NO. COA 20-304 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 15-CVS-5836

* *

PLAINTIFF-APPELLEE TOWN OF APEX'S RESPONSE TO BRIEF OF *AMICUS CURIAE*

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PLAINTIFF-APPELLEE TOWN OF APEX'S RESPONSE TO BRIEF OF *AMICUS CURIAE*

* *

Plaintiff-Appellee the Town of Apex ("Town"), pursuant to N. C. R. App. P. 28(i)(6), respectfully submits this Brief in response to the *Amicus Curiae* Brief of the North Carolina Advocates for Justice and John Locke Foundation ("Amicus parties"). The arguments contained herein are limited to a concise rebuttal of the arguments presented by the Amicus

parties in their *Amicus Curiae* Brief ("Amicus Brief"), filed herein on 1 July 2020.

INTRODUCTION

The Amicus parties ignore the procedure posture of this case and ignore the actual rulings of Judge O'Neal and Judge Collins. The Amicus parties attempt to interject a constitutional issue where there is not one, and attempt to lead this Court to address issues that are untimely raised and foreclosed by the landowner's own conduct. In their zeal to have this Court alter and reverse settled North Carolina condemnation law, they advocate for the Court turning existing pleading and injunction case law and Rules of Civil Procedure on their heads.

The Amicus parties ignore the landowner's failure to seek or receive injunctive relief, and ignore the failure of Judge O'Neal's Judgment to order permanent injunctive relief or order a "revesting" of the property in Rubin. Further, they fail to acknowledge that Judge Collins was asked in 2020 to exercise his discretion and order a sewer line serving 50 residential homes removed – relief that the original superior court judge presiding in 2016 and 2017 did not order. These Amicus parties picked the wrong landowner's case to co-op to advance their legislative position

that North Carolina's condemnation laws to "strengthen the public use requirement."

The Amicus parties ignore existing North Carolina condemnation law and misstate inverse condemnation law. In the cases cited by the Amicus parties, the landowners challenging the right to take pled or moved for injunctive relief and the courts' addressed it – Rubin did not do this here. The Amicus parties cite no condemnation case where a North Carolina appellate court has ordered utilities removed, much less a condemnation case where a North Carolina appellate court has ordered utilities removed where the landowner did not plead or request it.

FACTS RELEVANT TO THE AMICUS ARGUMENTS

A complete recitation of the facts is contained in the Town's Appellee Brief filed herein. The Town includes herein certain facts relevant to addressing the arguments raised by the Amicus parties.

Rubin was notified of the Town Council's decision to condemn for the 40-foot sewer line easement on 5 March 2015. (R pp 63-64; 68). Rubin did not seek injunctive or other relief in the trial court prior to the Town's filing of its condemnation complaint approximately two (2) months after the resolution was adopted and before filing. After the filing, Rubin's

attorney sent the Town a letter stating Rubin intended to contest the right to take, seek an expedited hearing on her motion, and would seek damages if successful in her challenge. (R p 72). Rubin did not state that she requested or expected the sewer line to be removed, or that she would seek injunctive relief – and ultimately did not ask for this expedited hearing.

Rubin filed an Answer, requesting dismissal, but did not request any injunctive relief. (R pp 20-24). Almost a year later, Rubin filed a motion for an "all other issues" hearing, and the only issue raised was the Town's right to take Rubin's property for the sewer easement plead in the Original Condemnation Complaint. (R pp 25-26). Again, Rubin did not plead or request permanent injunctive relief. The Amicus parties attempt twist these facts – but the fact remains that the Town did not "rush" to act after filing the condemnation complaint. It was only after the landowner filed an answer and did not raise injunctive relief that the Town proceeded to construct a modified sewer line beneath Rubin's property.

The Judgment dismissed the Town's claim for an acquisition of a forty (40) foot wide sewer easement across Rubin's property as "null and

void", rendering it a nullity. (R pp 33-39). The Judgment did not require removal of the sewer line, did not find that sewer line was installed pursuant to "quick take," and did not hold that title is reverted back to or revested with Rubin.

In the over 3 months from the entry of the Judgment to the denial of the Town's Rule 59 and 60 motion, Rubin did not ask Judge O'Neal to address the sewer line remaining on her property, did not ask Judge O'Neal to clarify her Judgment, and otherwise did nothing to advance the arguments in Court the Amicus parties now attempt to advance for her, that the Judgment required removal and it would be unconstitutional for the sewer line to remain. (Jan. 2017 T).

Given the language and effect of the Judgment, the construction of the 18-feet deep sewer line constituted a physical invasion and inverse condemnation of a sewer line easement on Rubin's property. (R p 157, ¶ 12). The dismissal of the Original Condemnation Action had no effect on the rights inversely taken. (R p 159-160, ¶ 11). The result is the Town acquired ownership of the sewer line easement on 27 July 2015. The sewer line is owned and operated by the Town, remains in place, is in use, and serves approximately 50 residential homes and/or lots located in

a properly annexed, rezoned and approved subdivision in the Town. (R pp 157-158, ¶14; 164, ¶7; Doc. Ex. 17).

Judge Collins orders in the 2015 original condemnation case found that Rubin was not entitled to mandatory injunctive relief to have the sewer line removed, concluding that she failed to plead or request said injunctive relief from the trial court (Judge O'Neal) and Judge O'Neal's Judgment did not order any injunctive relief. (R pp 155-161; Concl. of Law ¶ 9; R pp 162-168; Concl. of Law ¶ 4, 17). Judge Collins held that the effect of the Judgment is that the Town's underground sewer line and easement was a proper exercise of their sovereign power of inverse condemnation and Rubin's only remedy is at law – and is the recovery of just compensation for the value of the property rights taken by inverse condemnation. (R p 162-168). Judge Collins held that the 18 October 2016 Judgment that Rubin has used to support all her claims herein shall not be used prospectively to challenge the construction, maintenance and operation of the sewer line and easement under her property. (R p 162-168). Judge Collins' did not vacate the Judgment, did not alter its impact in dismissing the original condemnation complaint, and did not alter the

landowner's ability to seek attorney's fees and costs for obtaining a dismissal of the original condemnation complaint.

ARGUMENT

I. LANDOWNER'S FAILURE TO PLEAD INJUNCTIVE RELIEF AND JUDGE O'NEAL'S FAILURE TO ORDER IT PRECLUDE THE LANDOWNER'S TARDY REQUEST FOR INJUNCTIVE RELIEF

Rubin's failure to plead injunctive relief and the Judgment's failure to order permanent injunctive relief is fatal to the position advocated by the Amicus parties herein. N. C. R. Civ. P. 7(b)(1) requires an application to the court for an order to be by motion which… shall be made in writing, shall state with particularity the grounds therefor, ***and shall set forth the relief or order sought.*** [emphasis supplied]. *In re McKinney,* 158 N.C. App. 441, 581 S.E.2d 793 (2003);. *See Farm Lines, Inc. v. McBrayer,* 35 N.C.App. 34, 40, 241 S.E.2d 74, 78 (1978) (trial court erred by granting relief not sought in motion, because motion failed to comply with requirement of Rule 7(b)(1) that it "set forth the relief or order sought"). Rubin failed to set forth any injunctive relief in her pleading or any motion before Judge O'Neal, and therefore Rubin was not entitled to any injunctive relief in the Judgment.

Judge O'Neal's Judgment cannot be viewed as *implying, self-executing,* or *automatically issuing* permanent injunctive relief, as the Amicus parties apparently advocate. N. C. R. Civ. P. 65(d) provides:

> (d) Form and scope of injunction or restraining order. - Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; ***shall be specific in terms; shall describe in reasonable detail,*** and not by reference to the complaint or other document, ***the act or acts enjoined or restrained;*** … [emphasis supplied]

The purpose of Rule 65(d), taken from its federal counterpart, is to make certain that the restrained party is fully aware of what conduct is prohibited and to prevent undue restraint upon that conduct. *Woodlief, Shuford NC Civil Practice and Procedure* § 65:7 (2017). Judge O'Neal's Judgment cannot be read under the Rules of Civil Procedure and case law as granting a permanent injunction to Rubin; such relief cannot be *implied, self -executing* or *automatic* – and still be "specific in terms" and "describe in reasonable detail the act or acts enjoined or restrained."

The Amicus parties cite no condemnation case where a landowner failed to plead injunctive relief and the court still granted the landowner a permanent injunction. The landowners in the cases cited by the Amicus parties and Rubin either plead injunctive relief to the court considering the challenge to the right to take, or filed separate lawsuits seeking

mandatory injunctive relief. (See *Nelson, Batts, Cozad, Fisher, Town of Midland, City of Statesville, Greensboro-High Point* cases). And in *Town of Midland v. Morris*, the landowners filed motions for preliminary injunction and had them heard before the construction of the pipeline occurred. 209 N.C.App. 208, 213, 704 S.E.2d 329, 334 (2011).

A party asserting constitutional rights still must properly plead and properly request relief from the court. The rules of civil procedure are not suspended merely because a party asserts constitutional rights – and the Amicus parties cite no case so holding. The Amicus parties join Rubin in trying to misdirect the court from the true procedural issue at hand. Cases like the *Town of Midland v. Morris* and *City of Statesville v. Roth* illustrate how a landowner properly seeks permanent injunctive relief in a condemnation case or requests "revesting" of the property in the landowner – and the trial court's judgement in *Roth* shows what a judgment ordering injunctive relief and revesting looks like. *Roth*, at 803, 336 S.E. 2d 142, 143. The trial court in *Roth* included this in its judgment in the conclusion of law section:

> "3. That the filing of the Complaint by the petitioner does not vest title in the petitioner since the taking is not for a public purpose and the property sought to be acquired by the petitioner is revested

> with the respondents, and respondents are entitled to a Judgment on their Counterclaim enjoining and restraining the petitioner from going upon or about the respondents' land that is described in the Complaint." *Id.*

And included this in the "order" section of the trial court's judgment in *Roth*:

> "1. That the petitioner's Complaint be dismissed and the property sought to be acquired is revested in the respondents.
>
> 2. That the 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." *Id.*

Judge O'Neal issued no such order. Rubin's failure to ask Judge O'Neal to grant injunctive relief or clarify her order, and Rubin's failure to appeal Judge O'Neal's Judgment, are fatal to her 2020 attempts to receive permanent injunctive relief after the fact. The Amicus parties ignore this critical issue in an attempt to have this Court reach into the past and order relief never plead by the landowner nor ordered by the presiding judge.

II. ALLEGING A CONSTITUTIONAL ISSUE DOES NOT CONTROL THE COURT'S EXERCISE OF DISCRETION.

It was not lost on Judge Collins that Rubin is using the motion to enforce judgment to request that he grant a mandatory injunction in

2020 to remove an underground sewer line serving 50 residential homes – when Judge O'Neal, the trial court judge that originally heard the matter almost 4 years earlier, did not order the sewer line removed. Except for possibly the court's "inherent authority", none of the asserted bases for the motion implicate constitutional rights. The Amicus parties cite no case where a trial judge has granted a permanent injunction by using inherent authority in a condemnation case. Having a physical invasion and sewer line on one's property does not automatically trigger a constitutional issue. North Carolina statutes and case law say that if a municipality physically invades a landowner's property, an inverse condemnation has occurred and the landowner's sole remedy is compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *Beroth Oil Co. v. N.C. Dept. of Transp.*, 367 NC 333, 341, 757 S.E. 2d 466, 473 (2014) ("In its simplest form, a taking always has been found in cases involving 'a permanent physical occupation.'"); *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

The Judgment does not address in any respect the installation of the sewer line and resulting inverse condemnation, which pre-dates the Judgment. So the Judgment cannot be read to make any findings as to

the constitutionality of the installation of the sewer line and corresponding easement. The Judgment simply dismissed the Town's condemnation claim which, based on Rubin's inaction on the issue of an injunction, was the only remedy available to Rubin. *In re McKinney, supra*; *State Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E.2d 248 (1967).

As the Supreme Court held in *Thornton*, if the landowner does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – which here is an inverse condemnation claim – but not a mandatory injunction. *Id*. at 240, 241. The facts of *Thornton* are substantially similar to the case at bar, and are discussed in detail in the Town's Appellee Brief, Argument II, D.

The Amicus parties misconstrue *Thornton* in an attempt to give Rubin a pass for not seeking injunctive relief before Judge O'Neal. *Thornton* directs the landowner to remedies at law, and does not state that a permanent injunction is a remedy to remove already constructed facilities on the property in a condemnation action. This certainly explains why the landowners in the *Town of Midland* case and other

cases cited by the Amicus parties moved for injunctive relief prior to construction of the facilities.

The Amicus parties' arguments about "quick take" are misplaced. There is no evidence in the Record to support a finding or conclusion that "quick take" can serve as the basis to order removal of the sewer line. It is beyond the scope of Judge O'Neal's Judgment, and not supported by *Thornton*. The only relief granted to Rubin by the Judgment is the dismissal of the original condemnation action. The allegation of a constitutional issue does not change the procedural posture, does not cure the landowner's pleading failures, and does not change settled North Carolina law.

Also, under *Knick v Twp. of Scott,* the United States Constitution is only triggered if the Town attempted a taking without paying just compensation. 139 S.Ct. 2162 (2019). The Town did not violate Defendant's Fifth Amendment rights because the Town paid compensation prior to the taking. *Id.* Further, the Amicus parties' arguments that Judge Collins should have returned her property free and clear of the Town's sewer line is not supported by North Carolina law and ignores the procedural posture of the motion before Judge Collins.

The cases cited by Rubin for the return of her property differ from this case from a procedural standpoint and what was pled by the landowners. In each of those cases, the landowner is requesting the judge who is making the decision on the public use or benefit issue to grant injunctive relief and order the revesting of title to the landowner. But here, Rubin did not ask the presiding judge (Judge O'Neal) for injunctive relief or for revesting, but is now asking the trial court 3 ¾ years after the sewer line was installed – in the context of a motion for discretionary relief.

Further, it is even more of a stretch for the Amicus parties to take Judge Collins to task for exercising his discretion to grant the Town prospective relief from the Judgment per Rule 60(b) as it pertains to the existence of the sewer line beneath Rubin's property – under the facts and circumstances of this case. Said decision does not implicate a constitutional issue, and was a proper exercise of his discretionary authority.

III. JUDGE COLLINS PROPERLY EXAMINED THE TOWN'S PHYSICAL INVASION AS AN INVERSE TAKING.

Although Judge Collins had ample basis as described above to enter his Orders herein, a separate basis is his analysis that the effect of Judge O'Neal's Judgment is that the Town's physical invasion of Rubin's

property on 27 July 2015 was an inverse taking. Judge Collins properly found that the effect of the Judgment is that the Town physically invaded Rubin's property without an applicable condemnation complaint. The effect of Judge O'Neal's Judgment is that it is as if the original condemnation had never been filed – it is a legal nothing. *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E. 2d 103, 108 (1970)("…null and void, i.e., as if it never happened."). Without more in the Judgment, what we are left with is a physical invasion by the Town beneath Rubin's property without a condemnation complaint. Under North Carolina law, a physical invasion by an entity with the power of condemnation is a taking, and the power of eminent domain insulates the Town from trespass actions. *Beroth Oil Co., supra; McAdoo, supra.* The exclusive remedy for a physical invasion of private property by a municipality is inverse condemnation and the payment of compensation.

The Amicus parties advocate for a "fruit of the poisonous tree" concept – a concept with no support in North Carolina condemnation law. The Judgment used the words "null and void." Those words have meaning and have been interpreted by our courts. *Hopkins, supra.* When applied herein, particularly given the absence of any injunctive relief or

"revesting" language in the Judgment, Judge Collins properly applied settled North Carolina law and found that the underground sewer line was an inverse taking, thus resulting in the landowner having the remedy of just compensation (as opposed to no remedy at all). This is correct under the facts and circumstances of this case, and in any event properly supports his exercise of discretion in granting the orders herein.

The Amicus parties join Rubin in misstating Judge Collins' analysis and use of the *Wilkie* case. Judge Collins properly references the *Wilkie* case for providing Rubin a remedy for the Town's physical invasion and inverse condemnation. The *Beroth Oil* and *McAdoo* cases support Judge Collins' analysis that an inverse taking is what resulted from the Town's physical invasion coupled with Judge O'Neal's Judgment dismissing the original condemnation complaint as null and void but not ordering it removed.

IV. THE POLICY ARGUMENTS RAISED ARE MISPLACED[1]

In ruling on the motions herein, Judge Collins has not overruled Judge O'Neal. The Judgment entered by Judge O'Neal is final and was

[1] The policy arguments directed at the 2019 case and declaratory judgment action will be addressed in the Town's Response to the Brief of the Amicus Parties therein.

based upon an all other issues evidentiary hearing. Judge Collins did not re-hear the issues adjudicated by Judge O'Neal and did not reverse the Judgment ruling that the original eminent domain claim herein was null and void. In fact, Judge Collins' orders are in accord with Judge O'Neal's Judgment – for neither orders any permanent injunctive relief. Moreover, the motion to enforce judgment was filed by Rubin. She sought injunctive relief not request of or addressed by Judge O'Neal in the Judgment. Judge Collins denied the motion based on grounds not addressed by Judge O'Neal in the Judgment. So Judge Collins has not overruled another superior court judge.

It is Rubin's actions that do not promote finality in judgments. If she thought in 2016 what she argues now, why not ask Judge O'Neal to clarify her judgment, order removal, order "revesting", or otherwise actually address the relief she now claims she's entitled to. Rubin's request for injunctive relief 3 ¾ years after the sewer line was removed flies in the face of the Amicus parties' arguments here – and is counter to the finality arguments raised. North Carolina's statutes and case law establishes the rights and a path for landowners who object to the right to take to follow – Rubin just did not follow it. Instead, she and the

Amicus parties are taking Judge Collins to task in 2020 for not ordering the removal of a sewer line that the original presiding judge did not order removed in 2015, 2016 or 2017. Such an argument fails on policy grounds.

Finally, the Amicus parties file this Brief in part to have this Court alter and reverse settled North Carolina condemnation law because their attempts to "strengthen the public use requirement" though legislative changes have not been successful (Amicus parties' Motion, p 3). However, the suggested legislative changes perennially at issue before the North Carolina General Assembly would not change the result herein – and may actually clarify the public use issues underlying the original condemnation action. As the pending proposed legislative changes to N.C. Gen. Stat. § 40A-3 indicate, condemnors would more clearly possess the power of eminent domain to acquire property by condemnation to connect a customer or customers to utilities. (See App. 1-2; House Bill 3 (2019-2020 Legislative Session), p 2, lines 25-28; App 4, Legislative Staff Summary of House Bill 3, Section 4, third bullet point)[2]. Regardless, the

[2] Similar legislation was introduced but not enacted in recent past legislative sessions: House Bill 3, 2nd edition (2017-2018 Legislative Session); House Bill 548, 5th edition (2015-2016 Legislative Session).

Amicus parties' desire to change North Carolina condemnation law should not influence this Court to grant Rubin relief she never pled or requested before Judge O'Neal, and Judge O'Neal did not order.

CONCLUSION

For these reasons and the reasons contained in the Town's Appellee Brief, the Town respectfully requests that the Court affirm Judge Collins' order denying Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus and affirm Judge Collins' order granting the Town's Motion for Relief from Judgment.

This the 31st day of August, 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, counsel for the Appellee certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/ David P. Ferrell
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the parties by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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This the.31st day of August, 2020.

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CONTENTS OF APPENDIX

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

H 1

HOUSE BILL 3

Short Title:	Eminent Domain.	(Public)
Sponsors:	Representatives D. Hall, Lewis, Goodman, and McGrady (Primary Sponsors). *For a complete list of sponsors, refer to the North Carolina General Assembly web site.*	
Referred to:	Judiciary, if favorable, Rules, Calendar, and Operations of the House	

January 31, 2019

A BILL TO BE ENTITLED

AN ACT TO AMEND THE NORTH CAROLINA CONSTITUTION TO PROHIBIT CONDEMNATION OF PRIVATE PROPERTY EXCEPT FOR A PUBLIC USE, TO PROVIDE FOR THE PAYMENT OF JUST COMPENSATION WITH RIGHT OF TRIAL BY JURY IN ALL CONDEMNATION CASES, AND TO MAKE SIMILAR STATUTORY CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. Article I of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 39. Eminent domain.**

Private property shall not be taken by eminent domain except for a public use. Just compensation shall be paid and shall be determined by a jury at the request of any party."

SECTION 2. The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the primary election to be conducted in March 2020, which election shall be conducted under the laws then governing elections in the State. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to prohibit condemnation of private property except for a public use and to provide for the payment of just compensation with right of trial by jury in all condemnation cases."

SECTION 3. If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State. The Secretary of State shall enroll the amendment so certified among the permanent records of that office. The amendment set out in Section 1 of this act becomes effective upon certification and applies to takings after that date.

SECTION 4. G.S. 40A-3 reads as rewritten:

"**§ 40A-3. By whom right may be exercised.**

(a) Private Condemnors. – For the public ~~use or benefit,~~ use, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by ~~law.~~law:

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, ~~telegraphs, telephones,~~communication facilities, electric power lines, electric lights,

public water supplies, public sewerage systems, flumes, bridges, facilities related to the distribution of natural gas, and pipelines or mains for the transportation of petroleum products, coal, natural gas, limestone or minerals. Land condemned for any liquid pipelines ~~shall:~~shall meet both of the following requirements:

a. Not be less than 50 feet nor more than 100 feet in ~~width; and~~width.

b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

...

(b) Local Public Condemnors – Standard Provision. – For the public ~~use or benefit,~~ use, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following ~~purposes.~~purposes:

...

(b1) Local Public Condemnors – Modified Provision for Certain Localities. – For the public ~~use or benefit,~~ use, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property or interest therein, either inside or outside its boundaries, for the following ~~purposes.~~purposes:

...

(c) Other Public Condemnors. – For the public ~~use or benefit,~~ use, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated ~~purposes.~~purposes:

...

(d) Connection of Customers. – For the public use, private condemnors, local public condemnors, and other public condemnors in subsections (a), (b), (b1), and (c) of this section shall possess the power of eminent domain and may acquire by purchase, gift, or condemnation any property for the connection of any customer or customers."

SECTION 5. Section 4 of this act is effective when it becomes law and applies to takings occurring on or after that date. The remainder of this act is effective when it becomes law.

HOUSE BILL 3: Eminent Domain.

2019-2020 General Assembly

Committee:	House Rules, Calendar, and Operations of the House	**Date:**	February 25, 2019
Introduced by:	Reps. D. Hall, Lewis, Goodman, McGrady	**Prepared by:**	Jeremy Ray* Staff Attorney
Analysis of:	First Edition		

OVERVIEW: ***House Bill 3 proposes that the North Carolina Constitution be amended to prohibit condemnation of private property except for a public use and to require the payment of just compensation for the property taken in an amount to be determined by jury trial, if requested by any party. The bill also makes a conforming statutory change to state the purpose for which property may be taken by eminent domain as "public use," and clarifies the types of construction projects for which private property may be acquired by eminent domain by private condemnors, local public condemnors and other public condemnors subject to G.S. 40A-3.***

[As introduced, this bill was identical to S27, as introduced by Sens. B. Jackson, Britt, Sanderson, which is currently in Senate Rules and Operations of the Senate.]

BACKGROUND: The right of citizens in North Carolina to receive just compensation for property taken by eminent domain for public use is guaranteed under both the United States Constitution and the North Carolina Constitution.[1]

The North Carolina Supreme Court has recognized several tests to determine if a particular taking is permissible, including "public use", "public purpose," and "public benefit,"[2] and has also held that the General Assembly "has the right to determine what portion of this power it will delegate to public or private corporations."[3]

The General Assembly has enacted various statutes authorizing the use of eminent domain to acquire property by condemnation for "public use or benefit" under certain circumstances.

Chapter 40A of the General Statutes provides condemnation procedures for private condemnors, local public condemnors and other public condemnors. G.S. 40A-3 provides the list of specific purposes for which the power may be used by those condemnors. Other State agencies are granted the power of eminent domain for specified purposes in other Chapters of the General Statutes, such as the Department of Transportation under Chapter 136.

---

[1] The 5th Amendment to the United States Constitution states that private property shall not "be taken for public use without just compensation." Article I, Section 19 of the North Carolina Constitution states that "[n]o person shall be...in any manner deprived of his ... property, but by the law of the land." The North Carolina Supreme Court has ruled that the fundamental right to just compensation for property taken by eminent domain arises from this section. Long v. City of Charlotte, 306 N.C. 187, 195–96, 293 S.E.2d 101, 107–08 (1982) (footnotes and citations omitted), superseded on other grounds by statute, Act of July 10, 1981, ch. 919, sec. 28, 1981 N.C. Sess. Laws 1382, 1402. In addition, Section 1 of the 14th amendment to the U.S. Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law."

[2] See, e.g, Carolina Telephone and Telegraph Co. v McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988), and Piedmont Triad Airport Authority V. Urbine, 354 N.C. 336, 554 S.E.2d 331 (2001).

[3] Carolina Telephone and Telegraph Co. v McLeod, supra, 321 N.C. at 429, 364 S.E.2d at 401.

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Director

Legislative Analysis Division
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Although the North Carolina Supreme Court has ruled that there is no State Constitutional right to a jury trial on the issue of compensation for property taken by eminent domain,[4] State statutes do authorize a jury trial on the issue of compensation for the taking of property.[5]

In 2006, the General Assembly made clear that the purposes in G.S. 40A-3 are the only purposes for which eminent domain may be exercised by private condemnors, local public condemnors, and other public condemnors. Local acts that broadened the power were repealed. The General Assembly also excluded economic development projects from the list of revenue bond projects from which eminent domain powers may be used by the State and municipalities.[6]

BILL ANALYSIS:

Section 1 proposes to amend the North Carolina Constitution by adding a new Section 39 to Article I that would prohibit the taking of private property by eminent domain except for a public use. The amendment also would require just compensation to be paid as determined by jury trial if requested by any party.

Section 2 provides that the amendment must be submitted to the voters of the State at the primary election held in March of 2020.

Section 3 provides that if a majority of the votes cast on the question favor the amendment, the State Board of Elections must certify the amendment to the Secretary of State, who must then enroll the amendment. The amendment would become effective upon certification and would apply to takings occurring after that date.

Section 4 amends G.S. 40A-3 to do all of the following:

- Change the purpose for which private, local public, and other public condemnors may condemn property from "public use or benefit" to "public use." By including this statutory change with the proposed constitutional amendment, this Section makes clear that, *in pari materia,* the General Assembly finds that condemnation by the authorized private, local public, and other public condemnors for a statutorily authorized reason remain valid as a public use.
- Clarify that the purposes for which private condemnors may acquire property for the public use include construction of "communication facilities" (replacing the current reference to "telegraphs" and "telephones") and "facilities related to the distribution of natural gas."
- Permit private condemnors, local public condemnors, and other public condemnors to acquire property by eminent domain for the connection of any customer or customers.

EFFECTIVE DATE: Section 4 of this act becomes effective when this act becomes law and applies to takings occurring on or after that date. The remainder of this act is effective when it becomes law.

**Brad Krehley and Bill Patterson, Staff Attorneys for the Legislative Analysis Division, contributed to this summary.*

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[4] Kaperonis v. NC State Highway Commission, 260 N.C. 587, 133 S.E.2d 464 (1963).

[5] G.S. 40A-29 (private condemnors), G.S. 40A-48(d) (public condemnors); G.S. 136-109 (DOT condemnations).

[6] S.L. 2006-224. The act was in part, a response to the U.S. Supreme Court decision in the case of Kelo v. City of New London (2005), 545 U.S. 469 (2005). The case held that the State of Connecticut could constitutionally condemn private property for the purpose of transferring some of the property to a third party for economic development purposes. The court found that the redevelopment plan pursuant to which the condemnation and transfer occurred was a public use. The court also reaffirmed its broad interpretation of the term "public purpose" as meeting the requirements of "public use."