No. 410P18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
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TOWN OF APEX, Plaintiff-Appellee, v. BEVERLY RUBIN, Defendant-Appellant.	From Wake County No. COA 20-304 15-CVS-5836

TOWN OF APEX, Plaintiff-Appellee, v. BEVERLY RUBIN, Defendant-Appellant.	From Wake County No. COA 20-305 19-CVS-6295

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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BACKGROUND

It has been almost *five years* since the superior court entered a Judgment rejecting the Town's attempted taking of Ms. Rubin's land because "[t]he paramount reason for the taking of the sewer easement is for a private interest and the public's interest [is] merely incidental." (R p 37.) In its petition for discretionary review, the Town does not challenge that conclusion, nor could it: the Town *already* appealed that Judgment to the Court of Appeals and petitioned this Court for review, losing both times. *See 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).

That should have been the end of it. After all, the Judgment rendered the Town's attempted taking "null and void." (R p 38.) That is, the Town had no right to take the land in the first place. Its actions violated the state and federal constitutions, which both prohibit takings for a private purpose. *See* U.S. Const. amend. IV; N.C. Const. art. I § 19. With the entry of the Judgment, title to the property automatically reverted to Ms. Rubin. The land belonged to her, and her alone. *See State Highway Comm'n v. Thornton*, 271 N.C. 227, 236-37, 156 S.E.2d 248, 255 (1967); 29A C.J.S. Eminent Domain § 516; *Town of Midland v. Morris*, 209 N.C. App. 208, 213-14, 704 S.E.2d 329, 334 (2011).

But the Town refused to leave.

The Town cooked up a number of bizarre theories for why its taking was permissible after all. The trial court bought them all. Perhaps the worst offender was the Town's proposal that the remedy for their unconstitutional taking was just compensation, as though the public-purpose requirement in our constitutions doesn't exist—an argument the Town renews in its petition.

Finally, though, justice was served. The Court of Appeals forcefully rebuked the Town, reminding the Town that it had already lost and had no legal right to stay on Ms. Rubin's land. *See, e.g.*, *Town of Apex v. Rubin*, 2021-NCCOA-187, ¶ 2 (criticizing the Town's "circuitous and strained application of North Carolina law"); *id.* (the Town's view is "not the law, nor can it be consistent with our Federal and State Constitutions"); ¶ 26 (rejecting the Town's twisted reading of *Wilkie v. City of Boiling Springs*, 370 N.C. 540, 809 S.E.2d 853 (2018), as an attempt to "weaponize that decision and deprive private property owners of the public purpose protection").

Alas, the Town still refuses to accept the consequences of its unconstitutional taking. The Town asks this Court to step in and save the Town from itself. That invitation should be rejected for a host of reasons.

First, the Town created this mess by moving forward with its flawed condemnation *even after Ms. Rubin told the Town that she would be challenging its right to take in the first place.* (*See* R p 24 (19 May 2015 letter alerting the Town of Ms. Rubin's intent); R p 20 (8 July 2015 answer, stating that the Town

lacked a public purpose and could not constitutionally take her land). The Town began installation of the sewer pipe two weeks *after* Ms. Rubin answered. (R pp 163-64.) Indeed, at the time the issue of public purpose was heard by the trial court, the land to be served by the sewer (and still owned by a private developer) was still vacant. No houses had been built. No lot had even closed. (R S (I) 292.)

The Town knew it was a risk to blaze ahead with construction while its threshold right to condemn was being challenged. This Court explained decades ago the consequences of that decision: "Even if the [government] now finds itself embarrassed by its having constructed the road prematurely, . . . [it] may not assert such embarrassment as a bar to this right of the [property owners]." *State Highway Comm'n v. Thornton*, 271 N.C. 227, 238 (1967).

Second, this case is *sui generis*—it is hard to imagine another municipality behaving the way the Town has here. Besides, it is not all that common in the first place for the government to lose a condemnation case for lack of a public purpose. It is telling indeed that the Town was not able to marshal any amicus support for its petition. No one wants to cosign the Town's intransigence in fact or its sophistry in law.

Third, the Town has no answer to *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). For example, the Town says that the

statutes offer Ms. Rubin no relief. But even if that were true, *Corum* confirms that there must be a remedy for the Town's constitutional violation. The Town says that this Court's older cases protect the government from being sued for unconstitutional conduct. But then *Corum* declared that "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

The Court of Appeals decided to hold *this* Town to account on *these* facts. *See Rubin*, 2021-NCCOA-187, ¶ 61 ("[T]his case presents a unique circumstance . . . ."); *see also id.* ("We limit our holding to cases [with similar facts].")

On remand in the 2019 case, the superior court must craft a remedy for the Town's refusal to leave Ms. Rubin's land. The court might decide that the Town needs to re-route the sewer pipe around Ms. Rubin's land—something the Town could have done at any time. *See Town of Apex v. Rubin*, 2021-NCCOA-188, ¶ 32 ("Based on the evidence of record, we vacate finding of fact 28 and the portion of conclusion of law 10 stating that there are no practical alternatives to the sewer line already installed on Ms. Rubin's land."). Or, the court might decide that the Town is engaging in a sort of forced perpetual lease, and must pay for that use under the law of continuing trespass. *See Rubin*, 2021-NCCOA-187, ¶ 60.

The Town can hardly complain about that outcome. Again, it has already been decided in the 2015 Judgment, as upheld on the Town's first round of

appeals, that the Town had and has no right to remain on Ms. Rubin's land. After all these years, it is time for the Town to face the consequences of its choices.

REASONS WHY THE PETITION SHOULD BE DENIED

The Town's petition should be denied. It simply does not meet any of the statutory standards for review.

First, the Town has failed to show that the "subject matter of the appeal has significant public interest." N.C. Gen. Stat. § 7A-31(c)(1). No amicus party has surfaced, nor has the Town explained how the public will be impacted by the Court of Appeals decision.

Second, the Town has failed to show that this matter "involves legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat § 7A-31(c)(2). To be sure, it is immensely important that the government not be allowed to get away with unconstitutional conduct. But no one except the Town thinks that kind of scot-free outcome is even on the table.

Third, the Town has failed to show that the "decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N.C. Gen. Stat. § 7A-31(c)(3). The best the Town can muster is to point to pre-*Corum* cases for principles that are plainly moribund under modern law. *See Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 2021-NCSC-58, ¶ 18 ("Sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to

remedy violations of their rights guaranteed by the Declaration of Rights." (cleaned up)). That's not to mention the Town's misreading of *Wilkie* as a decision that *expanded* government power. But *Wilkie* rejected the Town's argument as one "attribut[ing] to the General Assembly a purpose and intent so fraught with injustice as to shock the consciences of fair-minded men." *Wilkie*, 370 N.C. at 549, 809 S.E.2d at 860 (cleaned up).

The Town's petition suffers from a procedural flaw as well. As the Town belabors, its petition is really focused on the "COA20-305" decision. *See* Pet. at 3 ("Although the Town may have been able to preserve and present these issue [sic] to the Court by only filing a Petition in COA20-305, the Town files this Petition in COA20-304 out of an abundance of caution."). But that decision is interlocutory; it leaves more work to be done in the trial court. *See Rubin*, 2021-NCCOA-188, ¶ 34 ("Reversed in part; vacated in part; affirmed in part and remanded for further proceedings.").

The statutes and Appellate Rules impose a heightened standard for review of such interlocutory decisions of the Court of Appeals. But the Town fails to mention that standard at all, let alone explain how they propose to meet it. Section 7A-31(c) provides:

> Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme

> Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

N.C. Gen. Stat. § 7A-31(c). For good measure, the Appellate Rules repeat a nearly identical standard, in the subsection titled "Discretionary Review of Interlocutory Orders":

> An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

N.C. R. App. P. 15(h).

This standard serves a critical purpose. There is simply no reason for this Court to consider issues today that may be mooted by further litigation, unless there is a showing of "substantial harm" to a party. This standard parallels the "substantial rights" standard set forth in Sections 7A-27(a)(3)(a), (b)(3)(a) and 1- 277(a) of the North Carolina General Statutes. Both serve to eliminate unnecessary interlocutory review. *Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950) ("There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.").

Accordingly, the Town's petition can only be granted if it shows "that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party." *Id.* The Town did not make any attempt to show that denial of its petition would cause it to suffer substantial harm. The Town's failure to address the applicable standard is a sufficient ground for denial of its petitions. *Cf. Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.").

In any event, the Town could not show substantial harm. The Town has dragged this case out for six years. Ms. Rubin is the party harmed by further delay, not the Town. This case needs to return to the trial court to be finally resolved. If the Town insists on appealing and petitioning again at that time, then it can do so.

ADDITIONAL ISSUE

Ms. Rubin asks for the Town's petition to be denied. But if it were to be granted, Ms. Rubin would seek to present this additional issue to this Court:

> Did the Court of Appeals err by failing to order the Town to stop its occupation of Ms. Rubin's land?

This the 21st day of June, 2021.

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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 SERVICE

I hereby certify that a copy of the foregoing document was electronically filed and served this day via email and by depositing a copy with the United States Postal Service, first-class mail, postage prepaid, and addressed as follows:

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This the 21st day of June, 2021.

/s/ Matthew Nis Leerberg
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