No. COA 20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

DEFENDANT-APPELLANT'S BRIEF

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INDEX

APPENDIX:

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

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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. Prior action pending and res judicata work hand-in-hand to preclude a second lawsuit that is duplicative of an earlier action, whether that action is still pending or final. Here, the Town filed its second lawsuit after the first was resolved by final judgment, which Ms. Rubin was still trying to enforce. That is, the first lawsuit was either pending or final at that time—the only two possibilities. Did the trial court err by refusing to dismiss the second lawsuit due to prior action pending or res judicata?

4. A declaratory judgment action should be dismissed if there is no genuine existing controversy between the parties, just as no preliminary injunction should issue upon a meritless complaint. Here, the Town's duplicative lawsuit was built on meritless legal theories already before the Court in the 2015 action. Did the trial court err by finding merit in the second lawsuit, failing to dismiss it, and entering a preliminary injunction?

STATEMENT OF THE CASE

On 13 May 2019, the Town commenced a declaratory-judgment action with the filing of a complaint in Wake County Superior Court. (R p 3.) The Town amended its complaint on 30 August 2019. (R p 83.)

On 9 January 2020, the superior court heard Ms. Rubin's motion to dismiss, as well as the Town's motion for a preliminary injunction. (R pp 102, 104.) At that same hearing, the court also heard two motions in the Town's original condemnation action. (1-9-20 T p 4.) On 17 January 2020, the superior court entered orders denying each of Ms. Rubin's motions in the two cases, and granting each of the Town's. (R pp 102-11; App. 1-14.)[1]

[1] For the convenience of the Court, Ms. Rubin is inserting relevant filings from the record on appeal in the 2015 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).

On 29 January 2020, Ms. Rubin timely appealed from all four of these orders, in each of the two cases. (R pp 112-14.) The orders from the original condemnation action (the 2015 case) are pending before this Court in docket number 20-304.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court entered two orders in the 2019 case: an order denying Ms. Rubin's motion to dismiss and an order granting the Town's motion for a preliminary injunction. As more fully explained in Ms. Rubin's response to the Town's motion to dismiss this appeal, each of these orders affect Ms. Rubin's substantial rights. Thus, this Court has jurisdiction over the appeal. N.C. Gen. Stat. § 7A-27(b)(3)(a).

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 F. 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 144.)

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 212-19.) Since the surrounding properties did not have sewer access, Mr. Zadell bought all of these properties cheaply. (R S (I) 143-45.)

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) 144-45.) 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 49, 821 S.E.2d at 614.

Unable to get what he wanted through negotiation, Mr. Zadell turned to compulsion. Mr. Zadell 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 9 (judgment ¶ 9).) The Town eventually relented. Mr. Zadell, through his company Parkside Builders, 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 p 10.)

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 46.) The Town estimated the compensation due to Ms. Rubin as $10,771. (R p 83.) Shortly after the complaint was filed, Mr. Zadell sold the vacant property for a $2.5 million profit. (R p 10.)

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 54-56.) Ms. Rubin asked the court to declare that the Town's taking was illegal. (R p 55.) The answer also 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 p 55.)

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 84; 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) 145.) 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) 144-45.)

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 8.) 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 12.) The court determined that the Town's taking violated the state and federal constitutions. 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 13.)

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. The trial court found the motion improper and meritless and denied it on 24 January 2017. *Rubin*, 262 N.C. App. at 150, 821 S.E.2d at 615.

On 30 January 2017, the Town gave notice of appeal. *Id.* 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 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 Court went further, though, and noted "for [the Town's] benefit" that it had also reviewed the merits, and found 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. (App. 29-30.) On the next day, this Court certified the case back to the superior court. (App. 32.)

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

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 the case was remanded, Ms. Rubin moved to enforce the final judgment. (App. 15-32.) Rather than respond to that motion, the Town instead filed a new, duplicative action against Ms. Rubin on 13 May 2019. (R p 3.) In that action (the "2019 case"), the Town asked that the superior court declare that *the Town* was the rightful owner of the sewer easement and that Ms. Rubin's sole remedy for the taking is just compensation. (R pp

87-88.) After the complaint was amended, Ms. Rubin moved to dismiss it because the action's legal theory was flawed, and it was also barred by either res judicata or the prior action pending doctrine. (R pp 91-93.) The Town also moved to enjoin Ms. Rubin from interfering with the sewer pipe, even though the superior court had already concluded that its installation was unconstitutional. (R p 18.) Meanwhile, the Town moved to vacate the final judgment in its original case. (App. 33-37.)

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 pp 81-82.) When the mediation impassed, 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 (App. 1-7);
- granted the Town's motion to vacate Judge O'Neal's final judgment in the original condemnation action (App. 8-14);
- denied Ms. Rubin's motion to dismiss the 2019 lawsuit (R pp 102-03); and

- granted the Town a preliminary injunction, ordering Ms. Rubin not to remove the sewer pipe that the Town unconstitutionally installed (R pp 104-11).

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.

ARGUMENT[2]

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 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

[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.

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 end its occupation of Ms. Rubin's property.

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 government 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 the 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 108 ("Defendant has an adequate remedy at law—i.e. compensation."); App. 14.) 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]." (App. 14.) But just a few paragraphs earlier, the trial court said that the rule of *Thornton* was that Ms. Rubin *had to* seek injunctive relief. (App. 12.) 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; *Pelham*, 303 N.C. at 432, 279 S.E.2d at 831. Those holdings are based on an assumption that is, fortunately, 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 a landowner's claim was not moot even though a completed highway was built on the land because the court could still require return of the land).

Here, the trial court held the exact opposite, vacating the condemnation judgment as moot and declaring that the Town's unconstitutional taking mooted Ms. Rubin's remedy. (App. 11.) This determination is just a rejection of *Midland*.

C. The federal constitution also requires the Town to ends its occupation of Ms. Rubin's property.

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 (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). 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 property. 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 2019 case, the trial court entered a preliminary injunction that prohibits Ms. Rubin from using her own property, even though the final judgment in the 2015 case rejected the Town's claim to her property. (R p 111.) That order also said that the Town was likely to succeed on its claim for declaratory and injunctive relief, (R p 109 ¶ 1), and those claims depend on the Town's argument that Ms. Rubin is limited to no remedy or to just compensation, but not return of her property, (R pp 86-88). For the same reason, the trial court erred by refusing to dismiss the Town's duplicative, 2019 action. (R p 102.)

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 pp 46-47.)[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 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.

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[3] The Town relied on the condemnation procedures created for the Department of Transportation. (R pp 36-37.) 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 46.)

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. 40-41); *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 46-52.) 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. (App. 10; 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. 38-39); *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. (App. 10; R p 108

¶ 20.) 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 p 12.) 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 13.) 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. (App. 13-14; R p 108 ¶ 21.)

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 granted the preliminary injunction because he determined that the Town's quick-take taking was retroactively transformed into "an inverse condemnation" when the Town lost its direct condemnation action. The order also accepted the Town's misinterpretation of *Wilkie*. (R pp 108 ¶¶ 20-22, 110 ¶ 3.) And the court's refusal to dismiss the 2019 case meant that it accepted the fake controversy created by the Town's confusion of inverse condemnation and *Wilkie*. (R pp 85-88, 102.)

III. The Trial Court Erred When It Refused to Dismiss the 2019 Action Based on Res Judicata or the Prior Action Pending Doctrine.

Ms. Rubin sought dismissal of the 2019 action on two alternative grounds. Either the original judgment was res judicata for the 2019 action, or the ongoing nature of the 2015 action meant that the 2019 case was abated under the prior action pending doctrine. The trial court apparently determined that the 2015 action was a zombie: too dead for prior action pending, and too alive for res judicata. That's impossible.

Ms. Rubin properly raised res judicata and prior action pending as defenses to the Town's second lawsuit. *See, e.g.*, *Catawba Mem'l Hosp. v. N.C. Dep't of Human Res.*, 112 N.C. App. 557, 566, 436 S.E.2d 390, 395 (1993) (res

judicata precluded declaratory-judgment action); *State, Dep't of Health & Human Servs. v. Armstrong ex rel. Gibbs*, 203 N.C. App. 116, 120, 690 S.E.2d 293, 296 (2010) (prior action pending abated declaratory-judgment action). A trial court's denial of a motion to dismiss on grounds of res judicata or prior action pending is reviewed de novo. *Shoaf v. Shoaf*, 219 N.C. App. 471, 475, 727 S.E.2d 301, 304 (2012) (prior action pending); *Quets v. Needham*, 198 N.C. App. 241, 249, 682 S.E.2d 214, 219 (2009) (res judicata). Under that or any other standard, the trial court erred in failing to dismiss this case.

A. The Town's duplicative action was barred by the prior action pending doctrine.

The Town's 2019 action raised the same issues as those pending in the 2015 action. Under the prior action pending doctrine, this redundancy required dismissal of the 2019 action.

Under the prior action pending doctrine, a prior pending lawsuit between the same parties over substantially the same issues abates a later filed lawsuit. *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Shoaf v. Shoaf*, 219

N.C. App. 471, 475-76, 727 S.E.2d 301, 305 (2012) (quoting *Jessee v. Jessee*, 212 N.C. App. 426, 438, 713 S.E.2d 28, 37 (2011)).

To test for issue overlap, the North Carolina courts consider not only the claims advanced in the prior lawsuit, but also the claims that *could* arise in that lawsuit. *Weaver v. Early*, 325 N.C. 535, 538, 385 S.E.2d 334, 336 (1989). For that reason, this Court has held that a prior inverse-condemnation action abates a later-filed condemnation action. *Dep't of Transp. v. Stimpson*, 813 S.E.2d 634, 640-41 (N.C. Ct. App. 2018). Two condemnation actions over the same property cannot proceed simultaneously. *Id.*

Here, the trial court erred by refusing to apply these basic principles.

First, the 2015 action was pending and prior to the 2019 action. The day after the 2015 case was remanded from this Court, Ms. Rubin filed a motion to enforce the judgment. (R p 60.) That motion was pending in the 2015 case when, over a month later, the Town retaliated by filing its 2019 action. (R p 3.) As other courts have noted, post-judgment motions in a prior case mean that a prior case is still pending. *See, e.g.*, *Steffens v. Harrison*, No. KNOFA104112694, 2017 WL 3248813, at *3 (Conn. Super. Ct. June 30, 2017).

Second, the Town's second action involved the same parties. (R pp 3, 46.)

Third, the two actions presented the same issues and relief. Ms. Rubin's motion to enforce the judgment asked the trial court to confirm that the Town had no claim to an easement on her property, and to order the Town to end its

occupation of her property. (R pp 60-64.) The Town's 2019 action merely restates the Town's opposition to the motion to enforce. In this case, the Town asked the trial court to declare that the Town owned an easement on Ms. Rubin's property, and that the Town can keep its sewer pipe on her land. (R pp 87-88.) In fact, to show that a "genuine controversy" existed sufficient to support the 2019 declaratory-judgment action, the trial court had to *refer* to the prior pending action. (R p 107 ¶¶ 12-13.)

Application of the prior action pending doctrine should have been that straightforward, but the trial court declined to see it that way. In fact, the trial court's order didn't offer any explanation for denying Ms. Rubin's motion to dismiss. (R p 102.) That's because there is none.

B. In the alternative, res judicata precluded the Town's second lawsuit.

Res judicata protects parties from relitigating decided issues, or issues that could have been litigated, in a prior action. That doctrine barred the Town's 2019 action from relitigating whether the Town has a claim to an easement on Ms. Rubin's property.

Under the doctrine of res judicata (or claim preclusion), "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C.

1, 15, 591 S.E.2d 870, 880 (2004)). Res judicata bars relitigation of "every ground of recovery or defense which was actually presented or which could have been presented in the previous action." *Id.* at 7, 719 S.E.2d at 93 (quoting *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336-37 (1988)). The estoppel effect extends to "to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Id.* (quoting *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985)).

The trial court erred when it refused to find the 2019 action precluded by the 2015 action. The 2015 action ended in a final judgment between the same parties involved in the 2019 action. (R pp 8-13, 83-88.) And the 2019 action raises the same issue already decided in the 2015 case. The Town's 2019 action asks whether the Town owns a sewer easement across Ms. Rubin's property. (R pp 87-88.) The 2015 judgment rejected the Town's claim to that very easement. (R pp 8, 13.)

Res judicata precluded relitigation of the Town's claim to an easement on Ms. Rubin's property. The Town's 2019 lawsuit is just looking for a do-over.

* * *

For either of these reasons, the trial court erred by denying Ms. Rubin's motion to dismiss. And because the defenses raised by Ms. Rubin's motion are

meritorious, the court likewise erred by finding that the Town had a likelihood of success in the 2019 case and granting a preliminary injunction.

IV. The Town's Second Lawsuit Is Meritless, Requiring Dismissal of the Suit and Denial of The Town's Request for a Preliminary Injunction.

The second complaint should have been dismissed for an additional reason—there was no genuine existing controversy between the parties. In the same vein, the trial court erred in entering a preliminary injunction where the Town was not likely to succeed on the merits of its claim.

An order on a motion to dismiss under Rule 12(b)(6) is reviewed de novo. *Holton v. Holton*, 258 N.C. App. 408, 416, 813 S.E.2d 649, 655 (2018). So, too, for preliminary injunctions. *J & M Aircraft Mobile T-Hangar, Inc. v. Johnston Cty. Airport Auth.*, 166 N.C. App. 534, 537, 603 S.E.2d 348, 350 (2004).

The Town's theory as presented in the complaint misstates the law. There is no dispute about it: The Town has no claim to Ms. Rubin's property.

As the movant for a preliminary injunction, the Town had to prove a likelihood of success on the merits of the 2019 action. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). Likewise, to avoid dismissal of its claim for a declaratory judgment, the Town had to prove the existence of a genuine, good-faith controversy regarding legal rights that aren't already settled. *See Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 631, 808 S.E.2d 576, 581 (2017); *see also Carter v. Stanly Cty.*,

125 N.C. App. 628, 631, 482 S.E.2d 9, 11 (1997) ("When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) will be granted.").

The Town couldn't rely on the "controversy" created by Ms. Rubin's filing of the motion to enforce the judgment in the 2015 case, since that controversy was already to be decided in a prior pending action. Yet that's the only controversy offered by the Town or found by the court below. (R pp 87, 107 ¶¶ 12-13.)

When, as here, the parties' rights were already "plain and clear," a declaratory-judgment action must be dismissed. *Fuller v. Easley*, 145 N.C. App. 391, 399, 553 S.E.2d 43, 49 (2001).

The Town's 2019 action should have dismissed because its premises are wrong. The complaint claims that Ms. Rubin's remedy for an unconstitutional taking is just compensation (R pp 87-88), but the actual remedy is return of the taken property. *Supra* Argument § I.A & C. The complaint says that Ms. Rubin was supposed to file an inverse condemnation action to seek return of the property (R p 86 ¶ 21), but that's wrong, too. *Supra* Argument § II. And the complaint says that *Wilkie* changed the law in the Town's favor. (R p 88.) Not so. *Supra* Argument § II.D.

For the same reasons, the trial court erred in entering a preliminary injunction, since the Town was not likely to succeed on the merits. Instead, the trial court entered a preliminary injunction, adopting the Town's legal theories in "findings of fact" that are not afforded any deference. (R pp 106-08 (findings 8-11, 13-14, 16-26, 28-29)); *State v. Johnson*, 837 S.E.2d 169, 174 (N.C. Ct. App. 2019) (conclusions of law improperly denominated as findings of fact are not entitled to deference); *A.E.P.*, 308 N.C. at 402, 302 S.E.2d at 760 ("[A]n appellate court is not bound by the findings [in a preliminary injunction order], but may review and weigh the evidence and find facts for itself.").

In sum, the Town's duplicative 2019 case was an ill-conceived lawsuit with no chance of success. It should have been dismissed, and no preliminary injunction should have issued.[4]

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 dismiss and deny the Town's motion for preliminary injunction. Given the complexity

[4] The Town points to others' *current* use of the sewer pipe as its irreparable harm justifying its preliminary injunction. (R p 23.) But those houses were not there when the Town condemned Ms. Rubin's property and were not there when the final judgment was entered in the 2015 case. (R pp 9, 11, 22; 1-9-20 T pp 110-11.) Besides, Ms. Rubin has repeatedly offered to work with the Town as it reroutes the sewer pipe around her property—which the undisputed evidence case declared possible. (1-9-20 T pp 30-33; R S (I) 144-45).

and importance of the interests at stake, Ms. Rubin also requests the opportunity to present oral argument.

This the 30th day of June, 2020.

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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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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 post-age-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 30th day of June, 2020, addressed as follows:

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No. 20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

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CONTENTS OF APPENDIX

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Appendix Pages

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the 17th day of January, 2020.

G. Bryan Collins
Superior Court Judge Presiding

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
WAKE COUNTY	15-CVS-5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**ORDER GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT**

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

2. Rule 60(b) provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (4) [t]he judgment is void…(6) [a]ny other reason justifying relief from the operation of the judgment." "'The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* at 71 (citing *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the 17th day of January, 2020.

G. Bryan Collins
Superior Court Judge Presiding

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 15 CVS 5836 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

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[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

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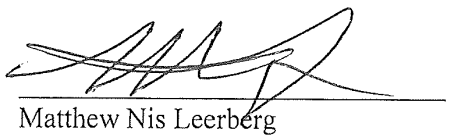
[2] As noted in the Judgment, Ms. Rubin is entitled to payment of her attorneys' fees and costs incurred in connection with this litigation. For efficiency, Ms. Rubin will wait to seek payment of those fees until after the Town has fully complied with the Judgment.

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

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 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 judication 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

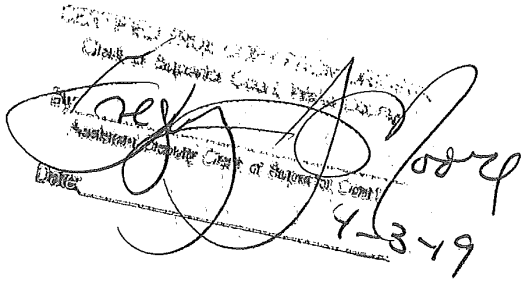


EXHIBIT B

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

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

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 Leerberg, Attorney at Law, For Rubin, Beverly L.

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15-CVS-5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**MOTION FOR RELIEF FROM JUDGMENT** **[OTHR]**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted, this the 30th day of August, 2019.

David P. Ferrell
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Norman W. Shearin
N.C. State Bar No.: 3956
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Nexsen Pruet PLLC
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Raleigh, NC 27612
Telephone: (919) 755-1800
Facsimile: (919) 890-4540
Attorney for Plaintiff Town of Apex

CERTIFICATE OF SERVICE

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

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

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

This the 30th day of August, 2019.

David P. Ferrell

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

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.

End of Document

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.

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.

End of Document