also requests the opportunity to present oral argument.

This the 30th day of June, 2020.

FOX ROTHSCHILD LLP

Electronically submitted

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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Counsel for Defendant Beverly L. Rubin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, and this Court's order of 10 June 2020, counsel for Ms. Rubin certifies that the foregoing brief contains no more than 9,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 30th day of June, 2020.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

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 30th day of June, 2020, addressed as follows:

David P. Ferrell
Norman W. Shearin
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

NORTH CAROLINA COURT OF APPEALS

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
15-CVS-5836

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19 CV 006295

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

WAKE COUNTY

2019 MAY 13 P 3:39

19-CVS-_____

TOWN OF APEX,

WAKE CO., C.S.C.

Plaintiff,

COMPLAINT

v.

[COMP]

BEVERLY L. RUBIN,

Defendant.

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

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

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

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

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

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

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

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

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

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

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

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

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

13. The Town has not abandoned the Project.

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

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

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

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

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

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

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

All of that certain parcel containing 11.426 acres and bounded on the North by the Southern right of way line of Olive Chapel Road, on the Northeast by the property of Madeleine J. Calder (Book of Maps 2000 Page 1587, Wake County Registry), on the Southeast by the property of Aspnes (Book of Maps 1987, Page 691, Wake County Registry), on the South by the property of the Richardson Heirs (Parcel ID No. 0721.01-47-4087), and on the West by the property of Eatman (Book of Maps 1996 Page 292, Wake County Registry), and having the street address of 2613 Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

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

Southern right of way line of Olive Chapel Road; thence along the said Southern right of way North 75 degrees 23 minutes 32 seconds East 93.90 feet to the point and place of beginning.

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

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

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

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

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

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

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

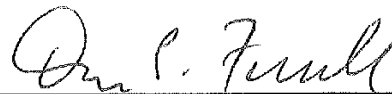
26. Town is entitled pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and Rule 57 of the Rules of Civil Procedure to (1) a declaration of rights that the installation of the sewer line on 27

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

WHEREFORE, Town requests judgment against Rubin as follows:

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

This the 13th day of May, 2019.



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Attorneys for Plaintiff Town of Apex

FILED

STATE OF NORTH CAROLINA

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IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

WAKE COUNTY, C.S.C.

15 CVS 5836

TOWN OF APEX,

BY _____

Plaintiff,

v.

JUDGMENT

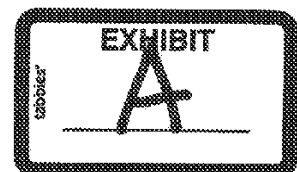
BEVERLY L. RUBIN

Defendant.

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.
2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.



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

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

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action ..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970).

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Al.Ct.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later adjudication upon Defendant's submitting a Motion in Support of such request.

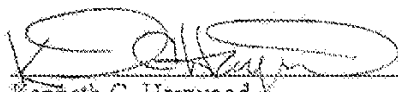
Signed This the 6th day of Oct., 2016.

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

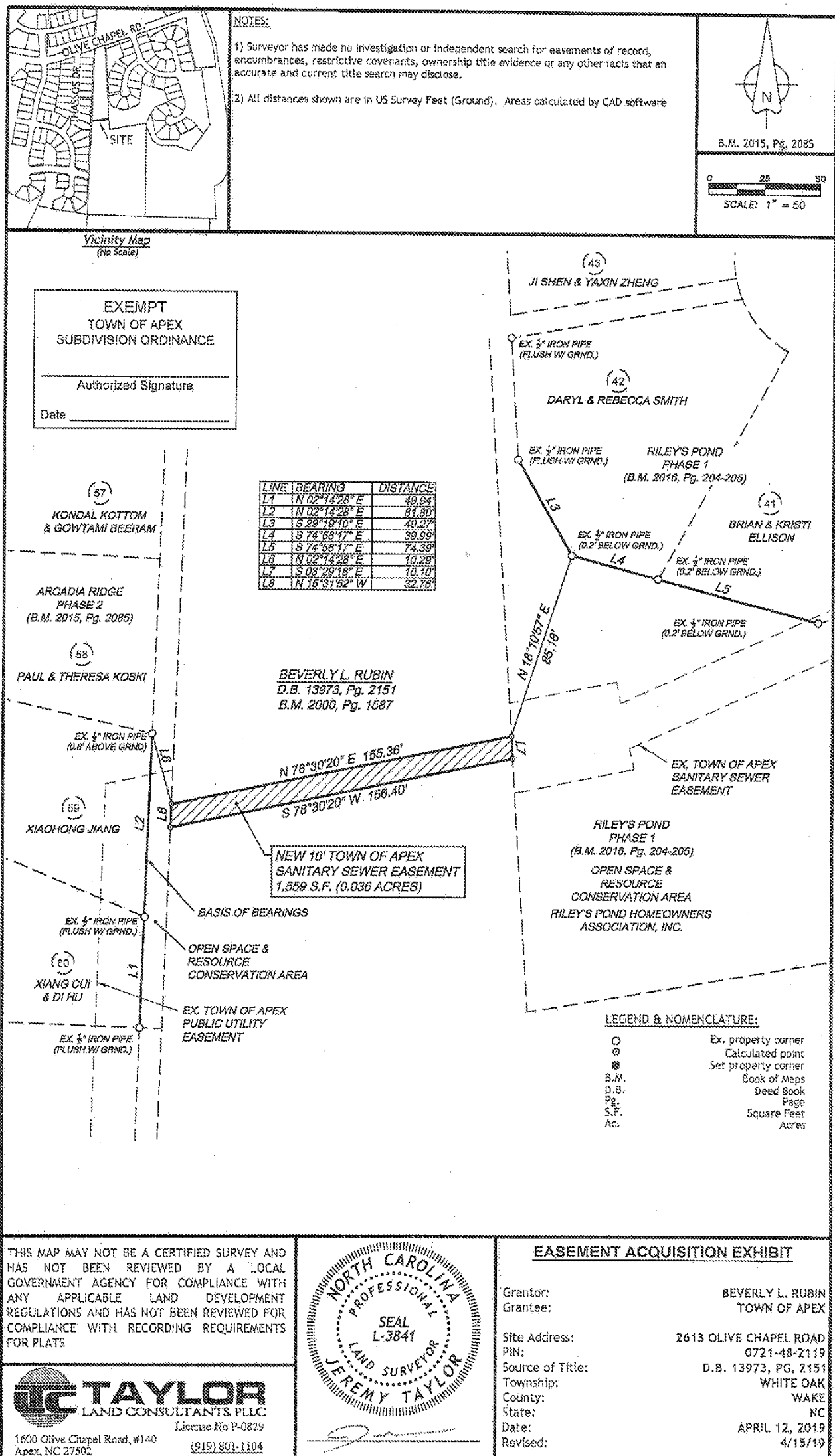
CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19th day of October, 2016.




Kenneth C. Haywood



EXHIBIT

B

9 CV 006295

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

RETURN OF SERVICE		
I certify that this Summons and a copy of the complaint were received and served as follows:		
DEFENDANT 1		
<i>Date Served</i>	<i>Time Served</i> <input type="checkbox"/> AM <input type="checkbox"/> PM	<i>Name Of Defendant</i>
<input type="checkbox"/> By delivering to the defendant named above a copy of the summons and complaint. <input type="checkbox"/> By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein. <input type="checkbox"/> As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.		
<div style="border: 1px solid black; height: 40px; margin-top: 5px;"></div> <i>Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)</i>		
<input type="checkbox"/> Other manner of service (specify)		
<input type="checkbox"/> Defendant WAS NOT served for the following reason:		
DEFENDANT 2		
<i>Date Served</i>	<i>Time Served</i> <input type="checkbox"/> AM <input type="checkbox"/> PM	<i>Name Of Defendant</i>
<input type="checkbox"/> By delivering to the defendant named above a copy of the summons and complaint. <input type="checkbox"/> By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein. <input type="checkbox"/> As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.		
<div style="border: 1px solid black; height: 40px; margin-top: 5px;"></div> <i>Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)</i>		
<input type="checkbox"/> Other manner of service (specify)		
<input type="checkbox"/> Defendant WAS NOT served for the following reason:		
<i>Service Fee Paid</i> \$	<i>Signature Of Deputy Sheriff Making Return</i>	
<i>Date Received</i>	<i>Name Of Sheriff (type or print)</i>	
<i>Date Of Return</i>	<i>County Of Sheriff</i>	
AOC-CV-100, Side Two, Rev. 4/18 © 2018 Administrative Office of the Courts		

STATE OF NORTH CAROLINA

COUNTY OF WAKE

TOWN OF APEX,

Plaintiff,


vs.

BEVERLY L. RUBIN,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

19-CVS-6295

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

MOTION TO DISMISS

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

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

1. The underlying dispute between Ms. Rubin and the Town involves an effort by a private real-estate developer—Bradley Zadell and his corporate entities—to use the Town's condemnation power for his personal enrichment.

2. On April 30, 2015, the Town filed a condemnation complaint against Ms. Rubin. A copy of the complaint is attached to this motion as Exhibit A.

3. Rather than await the outcome of the condemnation action, the Town used its statutory "quick-take" powers to immediately take possession of Ms. Rubin's property and install sewer lines on it before final judgment.

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

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

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

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

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

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

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

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

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

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

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

This the 16th day of May, 2019.

FOX ROTHSCHILD LLP



Matthew Nis Leerberg
N.C. Bar No. 35406
mleerberg@foxrothschild.com

Troy D. Shelton
N.C. Bar No. 48070
tshelton@foxrothschild.com
434 Fayetteville Street, Suite 2800
Post Office Box 27525 (27611)
Raleigh, NC 27601
Telephone: (919) 755-8700
Facsimile: (919) 755-8800

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

Kenneth C. Haywood
N.C. Bar. No. 19066
KHaywood@hsfh.com

B. Joan Davis
N.C. Bar No. 17379
5410 Trinity Road, Suite 210
Post Office Box 12347 (27605)
Raleigh, NC 27607
Telephone: (919) 821-7700
Facsimile: (919) 821-7703

CERTIFICATE OF SERVICE

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

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

This the 16th day of May, 2019.


Matthew Nis Leerberg

EXHIBIT A

15CV005836

STATE OF NORTH CAROLINA: FILED IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2015 APR 30 PM 4:00 SUPERIOR COURT DIVISION
TOWN OF APEX, HALL COUNTY, C.S.C. 15-CVS-
BY Plaintiff,)
)
) COMPLAINT
v.)
) [COMP]
BEVERLY L. RUBIN,)
)
Defendant.)

NOW COMES the Town of Apex, Plaintiff herein, and for its cause of action says and alleges:

1. The Plaintiff, Town of Apex is a duly chartered Municipal Corporation of the State of North Carolina with its principal offices in Apex, North Carolina. The Plaintiff possesses the powers, duties, and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. The Plaintiff alleges upon information and belief that those persons whose names and addresses are set forth in **Exhibit A**, attached hereto, are, insofar as the same can be ascertained by reasonable diligence, the only persons who may have or who claim to have an interest or estate in the property subject to this action, which is described in **Exhibit B**, attached hereto. The named interested persons are under no legal disability to Plaintiff's knowledge except as may be stated in said **Exhibit A**.

3. Pursuant to the authority vested in the Plaintiff under the provisions of Section 6.5 of its Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, it is necessary to condemn and appropriate certain property interests described in **Exhibit B** and **Exhibit C** for

public use for sanitary sewer and sewer facilities and for the other facilities described in said exhibits, and appurtenances thereto, to improve the public utility systems of the Town of Apex.

4. The property which is the subject of this action, the interest or estate acquired, and the areas appropriated are all described in **Exhibit B** and **Exhibit C**.

5. The Plaintiff alleges upon information and belief that the property described in **Exhibit B** is subject only to such liens and encumbrances as are set forth in **Exhibit A**.

6. The Plaintiff and the Defendant have been unable to agree as to the purchase price of the property interests herein appropriated.

WHEREFORE, Plaintiff prays that just compensation for the appropriation herein set forth be determined according to the provisions and procedures contained in Article 9 of Chapter 136 of the North Carolina General Statutes and for such other relief as to the Court may deem just and proper.

This the 30th day of April, 2015.



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

EXHIBIT A

NAMES AND ADDRESSES OF PERSONS WHO HAVE OR CLAIM AN INTEREST IN
THE SUBJECT PROPERTY AFFECTED BY THE TAKING:

BEVERLY L. RUBIN
2613 Olive Chapel Rd
Apex, NC 27502

See also persons listed under Liens and Encumbrances below.

DISABILITIES OF DEFENDANTS: NONE KNOWN

LIENS AND ENCUMBRANCES:

Easement for water easement - - Town of Apex

All taxes for the County of Wake for the year 2014 and all previous years.

All easements, restrictive covenants, encumbrances, encroachments and other matters of record.

All easements, encumbrances, encroachments and other interests to which the Subject Property is subject by adverse possession, prescription or otherwise.

EXHIBIT B

DESCRIPTION OF SUBJECT PROPERTY AFFECTED BY THIS ACTION:

Those certain lands lying and being in the Buckhorn Township, Wake County, North Carolina and being more particularly described as follows:

All of that certain parcel containing 11.426 acres and bounded on the North by the Southern right of way line of Olive Chapel Road, on the Northeast by the property of Madeleine J. Calder (Book of Maps 2000 Page 1587, Wake County Registry), on the Southeast by the property of Aspnes (Book of Maps 1987, Page 691, Wake County Registry), on the South by the property of the Richardson Heirs (Parcel ID No. 0721.01-47-4087), and on the West by the property of Eatman (Book of Maps 1996 Page 292, Wake County Registry), and having the street address of 2613 Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

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

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

DESCRIPTION OF INTERESTS AND AREAS TAKEN:

Easement - Permanent Public Utility Easement

A perpetual easement to construct, install, improve, remove, upgrade, replace, inspect, repair, rephase, maintain, use, and operate a system of lines, pipes, and force mains for sanitary sewer and sewer facilities of the Town, together with all the appurtenant facilities and equipment necessary or convenient to any of the above, in, on, over, above, under, through, and across the area described immediately below:

COMMENCING at an iron pipe on the southern right-of-way line of Olive Chapel Road, being the northwestern corner of the Beverly L. Rubin property as referenced above; thence, S02-14-28W 621, 20 feet to a point on the western line of the Rubin property, being the point of BEGINNING of a 40 foot wide sanitary sewer easement; thence, leaving the western property line of Rubin, N78-30-20E 154.30 feet to a point on the eastern property line of Rubin; thence, with the eastern property line of Rubin, S03-33-03E 40.39 feet to point on the eastern property line of Rubin; thence, leaving said property line, S78-30-20W 158.50 feet to a point on the western property line of Rubin; thence, with said property line, NO2-14-28E 41.18 feet to the point and place of BEGINNING.

And more particularly described as "Town of Apex 40' Wide Sanitary Sewer Easement," said area containing 6256 square feet (0.14 acres) more or less, all as shown on that certain survey plat entitled "EASEMENT ACQUISITION EXHIBIT PROPERTY OWNER: BEVERLY L. RUBIN" by Griffin Land Surveying, Inc., said survey plat being attached hereto as Exhibit C.

Further specific terms and conditions of the Easement include, but are not limited to, the following:

1. Plaintiff shall have the right to remove and control vegetation or other obstructions in the easement areas.
2. All lines, facilities, structures and related apparatus installed in the easement areas shall be and remain the Property of Plaintiff, removable or replaceable at its option.
3. Plaintiff maintains the right to construct, install, operate, utilize, inspect, rebuild, reconfigure, replace, remove and maintain all lines, facilities, structures and related apparatus placed within the easement area in connection with the aforementioned purpose of the easement, and Plaintiff maintains the right to alter, substitute or add other devices from time to time as Plaintiff may deem advisable.
4. Defendant shall have the right to use the land over which said easement area and easement rights are hereby taken for all purposes not inconsistent with said easement rights, Plaintiff's specifications, or any federal, state, or local

law, rule or regulations, provided that Defendant may not construct any structure within the easement area, except upon prior written agreement thereto by Plaintiff.

5. Plaintiff, its officers, agents, workmen and contractors, shall have the right to go to and from said easement at all times over and above the subject property by such route or routes as shall occasion to the least practicable inconvenience to Defendant, including private roads and ways then existing thereon, on foot or by conveyance, with materials, machinery, supplies, and equipment as may be desirable; provided that, except in emergencies, existing roads and ways thereon shall be used to the extent that they afford ingress and egress to and from the easement.
6. The invalidity or unenforceability of any provision of Exhibit B shall not affect the validity or unenforceability of any other provision. Any invalid or unenforceable provision shall be deemed severed from Exhibit B to the extent of its invalidity or unenforceability, and Exhibit B shall be constructed and enforced as if it did not contain that particular provision to the extent of its validity and unenforceability.

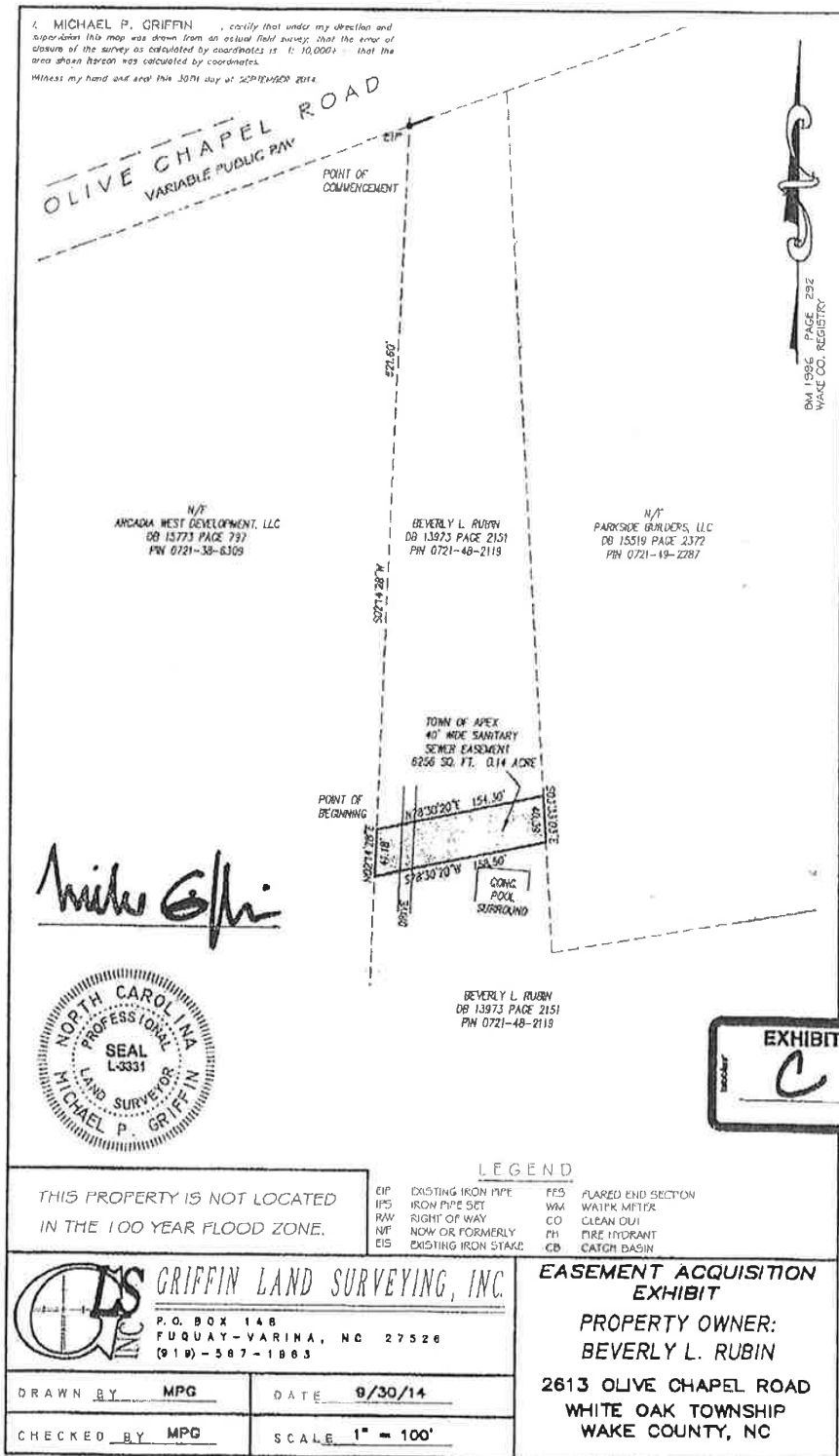


EXHIBIT B

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN

Defendants.

ANSWER AND AFFIRMATIVE
DEFENSES

NOW COMES Defendant Beverly L. Rubin, by and through counsel, and responds to each and every statement and allegation of the Complaint as follows:

1. That the statements and allegations of Paragraph 1 are admitted, subject to the limitations on Plaintiff's powers of eminent domain as contained in the U.S. and N.C. Constitutions and the North Carolina General Statutes.
2. It is specifically admitted that Beverly L. Rubin is the sole owner of the property that is the subject of this action. Except to the extent admitted herein, the remaining statements and allegations of Paragraph 2 are denied.
3. That the statements and allegations of Paragraph 4 are denied.
4. That this Defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations of Paragraph 4, and the same are therefore denied.
5. It is specifically admitted that the liens and encumbrances set forth in Exhibit A are to the best of the knowledge of Beverly L. Rubin the only ones of record with the Wake County Register of Deeds. Except to the extent admitted, the remaining statements and allegations of Paragraph 5 are denied.
6. It is specifically admitted that the Plaintiff and Defendant have not agreed as to the purchase price of the property interest attempting to be appropriated by the condemning authority, Town of Apex. Further, it is specifically admitted that the Town of Apex does not have the right to take any property interest of Beverly L. Rubin under the General Statutes in North Carolina and the North Carolina Constitution and United States Constitution. Except to the extent admitted, the remaining statements and allegations of Paragraph 6 are denied.

FIRST AFFIRMATIVE DEFENSE

Upon receiving a copy of the Complaint in this matter that the Town of Apex was attempting to take a portion of her property, Beverly L. Rubin notified the Town that she contested the right of the Town of Apex to take any of her property in this action. (See May 19, 2015 letter attached hereto). A private developer for its own financial gain to increase the value of its property for purposes of resale has used the Town's powers of eminent domain. Therefore, the risk for incurring any time or expense for construction activities by the Town of Apex or any private developer or builder within the area that is the subject to this condemnation case is solely placed upon those persons. Sufficient notice has been provided of the challenge by Beverly L. Rubin to the right to take her property by the Town of Apex.

SECOND AFFIRMATIVE DEFENSE

(Motion for Attorney's Fees, Expert Fees and Other Costs)

The Defendant Beverly L. Rubin's entitlement to just compensation for the taking of her property is a **fundamental right guaranteed by both the North Carolina Constitution and the U.S. Constitution. The 5th and 14th Amendments of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution's requirement that just compensation be paid includes payments of all costs of defense.** If the Defendant Beverly L. Rubin is required to pay the costs and expenses of defending this action, including her expert fees (including but not limited to appraisal and engineering fees), exhibit costs and attorney's fees out of the amount awarded, by the jury, then the Defendant Beverly L. Rubin's constitutional rights to recover just compensation would be violated. Thus, the Defendant Beverly L. Rubin moves the Court that she recover all costs of the defense of this action, including, but not limited, all expert and attorney's fees. This motion is made in a good faith effort in attempt to reverse an existing contract law on this issue.

WHEREFORE, the Defendant, Beverly L. Rubin, prays the Court for the following relief:

1. That the Court issue an order in this proceeding that the Town of Apex does not possess the right of eminent domain as applied to the areas stated within the Complaint that is a portion of the property owned by Beverly L. Rubin;
2. In the alternative, in the event this matter proceeds to trial by jury that a determination of just compensation for the property interest be taken be made in accordance with applicable laws; and the Defendant Beverly L. Rubin recover that amount from the Plaintiff together with interest at the highest rate allowed by law from the date of the taking;
3. That there be a trial by jury on all issues so triable;
4. That the costs of this action, including all mediation costs, expert witness fees and attorney's fees be taxed to the Plaintiff;

5. That a determination of the areas and interest taken be made;
6. That Plaintiff prepare a Plat showing the subject property including improvements and areas and interest taken; and
7. The Court award the Defendant Beverly L. Rubin such other and further relief as the Court deems just and proper.

This 7 day of July, 2015.

BOXLEY, BOLTON, GARBER & HAYWOOD, L.L.P.
Attorney for Defendant Beverly L. Rubin



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

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Answer and Affirmative Defenses upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 7 day of July, 2015.

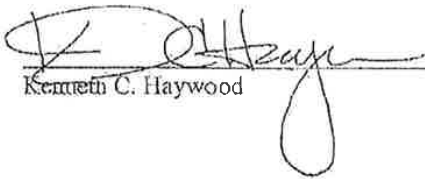

Kenneth C. Haywood

EXHIBIT C

FILED

STATE OF NORTH CAROLINA

2016 OCT 18 PM 1:41

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

WAKE COUNTY, C.S.C.

15 CVS 5836

TOWN OF APEX,

BY _____

Plaintiff,

v.

BEVERLY L. RUBIN

Defendant.

JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.

2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

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

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

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970)

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Al.Ct.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later adjudication upon Defendant's submitting a Motion in Support of such request.

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

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

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19th day of October, 2016.


Kenneth C. Haywood

EXHIBIT D

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

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

2015 APR 10 10:22

15

MOTION TO ENFORCE JUDGMENT AND
ALTERNATIVE PETITION FOR WRIT OF
MANDAMUS

Pursuant to Rule 70 of the North Carolina Rules of Civil Procedure, sections 1-259, 1-298, and 1-302 of the North Carolina General Statutes, and this Court's inherent authority, defendant Beverly Rubin moves to enforce the judgment awarded to her by this Court. In the alternative, Ms. Rubin petitions this Court for a writ of mandamus, directing the Town of Apex to remove the sewer line currently bisecting Ms. Rubin's property.

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

1. This case involved an effort by a private real-estate developer—Bradley Zadell and his corporate entities—to use the Town's condemnation power for his personal enrichment.
2. Mr. Zadell entered into a contract with the Town whereby the Town would install sewer across Ms. Rubin's property so long as Mr. Zadell paid for all of the costs—including litigation costs.
3. At the insistence of Mr. Zadell, the Town commenced this lawsuit to install sewer lines across Ms. Rubin's homestead. Rather than await the outcome of the condemnation action, the Town used its statutory "quick-take" powers to immediately take possession of Ms. Rubin's property and install sewer lines on it before final judgment.

4. The condemnation action did not go as planned for the Town and the developer. This Court determined that the Town had violated Ms. Rubin's rights by taking her property for a private purpose—enriching Mr. Zadell.

5. As Judge O'Neal explained in her final judgment, the reason that the Town took the sewer easement was "for a private interest and the public's interest [was] merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need." Judgment at 5 ¶ 6 [Exhibit A (certified copy of judgment)].

6. Thus, the final judgment ordered that the Town's "claim to [Ms. Rubin's property] is null and void." Judgment at 6 ¶ 1.

7. After the Town lost, it appealed to the North Carolina Court of Appeals. That Court unanimously dismissed the appeal as untimely. *Town of Apex v. Rubin*, 821 S.E.2d 613, 617 (N.C. Ct. App. 2018).

8. The Town then petitioned the North Carolina Supreme Court for discretionary review. On April 9, 2019, the Supreme Court filed its order denying the petition. Exhibit B.

9. After the Town's third loss, the Court of Appeals certified the case back to this Court on April 10. Exhibit C.

10. Ms. Rubin now seeks to enforce this Court's judgment and have the Town remove the sewer lines that it installed on her property illegally.

11. This Court has the power to enforce its own judgments. Such power is inherent, and is also confirmed by a number of rules and statutes.

12. For example, N.C. Gen. Stat. § 1-298 provides that after a case is remanded to the trial court by an appellate court, the trial court "shall direct the execution [of the judgment] to

proceed" at the "first session of the superior . . . court after a certificate of the determination of an appeal is received." N.C. Gen. Stat. § 1-298. The certification of the appeal to this Court has been received and is attached to this motion. Ex. C. Therefore, Ms. Rubin is now requesting that this Court order that the judgment be executed against the Town.

13. Second, this Court also has contempt power for enforcement of its judgment through section 1-302 of the General Statutes.¹ Therefore, this Court may hold the Town in civil contempt until it removes the sewer lines.

14. Third, this Court may also grant supplemental relief through the Uniform Declaratory Judgment Act. That Act provides, "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." N.C. Gen. Stat. § 1-259. The judgment entered by this Court declared and decreed that the Town's claim to Ms. Rubin's property was "null and void." Judgment at 6 ¶ 1. Because the Town has refused to comply with the judgment, Ms. Rubin now requires further relief ordering the Town to remove the illegally placed sewer lines.

15. Fourth, this Court has authority to enforce its judgment under Rule 70. Under that rule, because the Town has failed to comply with the judgment by removing the sewer lines, this Court can order the Town or a third-party to remove the sewer lines, or this Court can hold the Town in contempt until the sewer lines are removed.

16. Fifth, this Court has the inherent authority to enter any order to make its judgment against the Town effective. As the North Carolina Supreme Court recently reaffirmed, "[i]t is well

¹ Section 1-302 of the General Statutes provides, "Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt."

settled that, consistent with their inherent authority to enforce their own orders, North Carolina trial courts have jurisdiction to find new facts and determine whether a party has been 'disobedient' under a previous order that required the party to perform a 'specific act.'" *Pachas ex rel. Pachas v. N.C. Dep't of Health & Human Servs.*, 822 S.E.2d 847, 854 (N.C. 2019); *see also Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) ("Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment.")). Because the Town has failed to comply with the judgment, this Court has the inherent authority to order the Town to remove the sewer lines.

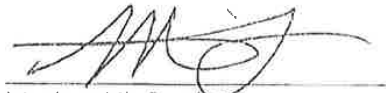
17. Finally, should the Court deem each of these grounds insufficient to enforce the final judgment, this Court may issue a writ of mandamus to the Town or its officers commanding them to remove the sewer lines. *See In re T.H.T.*, 362 N.C. 446, 453–54, 665 S.E.2d 54, 59 (2008). Mandamus would be appropriate because:

- (a) Ms. Rubin has a clear right to the full possession of her property, free of the sewer lines;
- (b) the Town has a legal duty to comply with the judgment and remove the sewer lines;
- (c) the Town's duty is ministerial and does not involve an exercise of discretion;
- (d) the Town has failed to remove the sewer lines, and the deadline for the Town to remove the lines has now passed; and
- (e) unless the Court grants Ms. Rubin relief under some other authority, Ms. Rubin has no other legally adequate remedies.

WHEREFORE, Ms. Rubin respectfully requests that this Court enforce its judgment and order the Town of Apex to remove the sewer lines on Ms. Rubin's property within thirty days of entry of its order on this motion.²

This the 10th day of April, 2019.

FOX ROTHSCHILD LLP



Matthew Nis Leerberg
N.C. Bar No. 35406
mleerberg@foxrothschild.com

Troy D. Shelton
N.C. Bar No. 48070
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434 Fayetteville Street, Suite 2800
Post Office Box 27525 (27611)
Raleigh, NC 27601
Telephone: (919) 755-8700
Facsimile: (919) 755-8800

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

Kenneth C. Haywood
N.C. Bar. No. 19066
KHaywood@hsfh.com
5410 Trinity Road, Suite 210
Post Office Box 12347 (27605)
Raleigh, NC 27607
Telephone: (919) 821-7700
Facsimile: (919) 821-7703

² As noted in the Judgment, Ms. Rubin is entitled to payment of her attorneys' fees and costs incurred in connection with this litigation. For efficiency, Ms. Rubin will wait to seek payment of those fees until after the Town has fully complied with the Judgment.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ms. Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus was served by United States mail, first-class postage pre-paid, and addressed as follows:

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

This the 10th day of April, 2019.


Matthew Nis Leerberg

EXHIBIT A

FILED

STATE OF NORTH CAROLINA
2016 OCT 18 PM 1:41
COUNTY OF WAKE
WAKE COUNTY, C.S.C.

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

TOWN OF APEX, BY _____)
Plaintiff,)
v.)
BEVERLY L. RUBIN)
Defendant.)

JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.

2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

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

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

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action ..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970)

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Ala.Ct.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zedell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later judgment upon Defendant's submitting a Motion in Support of such request.

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

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

4-3-19

EXHIBIT B

No. 410P18

TENTH DISTRICT

Supreme Court of North Carolina

TOWN OF APEX

v

BEVERLY L. RUBIN

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

ORDER

The following order has been entered on the motion filed on the 20th of November 2018 by Plaintiff for Temporary Stay:

"Motion Dissolved by order of the Court in conference, this the 27th of March 2019,"

s/ Earls, J.
For the Court

Upon consideration of the petition filed by Plaintiff on the 20th of November 2018 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

Upon consideration of the petition filed on the 20th of November 2018 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of April 2019.



Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. David P. Ferrell, Attorney at Law, For Town of Apex - (By Email)

Mr. Matthew Nis Leerberg, Attorney at Law, For Rubin, Beverly L. - (By Email)

Mr. Kenneth Haywood, For Rubin, Beverly L. - (By Email)

Mr. Troy D. Shelton, Attorney at Law, For Rubin, Beverly L. - (By Email)

West Publishing - (By Email)

Lexis-Nexis - (By Email)

EXHIBIT C



North Carolina Court of Appeals

Fax: (919) 831-3615
Web: <https://www.nccourts.gov>

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. COA17-955-1

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

From Wake
15CVS5836

ORDER

PETITION FOR DISCRETIONARY REVIEW to review the decision of the North Carolina Court of Appeals filed on the 20th of November 2018 was denied by order of the North Carolina Supreme Court on the 9th day of April 2019, and same has been certified to the North Carolina Court of Appeals.

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court, Wake County, North Carolina that the North Carolina Supreme Court has denied the PETITION FOR DISCRETIONARY REVIEW filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 10th day of April 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. David P. Ferrell, Attorney at Law, For Town of Apex
Mr. Matthew Nis Leorberg, Attorney at Law, For Rubin, Beverly L.

FILED

STATE OF NORTH CAROLINA

2019 AUG 30 PM 1:13

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

WAKE COUNTY, C.S.C.

19-CVS-6295

TOWN OF APEX,

BY

Plaintiff,

FIRST AMENDED COMPLAINT

V.

[AMND]

BEVERLY L. RUBIN,

Defendant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. The Town has not abandoned the Project.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, Town requests judgment against Rubin as follows:

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

This the 30th day of August, 2019.



David P. Ferrell
N.C. State Bar No. 23097
DFerrell@nexsenpruet.com
Norman W. Shearin
N.C. State Bar No. 3956
NShearin@nexsenpruet.com
Nexsen Pruet PLLC
4141 Parklake Ave., Ste 200

Raleigh, NC 27612

Telephone: (919) 573-7421

Facsimile: (919) 890-4540

Attorneys for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

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

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

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

This the 30th day of August, 2019.



David P. Ferrell

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

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

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

BY _____

MOTION TO DISMISS
AMENDED COMPLAINT

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

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

1. The underlying dispute between Ms. Rubin and the Town involves an effort by a private real-estate developer—Bradley Zadell and his corporate entities—to use the Town's condemnation power for his personal enrichment.
2. On April 30, 2015, the Town filed a condemnation complaint against Ms. Rubin. A copy of the complaint is attached to this motion as Exhibit A.
3. Rather than await the outcome of the condemnation action, the Town used its statutory "quick-take" powers to immediately take possession of Ms. Rubin's property and install sewer lines on it before final judgment.
4. On July 8, 2015, Ms. Rubin answered the complaint, denying that the taking was for a public purpose and raising as an affirmative defense that she was entitled to just compensation for the taking. A copy of the answer is attached to this motion as Exhibit B.

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

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

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

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

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

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

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

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

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

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

This the 29 day of September, 2019.

FOX ROTHSCHILD LLP

Troy Shelton

Matthew Nis Leerberg

N.C. Bar No. 35406

mleerberg@foxrothschild.com

Troy D. Shelton

N.C. Bar No. 48070

tshelton@foxrothschild.com

434 Fayetteville Street, Suite 2800

Post Office Box 27525 (27611)

Raleigh, NC 27601

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

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

Kenneth C. Haywood

N.C. Bar. No. 19066

KHaywood@hsfh.com

B. Joan Davis

N.C. Bar No. 17379

5410 Trinity Road, Suite 210

Post Office Box 12347 (27605)

Raleigh, NC 27607

Telephone: (919) 821-7700

Facsimile: (919) 821-7703

CERTIFICATE OF SERVICE

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

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

This the 25 day of September, 2019.



Troy D. Shelton

EXHIBIT A

1504005836

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2015 APR 30 PM 4:00 SUPERIOR COURT DIVISION
TOWN OF APEX, WAKE COUNTY, N.C. 15-CVS-
BY Plaintiff)
v.) COMPLAINT
BEVERLY L. RUBIN,) [COMP]
Defendant.)

NOW COMES the Town of Apex, Plaintiff herein, and for its cause of action says and alleges:

1. The Plaintiff, Town of Apex is a duly chartered Municipal Corporation of the State of North Carolina with its principal offices in Apex, North Carolina. The Plaintiff possesses the powers, duties, and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. The Plaintiff alleges upon information and belief that those persons whose names and addresses are set forth in **Exhibit A**, attached hereto, are, insofar as the same can be ascertained by reasonable diligence, the only persons who may have or who claim to have an interest or estate in the property subject to this action, which is described in **Exhibit B**, attached hereto. The named interested persons are under no legal disability to Plaintiff's knowledge except as may be stated in said **Exhibit A**.

3. Pursuant to the authority vested in the Plaintiff under the provisions of Section 6.5 of its Charter and Article 9 of Chapter 136 of the North Carolina General Statutes, it is necessary to condemn and appropriate certain property interests described in **Exhibit B** and **Exhibit C** for

public use for sanitary sewer and sewer facilities and for the other facilities described in said exhibits, and appurtenances thereto, to improve the public utility systems of the Town of Apex.

4. The property which is the subject of this action, the interest or estate acquired, and the areas appropriated are all described in **Exhibit B** and **Exhibit C**.

5. The Plaintiff alleges upon information and belief that the property described in **Exhibit B** is subject only to such liens and encumbrances as are set forth in **Exhibit A**.

6. The Plaintiff and the Defendant have been unable to agree as to the purchase price of the property interests herein appropriated.

WHEREFORE, Plaintiff prays that just compensation for the appropriation herein set forth be determined according to the provisions and procedures contained in Article 9 of Chapter 136 of the North Carolina General Statutes and for such other relief as to the Court may deem just and proper.

This the th30 day of April, 2015.



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

EXHIBIT A

NAMES AND ADDRESSES OF PERSONS WHO HAVE OR CLAIM AN INTEREST IN
THE SUBJECT PROPERTY AFFECTED BY THE TAKING:

BEVERLY L. RUBIN
2613 Olive Chapel Rd
Apex, NC 27502

See also persons listed under Liens and Encumbrances below.

DISABILITIES OF DEFENDANTS: NONE KNOWN

LIENS AND ENCUMBRANCES:

Easement for water easement - - Town of Apex

All taxes for the County of Wake for the year 2014 and all previous years.

All easements, restrictive covenants, encumbrances, encroachments and other matters of record.

All easements, encumbrances, encroachments and other interests to which the Subject Property is subject by adverse possession, prescription or otherwise.

EXHIBIT B

DESCRIPTION OF SUBJECT PROPERTY AFFECTED BY THIS ACTION:

Those certain lands lying and being in the Buckhorn Township, Wake County, North Carolina and being more particularly described as follows:

All of that certain parcel containing 11.426 acres and bounded on the North by the Southern right of way line of Olive Chapel Road, on the Northeast by the property of Madeleine J. Calder (Book of Maps 2000 Page 1587, Wake County Registry), on the Southeast by the property of Aspnes (Book of Maps 1987, Page 691, Wake County Registry), on the South by the property of the Richardson Heirs (Parcel ID No. 0721.01-47-4087), and on the West by the property of Eatman (Book of Maps 1996 Page 292, Wake County Registry), and having the street address of 2613 Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

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

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

DESCRIPTION OF INTERESTS AND AREAS TAKEN:

Easement - Permanent Public Utility Easement

A perpetual easement to construct, install, improve, remove, upgrade, replace, inspect, repair, rephase, maintain, use, and operate a system of lines, pipes, and force mains for sanitary sewer and sewer facilities of the Town, together with all the appurtenant facilities and equipment necessary or convenient to any of the above, in, on, over, above, under, through, and across the area described immediately below:

COMMENCING at an iron pipe on the southern right-of-way line of Olive Chapel Road, being the northwestern corner of the Beverly L. Rubin property as referenced above; thence, S02-14-28W 621, 20 feet to a point on the western line of the Rubin property, being the point of BEGINNING of a 40 foot wide sanitary sewer easement; thence, leaving the western property line of Rubin, N78-30-20E 154.30 feet to a point on the eastern property line of Rubin; thence, with the eastern property line of Rubin, S03-33-03E 40.39 feet to point on the eastern property line of Rubin; thence, leaving said property line, S78-30-20W 158.50 feet to a point on the western property line of Rubin; thence, with said property line, N02-14-28E 41.18 feet to the point and place of BEGINNING.

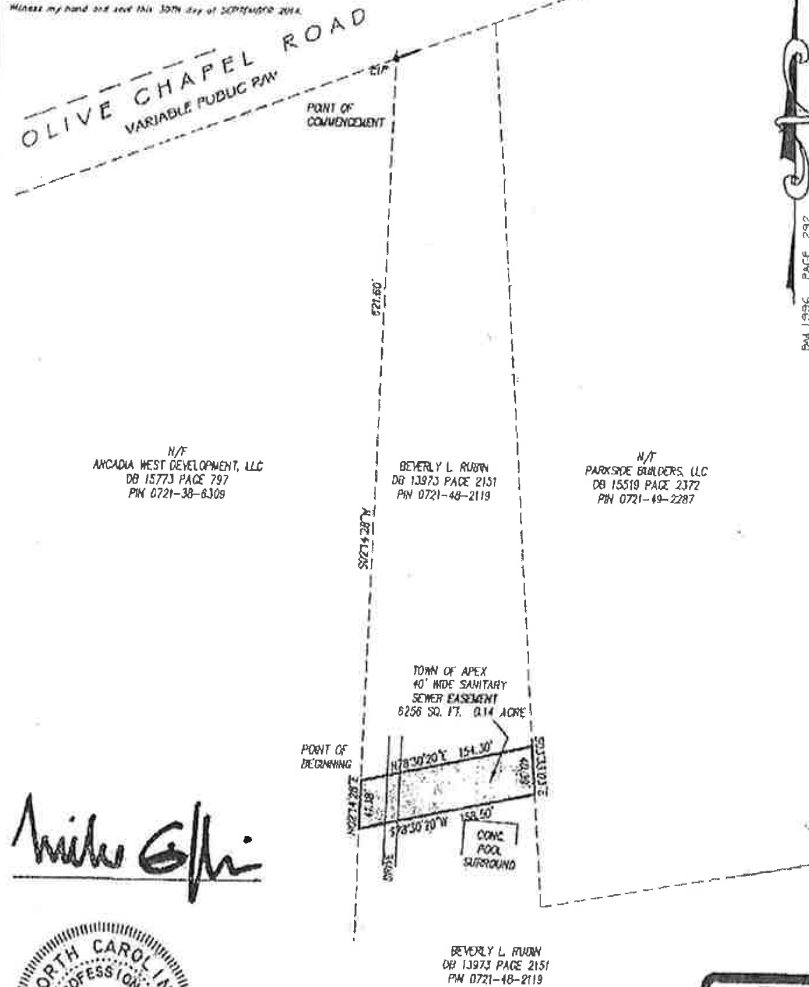
And more particularly described as "Town of Apex 40' Wide Sanitary Sewer Easement," said area containing 6256 square feet (0.14 acres) more or less, all as shown on that certain survey plat entitled "EASEMENT ACQUISITION EXHIBIT PROPERTY OWNER: BEVERLY L. RUBIN" by Griffin Land Surveying, Inc., said survey plat being attached hereto as Exhibit C.

Further specific terms and conditions of the Easement include, but are not limited to, the following:

1. Plaintiff shall have the right to remove and control vegetation or other obstructions in the easement areas.
2. All lines, facilities, structures and related apparatus installed in the easement areas shall be and remain the Property of Plaintiff, removable or replaceable at its option.
3. Plaintiff maintains the right to construct, install, operate, utilize, inspect, rebuild, reconfigure, replace, remove and maintain all lines, facilities, structures and related apparatus placed within the easement area in connection with the aforementioned purpose of the easement, and Plaintiff maintains the right to alter, substitute or add other devices from time to time as Plaintiff may deem advisable.
4. Defendant shall have the right to use the land over which said easement area and easement rights are hereby taken for all purposes not inconsistent with said easement rights, Plaintiff's specifications, or any federal, state, or local

law, rule or regulations, provided that Defendant may not construct any structure within the easement area, except upon prior written agreement thereto by Plaintiff.

5. Plaintiff, its officers, agents, workmen and contractors, shall have the right to go to and from said easement at all times over and above the subject property by such route or routes as shall occasion to the least practicable inconvenience to Defendant, including private roads and ways then existing thereon, on foot or by conveyance, with materials, machinery, supplies, and equipment as may be desirable; provided that, except in emergencies, existing roads and ways thereon shall be used to the extent that they afford ingress and egress to and from the easement.
6. The invalidity or unenforceability of any provision of Exhibit B shall not affect the validity or unenforceability of any other provision. Any invalid or unenforceable provision shall be deemed severed from Exhibit B to the extent of its invalidity or unenforceability, and Exhibit B shall be constructed and enforced as if it did not contain that particular provision to the extent of its validity and unenforceability.



EXHIBIT

C

THIS PROPERTY IS NOT LOCATED
IN THE 100 YEAR FLOOD ZONE.

LEGEND

EIP	EXISTING IRON PIPE	FES	FLARED END SECTION
IPS	IRON PIPE SET	WM	WATER METER
RAW	RIGHT OF WAY	CO	CLEAN OUT
NF	NOW OR FORMERLY	PH	FIRE HYDRANT
EIS	EXISTING IRON SIKE	CB	CATCH BASIN



GRIFFIN LAND SURVEYING, INC.

P.O. BOX 148
FUQUAY-VARINA, NC 27526
(919)-567-1963

**EASEMENT ACQUISITION
EXHIBIT**

PROPERTY OWNER:
BEVERLY L. RUBIN

2613 OLIVE CHAPEL ROAD
WHITE OAK TOWNSHIP
WAKE COUNTY, NC

DRAWN BY MPG

DATE 9/30/14

CHECKED BY MPO

SCALE 1" = 100'

EXHIBIT B

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

TOWN OF APEX,

Plaintiff,

v.

BEVERLY L. RUBIN

Defendants,

ANSWER AND AFFIRMATIVE
DEFENSES

FILED
2015 JUL -8 P 2:51
WAKE COUNTY CLERK

NOW COMES Defendant Beverly L. Rubin, by and through counsel, and responds to each and every statement and allegation of the Complaint as follows:

1. That the statements and allegations of Paragraph 1 are admitted, subject to the limitations on Plaintiff's powers of eminent domain as contained in the U.S. and N.C. Constitutions and the North Carolina General Statutes.
2. It is specifically admitted that Beverly L. Rubin is the sole owner of the property that is the subject of this action. Except to the extent admitted herein, the remaining statements and allegations of Paragraph 2 are denied.
3. That the statements and allegations of Paragraph 4 are denied.
4. That this Defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations of Paragraph 4, and the same are therefore denied.
5. It is specifically admitted that the liens and encumbrances set forth in Exhibit A are to the best of the knowledge of Beverly L. Rubin the only ones of record with the Wake County Register of Deeds. Except to the extent admitted, the remaining statements and allegations of Paragraph 5 are denied.
6. It is specifically admitted that the Plaintiff and Defendant have not agreed as to the purchase price of the property interest attempting to be appropriated by the condemning authority, Town of Apex. Further, it is specifically admitted that the Town of Apex does not have the right to take any property interest of Beverly L. Rubin under the General Statutes in North Carolina and the North Carolina Constitution and United States Constitution. Except to the extent admitted, the remaining statements and allegations of Paragraph 6 are denied.

FIRST AFFIRMATIVE DEFENSE

Upon receiving a copy of the Complaint in this matter that the Town of Apex was attempting to take a portion of her property, Beverly L. Rubin notified the Town that she contested the right of the Town of Apex to take any of her property in this action. (See May 19, 2015 letter attached hereto). A private developer for its own financial gain to increase the value of its property for purposes of resale has used the Town's powers of eminent domain. Therefore, the risk for incurring any time or expense for construction activities by the Town of Apex or any private developer or builder within the area that is the subject to this condemnation case is solely placed upon those persons. Sufficient notice has been provided of the challenge by Beverly L. Rubin to the right to take her property by the Town of Apex.

SECOND AFFIRMATIVE DEFENSE

(Motion for Attorney's Fees, Expert Fees and Other Costs)

The Defendant Beverly L. Rubin's entitlement to just compensation for the taking of her property is a fundamental right guaranteed by both the North Carolina Constitution and the U.S. Constitution. The 5th and 14th Amendments of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution's requirement that just compensation be paid includes payments of all costs of defense. If the Defendant Beverly L. Rubin is required to pay the costs and expenses of defending this action, including her expert fees (including but not limited to appraisal and engineering fees), exhibit costs and attorney's fees out of the amount awarded, by the jury, then the Defendant Beverly L. Rubin's constitutional rights to recover just compensation would be violated. Thus, the Defendant Beverly L. Rubin moves the Court that she recover all costs of the defense of this action, including, but not limited, all expert and attorney's fees. This motion is made in a good faith effort in attempt to reverse an existing contract law on this issue.

WHEREFORE, the Defendant, Beverly L. Rubin, prays the Court for the following relief:

1. That the Court issue an order in this proceeding that the Town of Apex does not possess the right of eminent domain as applied to the areas stated within the Complaint that is a portion of the property owned by Beverly L. Rubin;
2. In the alternative, in the event this matter proceeds to trial by jury that a determination of just compensation for the property interest be taken be made in accordance with applicable laws; and the Defendant Beverly L. Rubin recover that amount from the Plaintiff together with interest at the highest rate allowed by law from the date of the taking;
3. That there be a trial by jury on all issues so triable;
4. That the costs of this action, including all mediation costs, expert witness fees and attorney's fees be taxed to the Plaintiff;

5. That a determination of the areas and interest taken be made;
6. That Plaintiff prepare a Plat showing the subject property including improvements and areas and interest taken; and
7. The Court award the Defendant Beverly L. Rubin such other and further relief as the Court deems just and proper.

This 7 day of July, 2015.

BOXLEY, BOLTON, GARBER & HAYWOOD, L.L.P.
Attorney for Defendant Beverly L. Rubin



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

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Answer and Affirmative Defenses upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 7 day of July, 2015.

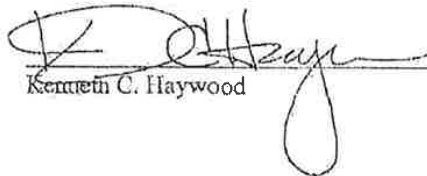

Kenneth C. Haywood

EXHIBIT C

FILED

STATE OF NORTH CAROLINA

2016 OCT 18 PM 1:41

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

WAKE COUNTY, C.S.C.

15 CVS 5836

TOWN OF APEX,

BY _____

Plaintiff,

v.

BEVERLY L. RUBIN

Defendant.

JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.
2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

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

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

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970)

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Al.Cl.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later judgment upon Defendant's submitting a Motion in Support of such request.

Signed This the 16th day of Oct., 2016.

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

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19th day of October, 2016.


Kenneth C. Haywood

EXHIBIT D

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

759 APR 10 10 39 AM

MOTION TO ENFORCE JUDGMENT AND
ALTERNATIVE PETITION FOR WRIT OF
MANDAMUS

Pursuant to Rule 70 of the North Carolina Rules of Civil Procedure, sections 1-259, 1-298, and 1-302 of the North Carolina General Statutes, and this Court's inherent authority, defendant Beverly Rubin moves to enforce the judgment awarded to her by this Court. In the alternative, Ms. Rubin petitions this Court for a writ of mandamus, directing the Town of Apex to remove the sewer line currently bisecting Ms. Rubin's property.

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

1. This case involved an effort by a private real-estate developer—Bradley Zadell and his corporate entities—to use the Town's condemnation power for his personal enrichment.
2. Mr. Zadell entered into a contract with the Town whereby the Town would install sewer across Ms. Rubin's property so long as Mr. Zadell paid for all of the costs—including litigation costs.
3. At the insistence of Mr. Zadell, the Town commenced this lawsuit to install sewer lines across Ms. Rubin's homestead. Rather than await the outcome of the condemnation action, the Town used its statutory "quick-take" powers to immediately take possession of Ms. Rubin's property and install sewer lines on it before final judgment.

4. The condemnation action did not go as planned for the Town and the developer. This Court determined that the Town had violated Ms. Rubin's rights by taking her property for a private purpose—enriching Mr. Zadell.

5. As Judge O'Neal explained in her final judgment, the reason that the Town took the sewer easement was "for a private interest and the public's interest [was] merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need." Judgment at 5 ¶ 6 [Exhibit A (certified copy of judgment)].

6. Thus, the final judgment ordered that the Town's "claim to [Ms. Rubin's property] is null and void." Judgment at 6 ¶ 1.

7. After the Town lost, it appealed to the North Carolina Court of Appeals. That Court unanimously dismissed the appeal as untimely. *Town of Apex v. Rubin*, 821 S.E.2d 613, 617 (N.C. Ct. App. 2018).

8. The Town then petitioned the North Carolina Supreme Court for discretionary review. On April 9, 2019, the Supreme Court filed its order denying the petition. Exhibit B.

9. After the Town's third loss, the Court of Appeals certified the case back to this Court on April 10. Exhibit C.

10. Ms. Rubin now seeks to enforce this Court's judgment and have the Town remove the sewer lines that it installed on her property illegally.

11. This Court has the power to enforce its own judgments. Such power is inherent, and is also confirmed by a number of rules and statutes.

12. For example, N.C. Gen. Stat. § 1-298 provides that after a case is remanded to the trial court by an appellate court, the trial court "shall direct the execution [of the judgment] to

proceed" at the "first session of the superior . . . court after a certificate of the determination of an appeal is received," N.C. Gen. Stat. § 1-298. The certification of the appeal to this Court has been received and is attached to this motion. Ex. C. Therefore, Ms. Rubin is now requesting that this Court order that the judgment be executed against the Town.

13. Second, this Court also has contempt power for enforcement of its judgment through section 1-302 of the General Statutes.¹ Therefore, this Court may hold the Town in civil contempt until it removes the sewer lines.

14. Third, this Court may also grant supplemental relief through the Uniform Declaratory Judgment Act. That Act provides, "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." N.C. Gen. Stat. § 1-259. The judgment entered by this Court declared and decreed that the Town's claim to Ms. Rubin's property was "null and void." Judgment at 6 ¶ 1. Because the Town has refused to comply with the judgment, Ms. Rubin now requires further relief ordering the Town to remove the illegally placed sewer lines.

15. Fourth, this Court has authority to enforce its judgment under Rule 70. Under that rule, because the Town has failed to comply with the judgment by removing the sewer lines, this Court can order the Town or a third-party to remove the sewer lines, or this Court can hold the Town in contempt until the sewer lines are removed.

16. Fifth, this Court has the inherent authority to enter any order to make its judgment against the Town effective. As the North Carolina Supreme Court recently reaffirmed, "[i]t is well

¹ Section 1-302 of the General Statutes provides, "Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt."

settled that, consistent with their inherent authority to enforce their own orders, North Carolina trial courts have jurisdiction to find new facts and determine whether a party has been 'disobedient' under a previous order that required the party to perform a 'specific act.'" *Pachas ex rel. Pachas v. N.C. Dep't of Health & Human Servs.*, 822 S.E.2d 847, 854 (N.C. 2019); *see also Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) ("Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment.")). Because the Town has failed to comply with the judgment, this Court has the inherent authority to order the Town to remove the sewer lines.


17. Finally, should the Court deem each of these grounds insufficient to enforce the final judgment, this Court may issue a writ of mandamus to the Town or its officers commanding them to remove the sewer lines. *See In re T.H.T.*, 362 N.C. 446, 453–54, 665 S.E.2d 54, 59 (2008). Mandamus would be appropriate because:

- (a) Ms. Rubin has a clear right to the full possession of her property, free of the sewer lines;
- (b) the Town has a legal duty to comply with the judgment and remove the sewer lines;
- (c) the Town's duty is ministerial and does not involve an exercise of discretion;
- (d) the Town has failed to remove the sewer lines, and the deadline for the Town to remove the lines has now passed; and
- (e) unless the Court grants Ms. Rubin relief under some other authority, Ms. Rubin has no other legally adequate remedies.

WHEREFORE, Ms. Rubin respectfully requests that this Court enforce its judgment and order the Town of Apex to remove the sewer lines on Ms. Rubin's property within thirty days of entry of its order on this motion.²

This the 10th day of April, 2019.

FOX ROTHSCHILD LLP



Matthew Nis Leerberg

N.C. Bar No. 35406

mleerberg@foxrothschild.com

Troy D. Shelton

N.C. Bar No. 48070

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Raleigh, NC 27601

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

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

Kenneth C. Haywood

N.C. Bar. No. 19066

KHaywood@hsfh.com

5410 Trinity Road, Suite 210

Post Office Box 12347 (27605)

Raleigh, NC 27607

Telephone: (919) 821-7700

Facsimile: (919) 821-7703

² As noted in the Judgment, Ms. Rubin is entitled to payment of her attorneys' fees and costs incurred in connection with this litigation. For efficiency, Ms. Rubin will wait to seek payment of those fees until after the Town has fully complied with the Judgment.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ms. Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus was served by United States mail, first-class postage pre-paid, and addressed as follows:

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

This the 10th day of April, 2019.


Matthew Nis Leerberg

EXHIBIT A

FILED

STATE OF NORTH CAROLINA

2016 OCT 18 PM 1:41

COUNTY OF WAKE

WAKE COUNTY, C.S.C.

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

15 CVS 5836

TOWN OF APEX,

BY

Plaintiff,

v.

BEVERLY L. RUBIN

Defendant.

JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.

2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

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

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

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action ..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.W.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970).

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Ala. App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C. Gen. Stat. §6-21.7, which ruling is reserved for later adjudication upon Defendant's submitting a Motion in Support of such request.

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

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

[Signature]
4-3-19

EXHIBIT B

No. 410P18

TENTH DISTRICT

Supreme Court of North Carolina

TOWN OF APEX

v

BEVERLY L. RUBIN

From N.C. Court of Appeals
(17-955)
From Wake
(15CVS5836)

ORDER

The following order has been entered on the motion filed on the 20th of November 2018 by Plaintiff for Temporary Stay:

"Motion Dissolved by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

Upon consideration of the petition filed by Plaintiff on the 20th of November 2018 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

Upon consideration of the petition filed on the 20th of November 2018 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th of March 2019."

s/ Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of April 2019.



Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. David P. Ferrell, Attorney at Law, For Town of Apex - (By Email)

Mr. Matthew Nis Leerberg, Attorney at Law, For Rubin, Beverly L. - (By Email)

Mr. Kenneth Haywood, For Rubin, Beverly L. - (By Email)

Mr. Troy D. Shelton, Attorney at Law, For Rubin, Beverly L. - (By Email)

West Publishing - (By Email)

Lexis-Nexis - (By Email)

EXHIBIT C



North Carolina Court of Appeals

Fax: (919) 831-3615
Web: <https://www.nccourts.gov>

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. COA17-955-1

TOWN OF APEX,
Plaintiff,

v.

BEVERLY L. RUBIN,
Defendant.

From Wake
15CV55836

ORDER

PETITION FOR DISCRETIONARY REVIEW to review the decision of the North Carolina Court of Appeals filed on the 20th of November 2018 was denied by order of the North Carolina Supreme Court on the 9th day of April 2019, and same has been certified to the North Carolina Court of Appeals.

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court, Wake County, North Carolina that the North Carolina Supreme Court has denied the PETITION FOR DISCRETIONARY REVIEW filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 10th day of April 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. David P. Ferrell, Attorney at Law, For Town of Apex
Mr. Matthew Nis Leeborg, Attorney at Law, For Rubin, Beverly L.

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

WAKE COUNTY

2019 MAY 13 P 3:39 19-CVS-

TOWN OF APEX,

WAKE CO., D.S.C.

Plaintiff, *le*VERIFIED MOTION FOR
PRELIMINARY INJUNCTION

v.

BEVERLY L. RUBIN,

[PREL]

Defendant.

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

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

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

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

7. The Town had constructed an underground sewer line ("Project") across the entire width of a narrow portion of Rubin's property, more particularly described in paragraph 19 hereof ("Property"); also illustrated on the attached as **Exhibit B**. The eight (8) inch, 156 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. No manholes are on the Property.

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

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

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

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

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

13. The Town has not abandoned the Project.

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

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

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

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

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

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

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

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

All of that certain parcel containing 11.426 acres and bounded on the North by the Southern right of way line of Olive Chapel Road, on the Northeast by the property of Madeleine J. Calder (Book of Maps 2000 Page 1587, Wake County Registry), on the Southeast by the property of Aspnes (Book of Maps 1987, Page 691, Wake County Registry), on the South by the property of the Richardson Heirs (Parcel ID No. 0721.01-47-4087), and on the West by the property of Eatman (Book of Maps 1996 Page 292, Wake County Registry), and having the street address of 2613 Olive Chapel Road, Apex, North Carolina 27502, and being more particularly described as follows:

Beginning at an existing iron pipe in the Southern right of way line of Olive Chapel Road and the Northwesternmost corner of the said Calder property and proceeding along a common property line with Calder South 01 degrees 33 minutes 25 seconds West 761.61 feet to an existing iron pipe; thence proceeding along a different common property line with Calder North 85 degrees 31 minutes 27 seconds East 339.29 feet to an existing iron pipe; thence proceeding along the common property line with the said Aspnes property South 05 degrees 24 minutes 31 seconds West 836.88 feet to an existing iron pipe; thence proceeding along the common

property line with the said Richardson Heirs North 83 degrees 49 minutes 51 seconds West 523.35 feet to an existing iron pipe; thence proceeding along the common property line with the said Eatman North 07 degrees 10 minutes 08 seconds East 1499.31 feet to an existing iron pipe set in the Southern right of way line of Olive Chapel Road; thence along the said Southern right of way North 75 degrees 23 minutes 32 seconds East 93.90 feet to the point and place of beginning.

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

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

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

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

Inverse condemnation statutory remedy is not dependent upon taking or using for a public use.

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 809 S.E.2d 853 (2018).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



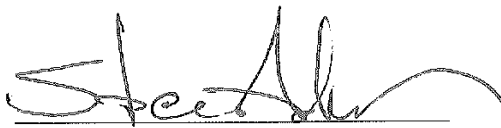
David P. Ferrell
N.C. State Bar No. 23097
DFerrell@nexsenpruet.com
Norman W. Shearin
N.C. State Bar No. 3956
NShearin@nexsenpruet.com
Nexsen Pruet PLLC
4141 Parklake Ave., Ste 200
Raleigh, NC 27612
Telephone: (919) 573-7421
Facsimile: (919) 890-4540
Attorneys for Plaintiff Town of Apex

NORTH CAROLINA

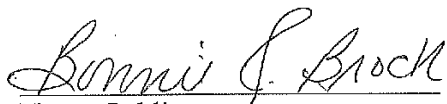
WAKE COUNTY

VERIFICATION

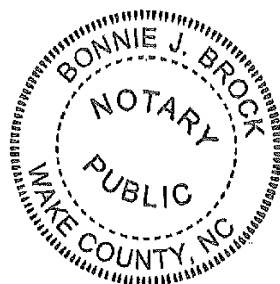
I, Steven Adams, being first duly sworn, depose and say that I am the Real Estate and Utilities Systems Specialist of the Plaintiff, Town of Apex in the above entitled action; that I have read the foregoing Motion and know the contents thereof; and that the same is true to my own knowledge, except as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


Steven Adams

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


Notary Public

My Commission Expires: 7/7/2020



CERTIFICATE OF SERVICE

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

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

As well as by facsimile and electronic mail to:

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

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

This the 13th day of May, 2019.



David P. Ferrell

FILED

STATE OF NORTH CAROLINA

2016 OCT 18 PM 1:41

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

15 CVS 5836

WAKE COUNTY, C.S.C.

TOWN OF APEX,

BY _____

Plaintiff,

v.

JUDGMENT

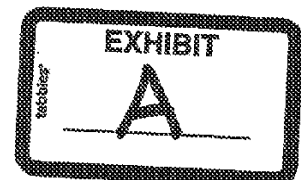
BEVERLY L. RUBIN

Defendant.

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.
2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.



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

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

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action ..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars (\$2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970).

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I §19; accord, *Hogan v. Alabama Power Company*, 351 So.2d 1378 (Al.C.L.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.
2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.
3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.
4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later adjudication upon Defendant's submitting a Motion in Support of such request.

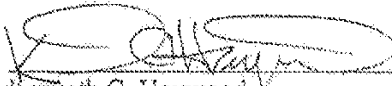
Signed This the 6th day of Oct., 2016.

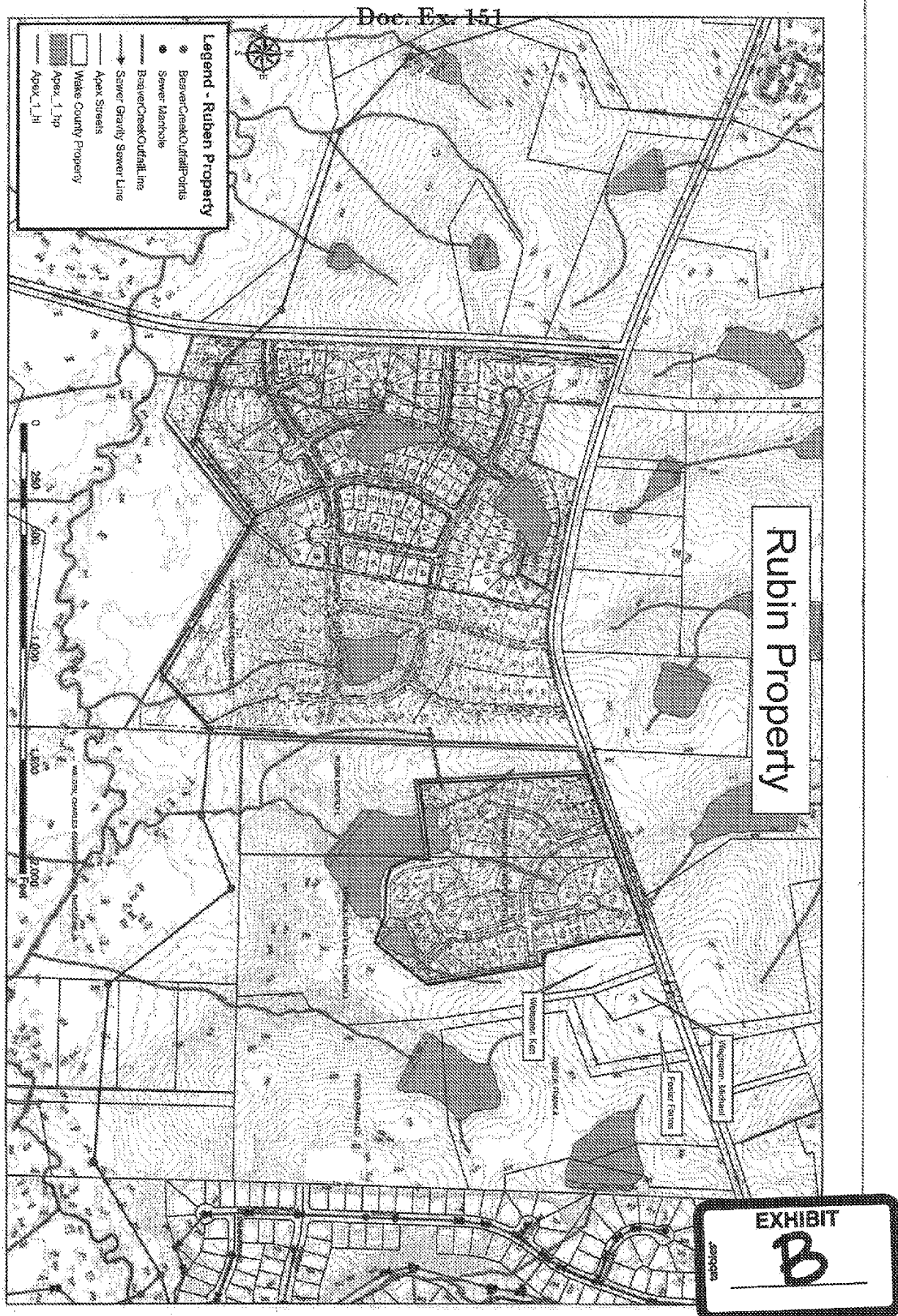
Elaine M. O'Neal
Superior Court Judge Elaine M. O'Neal

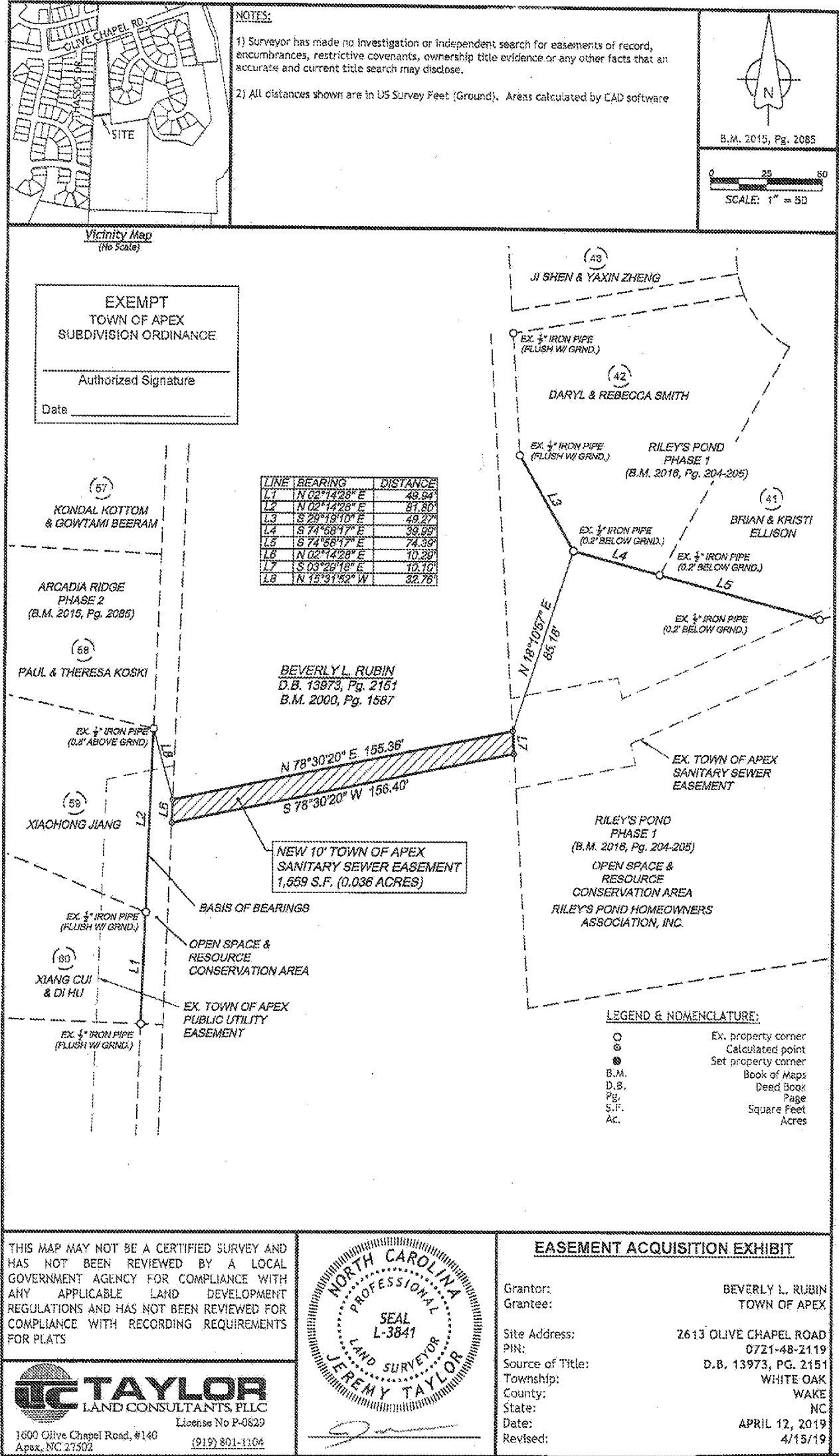
CERTIFICATE OF SERVICE

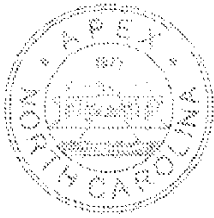
This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19th day of October, 2016.


Kenneth C. Haywood





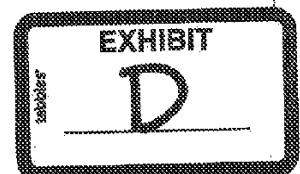
*"The Peak of Good Living"*Office of the Town Clerk
Donna B. Hosch, MMC, NCCMCTOWN OF APEX
NORTH CAROLINA**COPY**

CLERK'S CERTIFICATION

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

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


Donna B. Hosch, MMC, NCCMC
Town Clerk

RESOLUTION: 19- 04116-14

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To be used for the operation and maintenance of gravity sewer lines and related facilities and all appurtenances necessary or convenient thereto in connection with the Apex Sewer System to promote the public health, interest and general welfare.

WHEREAS, the Town of Apex is authorized to acquire by eminent domain interests in real property in accordance with Chapter 40A of the General Statutes and in accordance with Section 6.5 of the Town of Apex Charter which authorizes the Town of Apex to use the eminent domain powers, rights and procedures provided in Article 9 of Chapter 136 of the General Statutes for, among other things, water lines, sewer lines, and appurtenances thereto.

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

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

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

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

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

3. Reasonable eminent domain deposits to the Clerk of Court as determined by the Town Manager, his designee or the Town Attorney are hereby authorized. The Town Attorney or such attorney as is retained by the Town is hereby authorized to pursue the above acquisitions through eminent domain and/or negotiation and to determine which eminent domain authority to use to acquire the above described property interests.

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

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

Motion made by Council Member

Andra Killingsworth

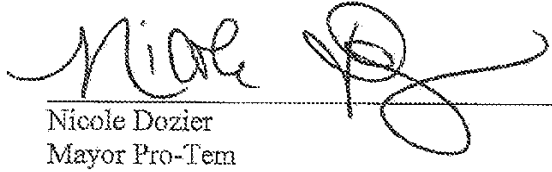
Motion seconded by Council Member

Mayer, Fred

With 5 Council Members voting aye.

With 0 Council Members voting no.

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



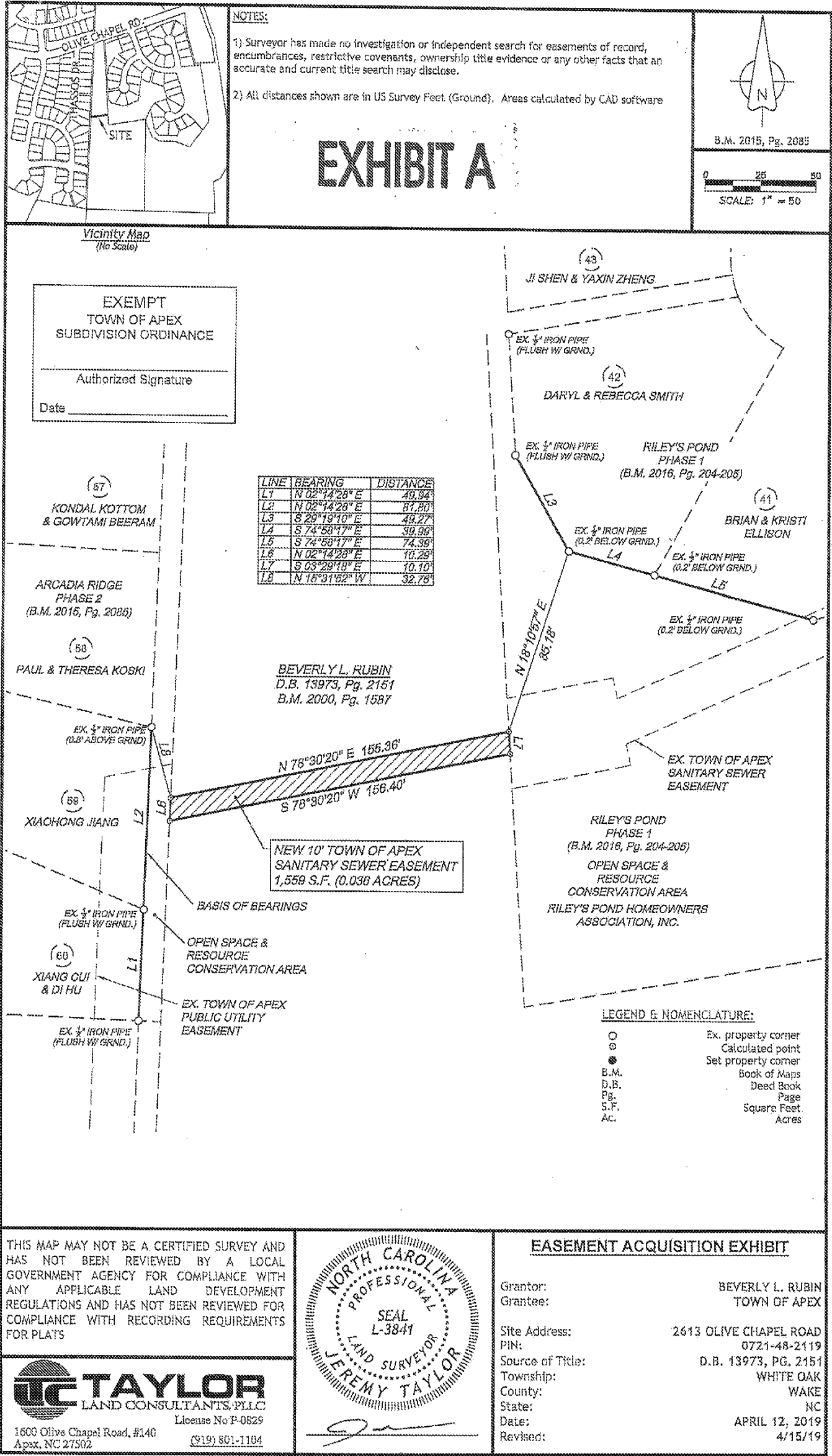
Nicole Dozier
Mayor Pro-Tem

ATTEST:



Donna B. Hosch, MMC
Town Clerk

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




19 CV 006295

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

19-CVS-_____

TOWN OF APEX,

2019 MAY 13 P 3:39

WAKE CO., C.S.C.
Plaintiff,
BY 

v.

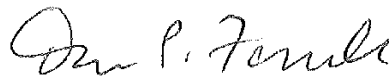
NOTICE OF HEARING

BEVERLY L. RUBIN,

Defendant.

NOW COMES Plaintiff the Town of Apex, by and through Counsel, and hereby gives notice to all parties that Plaintiff's Motion for Preliminary Injunction will be heard at the Wake County Courthouse, 316 Fayetteville Street, Raleigh, North Carolina, 27601, on Monday, May 20, 2019 at 10:00 a.m., or as soon thereafter as the matter may be heard.

This the 13th day of May, 2019.



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

CERTIFICATE OF SERVICE

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


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

As well as by facsimile and electronic mail to:

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

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

This the 13th day of May, 2019.



David P. Ferrell

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2020 JUN 21 AM 11:33 SUPERIOR COURT DIVISION
WAKE COUNTY 19-CVS-6295
WAKE CO., C.S.C.
TOWN OF APEX,)
Plaintiff,)
v.) **PRELIMINARY INJUNCTION**
BEVERLY L. RUBIN,)
Defendant.)

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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


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

13. No bond is required of the Town herein.

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

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

This the 17th day of January, 2020.



G. Bryan Collins
Superior Court Judge Presiding

FILED


STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2020 JAN 21 AM 11:33 SUPERIOR COURT DIVISION
TOWN OF APEX, WAKE CO., G.S.C. 19-CVS-6295
BY _____)
Plaintiff,)
v.) **ORDER DENYING DEFENDANT'S**
BEVERLY L. RUBIN,) **MOTION TO DISMISS**
Defendant.)

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

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

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

This the 17th day of January, 2020.



G. Bryan Collins
Superior Court Judge Presiding

West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 9. Condemnation (Refs & Annos)

N.C.G.S.A. § 136-104

§ 136-104. Vesting of title and right of possession; recording
memorandum or supplemental memorandum of action

Currentness

Upon the filing of the complaint and the declaration of taking and deposit in court, to the use of the person entitled thereto, of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified in the complaint and the declaration of taking, together with the right to immediate possession hereof shall vest in the Department of Transportation and the judge shall enter such orders in the cause as may be required to place the Department of Transportation in possession, and said land shall be deemed to be condemned and taken for the use of the Department of Transportation and the right to just compensation therefor shall vest in the person owning said property or any compensable interest therein at the time of the filing of the complaint and the declaration of taking and deposit of the money in court, and compensation shall be determined and awarded in said action and established by judgment therein.

Where there is a life estate and a remainder either vested or contingent, in lieu of the investment of the proceeds of the amount determined and awarded as just compensation to which the life tenant would be entitled to the use during the life estate, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant be ascertained as now provided by law and paid directly to the life tenant out of the final award as just compensation established by the judgment in the cause and the life tenant may have the relief provided for in [G.S. 136-105](#).

On and after July 1, 1961, the Department of Transportation, at the time of the filing of the complaint and declaration of taking and deposit of estimated compensation, shall record a memorandum of action with the register of deeds in all counties in which the land involved therein is located and said memorandum shall be recorded among the land records of said county. Upon the amending of any complaint and declaration of taking affecting the property taken, the Department of Transportation shall record a supplemental memorandum of action. The memorandum of action shall contain

- (1) The names of those persons who the Department of Transportation is informed and believes may have or claim to have an interest in said lands and who are parties to said action;
- (2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof;
- (3) A statement of the estate or interest in said land taken for public use;
- (4) The date of institution of said action, the county in which said action is pending, and such other reference thereto as may be necessary for the identification of said action.

As to those actions instituted by the Department of Transportation under the provisions of this Article prior to July 1, 1961, the Department of Transportation shall, on or before October 1, 1961, record a memorandum of action with the register of deeds

- App. 151 -

§ 136-104. Vesting of title and right of possession; recording..., NC ST § 136-104

in all counties in which said land is located as hereinabove set forth; however, the failure of the Department of Transportation to record said memorandum shall not invalidate those actions instituted prior to July 1, 1961.

Credits

Added by Laws 1959, c. 1025, § 2. Amended by Laws 1961, c. 1084, § 2; Laws 1963, c. 1156, § 2; Laws 1973, c. 507, § 5; Laws 1975, c. 522, § 1; Laws 1977, c. 464, § 7.1.

N.C.G.S.A. § 136-104, NC ST § 136-104

The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

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West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 9. Condemnation (Refs & Annos)

N.C.G.S.A. § 136-111

§ 136-111. Remedy where no declaration of taking filed; recording memorandum of action

Currentness

Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court setting forth the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have estates or interests in the said real estate and if any such persons are under a legal disability, it must be so stated, together with a statement as to any encumbrances on said real estate; said complaint shall further allege with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken. Upon the filing of said complaint summons shall issue and together with a copy of said complaint be served on the Department of Transportation as provided by [G.S. 1A-1, Rule 4\(j\)\(4\)](#). The allegations of said complaint shall be deemed denied; however, the Department of Transportation within 60 days of service of summons and complaint may file answer thereto, and if said taking is admitted by the Department of Transportation, it shall, at the time of filing answer, deposit with the court the estimated amount of compensation for said taking and notice of said deposit shall be given to said owner. Said owner may apply for disbursement of said deposit and disbursement shall be made in accordance with the applicable provisions of [G.S. 136-105](#) of this Chapter. If a taking is admitted, the Department of Transportation shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the land taken. The procedure hereinbefore set out shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.

The plaintiff at the time of filing of the complaint shall record a memorandum of action with the register of deeds in all counties in which the land involved therein is located, said memorandum to be recorded among the land records of said county. The memorandum of action shall contain

- (1) The names of those persons who the plaintiff is informed and believes may have or claim to have an interest in said lands and who are parties to said action;
- (2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;
- (3) A statement of the estate or interest in said land allegedly taken for public use; and
- (4) The date on which plaintiff alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action.

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§ 136-111. Remedy where no declaration of taking filed;..., NC ST § 136-111

Credits

Added by Laws 1959, c. 1025, § 2. Amended by Laws 1961, c. 1084, § 6; Laws 1963, c. 1156, § 8; Laws 1965, c. 514, §§ 1, 1 1/2; Laws 1971, c. 1195; Laws 1973, c. 507, § 5; Laws 1977, c. 464, §§ 7.1, 29; Laws 1985, c. 182, § 1.

N.C.G.S.A. § 136-111, NC ST § 136-111

The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

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West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 9. Condemnation (Refs & Annos)

N.C.G.S.A. § 136-114

§ 136-114. Additional rules

[Currentness](#)

In all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts.

Credits

Added by Laws 1959, c. 1025, § 2.

N.C.G.S.A. § 136-114, NC ST § 136-114

The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

No. 20-304

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

CONTENTS OF ADDENDUM

Addendum Pages

S. Seeding Serv., Inc. v. Martin's Grading &
Const., No. COA10-180, 2010 WL 3466603
(N.C. Ct. App. 2010).....Add. 1-3

206 N.C.App. 762

Unpublished Disposition

Only the Westlaw citation is currently available.

NOTE: THIS OPINION WILL NOT APPEAR
IN A PRINTED VOLUME. THE DISPOSITION
WILL APPEAR IN A REPORTER TABLE.

An unpublished opinion of the North Carolina Court
of Appeals does not constitute controlling legal
authority. Citation is disfavored, but may be permitted
in accordance with the provisions of Rule 30(e)(3)
of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

SOUTHERN SEEDING SERVICE, INC., Plaintiff,
v.

MARTIN'S GRADING &
CONSTRUCTION, Defendant.

No. COA10-180.

|

Sept. 7, 2010.

West KeySummary

1 Judgment Operation and Effect

Judgment creditor's motion for order requiring that property of sole proprietor of judgment debtor be sold to satisfy money judgment was merely a reiteration of judgment creditor's motion for relief from judgment, the denial of which judgment creditor failed to appeal in timely manner. Thus, denial of motion was warranted. Judgment creditor presented no additional issues for the trial court's determination and merely used the second motion to again bring before the trial court the substance of the motion for relief from judgment, which sought to add sole proprietor as a judgment debtor. [Rules Civ.Proc., Rule 60](#), West's N.C.G.S.A. § 1A-1; [Rules App.Proc., Rule 3](#).

*1 Appeal by plaintiff Southern Seeding Service, Inc., from order entered 21 June 2009 by Judge Nancy Gordon and order entered 10 December 2009 by Judge James T. Hill in Durham

County District Court. Heard in the Court of Appeals 9 June 2010.

Attorneys and Law Firms

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by [Clint S. Morse](#), for plaintiff-appellant.

Shanahan Law Group, PLLC, by [Kieran J. Shanahan](#), and [Michael J. Denning](#), for defendant-appellee.

Opinion

[HUNTER, JR.](#), ROBERT N., Judge.

Southern Seeding Service, Inc. ("SSSI"), appeals from orders entered by the trial court denying execution against Greg S. Martin. Mr. Martin is a sole proprietor doing business under the name Martin's Grading and Construction ("MGC"), and SSSI sued MGC in order to recover \$4,294.00 due on an account. Mr. Martin was not named individually in the complaint. On appeal, SSSI contends the trial court committed reversible error in denying: (1) SSSI's motion for relief under [Rule 60](#) (the "[Rule 60](#) Motion") to revise or amend the judgment; and (2) SSSI's Motion for Order Requiring Debtor's Property to be Sold (the "Second Motion").

We conclude that SSSI did not file a timely notice of appeal from the [Rule 60](#) Motion, and that the Second Motion was merely a reiteration of the [Rule 60](#) Motion. Accordingly, we affirm the order denying the Second Motion as duplicitous, and dismiss SSSI's appeal concerning the [Rule 60](#) Motion.

I. BACKGROUND

On 29 October 2007, SSSI commenced a small claim action against MGC, by filing a complaint in the Magistrate Court of Durham County seeking damages for breach of contract. Judgment was entered in favor of SSSI, and MGC gave timely notice of appeal to the district court. The notice of appeal named "Greg S. Martin, d/b/a Martin's Grading" as the appellant.

The case was set for mandatory arbitration, and on 20 February 2008, the arbitrator found in favor of SSSI. The arbitration award listed the damages as recoverable only from "Martin's Grading & Construction." On 21 February 2008, contesting the amount awarded, SSSI appealed the arbitration

award for a trial *de novo* in Durham County District Court. SSSI again named MGC as the sole defendant. On 23 June 2008, a bench trial was held before Judge Marcia Morey. On 2 July 2008, judgment was entered against MGC, ordering it to pay SSSI the amount of \$3,749.49. SSSI attempted to recover on the judgment, but was informed by the clerk of court that a Writ of Execution against Greg Martin's property could not be obtained until the caption in the order and judgment was changed to reflect Greg Martin's involvement in the case as a party-defendant.

On 20 February 2009, SSSI filed the [Rule 60](#) Motion requesting the trial court to: (1) substitute the name "Greg S. Martin, d/b/a Martin's Grading and Construction" as the named defendant in place of "Martin's Grading and Construction"; and (2) amend the judgment to reflect judgment against "Greg Martin, d/b/a Martin's Grading and Construction." On 21 June 2009, Judge Nancy Gordon entered an order denying SSSI's motion. In the order, Judge Gordon recited the procedural history of the case, and then concluded as a matter of law that SSSI was not entitled to the relief it sought under [Rule 60](#).

*2 On 28 October 2009, SSSI filed the Second Motion. In the Second Motion, SSSI stated that there was no confusion as to Greg Martin's relationship with MGC at any point in the case, and that since there was no legal separation between Greg Martin and MGC, SSSI was entitled to execute the judgment against Greg Martin's property. On 10 December 2009, Judge James T. Hill entered an order denying the second motion. In the order, Judge Hill noted that SSSI had made the [Rule 60](#) Motion attempting to add Greg Martin as a defendant, and that the [Rule 60](#) Motion had already been denied. Accordingly, Judge Hill found that "[t]here is no basis in law for entry of the Order requested by [SSSI] which would require Greg Martin be added as an individual." On 16 December 2009, SSSI filed notice of appeal to this Court from the [Rule 60](#) Motion and the Second Motion.

II. ANALYSIS

SSSI argues that: (1) the judgment is valid against Greg Martin, because Greg Martin and MGC are the same legal entity and Greg Martin is named in the judgment through his trade name; and (2) the trial court erred in denying SSSI's [Rule 60](#) motion to amend the judgment. We disagree.

Our Court has jurisdiction to hear this appeal pursuant to [N.C. Gen.Stat. § 7A-27](#) (b) (2009) (review of final judgment). "[R]eview of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *In re J.L.*, [183 N.C.App. 126, 130, 643 S.E.2d 604, 606 \(2007\)](#). Since SSSI does not challenge any of the trial court's findings of fact, we review this matter only to determine if those findings of fact support the trial court's legal conclusions. *Lumsden v. Lawing*, [107 N.C.App. 493, 499, 421 S.E.2d 594, 598 \(1992\)](#).

A. Order Denying the [Rule 60](#) Motion

In this case, after the denial of SSSI's [Rule 60](#) Motion entered by the trial court on 21 June 2009, there was nothing left to be judicially determined. As a result, it was "[a] final judgment dispos[ing] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[.]" *Blythe v. Blythe*, [163 N.C.App. 198, 200, 593 S.E.2d 403, 404 \(2004\)](#) (citation omitted). Following this order, no further action was taken by SSSI until 28 October 2009, when SSSI filed the Second Motion.

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, [353 N.C. 142, 156, 540 S.E.2d 313, 322 \(2000\)](#) (citations omitted). Rule 3 provides in part:

(c) ... In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by [Rule 58 of the Rules of Civil Procedure](#); or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that

*3 (3) if a timely motion is made by any party for relief under [Rules 50\(b\), 52\(b\)](#) or [59 of the Rules of Civil Procedure](#), the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C.R.App. P. 3(c)(1)-(3) (2010). The requirements of [Rule 3](#) are jurisdictional, and if not complied with, the appeal must be dismissed. [Bailey](#), 353 N.C. at 156, 540 S.E.2d at 322 (Failure to comply “mandates” dismissal of the appeal.). “Motions entered pursuant to [Rule 60](#) do not toll the time for filing a notice of appeal.” [Wallis v. Cambron](#), 194 N.C.App. 190, 193, 670 S.E.2d 239, 241 (2008).

The notice of appeal in this case for the order denying the [Rule 60](#) Motion, filed on 21 June 2009, was not filed until 16 December 2009, well outside the bounds prescribed in Rule 3 of the North Carolina Rules of Appellate Procedure. Accordingly, SSSI's arguments regarding the denial of its [Rule 60](#) Motion are dismissed.

B. Order Denying the Second Motion

“A motion is properly treated according to its substance rather than its label.” [Harrell v. Whisenant](#), 53 N.C.App. 615, 617, 281 S.E.2d 453, 454 (1981). “This Court has previously stated that ‘[t]he conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigation of the same issue before a different trial judge.’” [Huffaker v. Holley](#), 111 N.C.App. 914, 915-16, 433 S.E.2d 474, 475 (1993) (addressing repeated motions for summary judgment under Rule 56) (quoting [Carr v. Carbon Corp.](#), 49 N.C.App. 631, 636, 272 S.E.2d 374, 378 (1980)).

In its 10 December 2009 order, the trial court denied SSSI's Second Motion after making the following findings of fact:

1. On February 19, 2009 [SSSI] filed a Motion for Relief pursuant to [Rule 60 of the North Carolina Rules of Civil Procedure](#) requesting relief from the Judgment through amendment of the caption of same.
2. Specifically, SSSI requested that Greg Martin be added as an individual to facilitate execution of the Judgment.
3. [SSSI]'s motion was denied on June 8, 2009.
4. There is no basis in law for entry of the Order requested by [SSSI] which would require Greg Martin be added as an individual.

We agree with the trial court that the Second Motion was merely a reiteration of SSSI's [Rule 60](#) Motion. SSSI presented no additional issues for the trial court's determination, and merely used the Second Motion to again bring the substance of the [Rule 60](#) Motion before the trial court. Since the trial court correctly concluded that SSSI had no basis in law for its motion, we affirm the 10 December 2009 order of the trial court.

***4** Affirmed in part and dismissed in part.

Judges [STEELMAN](#) and [STEPHENS](#) concur.
Report per Rule 30(e).

All Citations

206 N.C.App. 762, 699 S.E.2d 140 (Table), 2010 WL 3466603