No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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|---|---|---|
| TOWN OF APEX, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | From Wake County |
| v. | ) | 15-CVS-5836 |
| | ) | COA20-304 |
| BEVERLY L. RUBIN, | ) | 2021-NCCOA-187 |
| | ) | |
| Defendant-Appellee. | ) | |

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No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| TOWN OF APEX, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | From Wake County |
| v. | ) | 19-CVS-6295 |
| | ) | COA20-305 |
| BEVERLY L. RUBIN, | ) | 2021-NCCOA-188 |
| | ) | |
| Defendant-Appellee. | ) | |

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# PLAINTIFF-APPELLANT'S CONSOLIDATED NEW BRIEF

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SUPREME COURT OF NORTH CAROLINA

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No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| Plaintiff-Appellant, | ) | From Wake County |
| v. | ) | 19-CVS-6295 |
| | ) | COA20-305 |
| BEVERLY L. RUBIN, | ) | 2021-NCCOA-188 |
| | ) | |
| Defendant-Appellee. | ) | |

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# PLAINTIFF-APPELLANT'S CONSOLIDATED NEW BRIEF

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## ISSUES PRESENTED

1. DID THE COURT OF APPEALS ERR IN FINDING THAT THE SEWER LINE BENEATH RUBIN'S PROPERTY IS NOT AN INVERSE TAKING BY THE TOWN?

2. DID THE COURT OF APPEALS ERR IN FINDING THAT THE PROPERTY REVESTED IN RUBIN FREE AND CLEAR OF THE SEWER LINE UNDER THE LANGUAGE OF THE JUDGMENT HEREIN?

3. DID THE COURT OF APPEALS ERR IN FINDING THE TOWN TRESPASSED ON RUBIN'S PROPERTY GIVEN THE EXISTENCE OF THE SEWER LINE BENEATH RUBIN'S PROPERTY?

4. DID THE COURT OF APPEALS ERR IN FINDING THAT RUBIN COULD BRING A NEW TRESPASS ACTION AGAINST THE TOWN AFTER THE CONCLUSION OF THE ORIGINAL CONDEMNATION ACTION?

5. DID THE COURT OF APPEALS ERR IN STRIKING THE LISTED FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM JUDGE COLLINS' ORDER DENYING RUBIN'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF SUPERSEDEAS ENTERED IN THE COA20-304 CASE?

6. DID THE COURT OF APPEALS ERR IN FINDING THAT RES JUDICATA BARS THE JUDGE COLLINS' FINDING THAT THE SEWER LINE BENEATH RUBIN'S PROPERTY IS AN INVERSE TAKING BY THE TOWN?

7. DID THE COURT OF APPEALS ERR IN FINDING THAT RUBIN COULD ASSERT A MANDATORY INJUNCTION REMEDY FOR THE REMOVAL OF THE SEWER LINE IN A NEW TRESPASS ACTION AGAINST THE TOWN?

8. DID THE COURT OF APPEALS ERR IN FINDING THAT RUBIN COULD ASSERT A MANDATORY INJUNCTION REMEDY FOR THE REMOVAL OF THE SEWER LINE IN A NEW TRESPASS ACTION AGAINST THE TOWN WHEN SHE DID NOT PLEAD OR RAISE IT IN THE ORIGINAL CONDEMNATION ACTION?

9. DID THE COURT OF APPEALS ERR IN FINDING THAT THE JUDGMENT AND/OR THE RULING IN THE COA20-304 CASE IS RES JUDICATA AND BARRED THE TRIAL COURT FROM FINDING THAT THE SEWER LINE BENEATH RUBIN'S PROPERTY IS AN INVERSE TAKING BY THE TOWN IN THE COA20-305 CASE.

10. DID THE COURT OF APPEALS ERR IN FINDING THAT THE RULING IN THE COA20-304 CASE IS RES JUDICATA AND BARRED THE TRIAL COURT FROM FINDING THAT MANDATORY INJUNCTIVE RELIEF IS NOT AVAILABLE TO RUBIN IN THE COA20-305 CASE.

11. DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT'S DENIAL OF RUBIN'S MOTION TO DISMISS AS TO DECLARATIONS (1)-(7) IN PARAGRAPH 27 OF THE TOWN'S AMENDED COMPLAINT IN THE COA20-305 CASE?

## INTRODUCTION

This case presents a unique situation resulting from a landowner's failure to plead and request available remedies that could have prevented this situation from occurring. Landowners in condemnation cases that object to the right to take and want to prevent a project from being built before the challenge can be resolved have adequate remedies available

under Supreme Court case law and applicable statutes – namely injunctive relief. And in the cases cited by the parties, the landowners plead and requested injunctive relief in or at the time of the condemnation case. Here Rubin chose not to plead or request injunctive relief – she told the Town she wanted money damages if the condemnation action is dismissed. So it is no surprise that when the trial court dismissed the condemnation petition, it did not grant Rubin injunctive relief and did not order the sewer line removed. Rubin even raised constitutional claims and rights in the condemnation action, but did not request the trial court issue injunctive relief as a way to protect these alleged constitutional rights. Rubin did not appeal this final judgment and it is law of the case. The Court of Appeal and trial court properly denied Rubin's late attempts to raise injunctive relief 3 ¾ years after the installation of the sewer line based on the O'Neal Judgment.

So where does that leave us. The Town has and maintains a sewer line 18 feet below Rubin's property that is part of the Town's public sewer system. The sewer line serves and is relied on by 50 households and families/residents of the Town of Apex. Due to the development in the

area and topography of the surrounding properties, there are not reasonable alternatives to the existing sewer line to serve these 50 + Town residents. Although the sewer line is a physical invasion 18 feet beneath Rubin's property, the Town does not need and will not have to access the surface of Rubin's property to maintain or service the sewer line – this can all be done from the neighboring properties.

The Town's 2019 declaratory judgment action is an attempt to provide Rubin a monetary remedy – which she told the Town was her desired remedy in the original condemnation action – though a recognition of the physical invasion as a taking, which would allow Rubin to receive just compensation for the physical invasion. The Town recognizes that there is Supreme Court precedent like *Batts* and *Clark* that states no claim lies against a condemnor like the Town using Chapter 136 for the exercise of the power of eminent domain for a dismissed condemnation if the project is already constructed. But the more recent case of *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018) seems to recognize inverse taking as a right Rubin would have for the physical invasion – regardless of the public vs private

purpose issue. The 2019 declaratory judgment action is merely an attempt to provide Rubin a monetary remedy – the remedy she told the Town she wanted during the original condemnation case. If Rubin does not want to avail herself of this remedy, that's fine, it's her call. But injunctive relief is not a remedy available to her.

The Town recognizes that it is not ideal for a landowner to have a sewer line under their property that was not authorized pursuant a condemnation complaint. But it is important to keep in mind that the sewer line exists due to Rubin's failure to avail herself of available remedies. Had she requested injunctive relief like other landowners do who contest the right to take, the sewer line would not have been constructed. The Court of Appeals recognized this in denying Rubin's motion for relief and alternative petition for writ.

Unfortunately, the Court of Appeal goes further and attempts to create a new trespass claim in order to give Rubin an injunctive remedy that can be brought in a separate, subsequent lawsuit. The Town respectfully requests this Court apply its precedent to find that Rubin is

not entitled to assert a trespass claim or mandatory injunction claim against the Town herein.

## STATEMENT OF THE CASE

Plaintiff-Appellant Town of Apex ("Apex" or the "Town") filed the condemnation action in COA20-304 (410PA18-2) on 30 April 2015 to acquire via eminent domain a public gravity sewer easement across real property owned by Defendant-Appellee Beverly L. Rubin ("Rubin"). (2015 R pp 3-9)[1]. The Town's Complaint invokes its authority to acquire an easement for sanitary sewer and sewer facilities pursuant to Article 9 of Chapter 136 of the General Statutes and pursuant to Section 6.5 of its Charter. (2015 R p 3, ¶ 3)(App. 1). On or about 30 April 2015, Apex deposited $10,771.00 as its estimate of just compensation for the 40 foot wide, 151 feet long (.14 acre) underground sewer easement. (2015 R pp 12-14 ¶6). Apex filed its Memorandum of Action on 30 April 2015 (2015 R p 15-18). Rubin served her Answer to the Complaint on 7 July 2015.

[1] For ease of reference and to avoid confusion since the cases have been consolidated, cites to the 2015 Record (15-CVS-5836, COA20-304, 410PA18-2) will be referenced as 2015 R p xx. Cites to the Record in the 2019 case (19-CVS-6295, COA20-305, 206PA21) will be referenced as 2019 R p xx.

(2015 R pp 20-24). The parties requested the trial court conduct a hearing pursuant to N.C. Gen. Stat. § 136-108. (2015 R pp 25-28). At the Section 108 Hearing, the issue noticed for hearing and under consideration was Rubin's request that the Court determine if the commendation action was for a public use or benefit. The Court considered documentary evidence and heard testimony on the disputed issues of fact. Judge O'Neal took the matter under advisement, then found that the paramount reason for the taking of the sewer easement is for a private interest, and entered a Judgment on 18 October 2016 dismissing Apex's condemnation action as "null and void" (the "Judgment"). (2015 R pp 33-39).

On 28 October 2016, Apex filed Plaintiff's Verified Motion for Reconsideration to Alter, Amend, and/or Seek Relief from Judgment (the "Motion to Reconsider or Amend Judgment") related to the Judgment under Rules of Civil Procedure 59 and 60. (2015 R pp 40-100). The Motion to Reconsider or Amend Judgment was heard by Judge O'Neal on 5 January 2017. Judge O'Neal denied the motion and entered an Order denying the Motion to Reconsider or Amend Judgment on 24 January 2017 (the "Order"). (2015 R pp 101-102). The Town appealed Judge

O'Neal's Judgment and Order denying the Town's post-judgment motions to the Court of Appeals. (2015 R pp 103-106). The Town did not seek a stay of the Judgment in the trial court or Court of Appeals. The Town's prior appeal was resolved on procedural grounds (holding the Town's post-judgment Rule 59 motion did not toll the time to appeal). *Town of Apex v. Rubin*, 262 N.C. App. 148, 821 S.E.2d 613 (2018).

Rubin filed a Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus on 10 April 2019 in the COA-20-304 (410PA18-2) case, seeking a permanent injunction to remove the sewer line. (2015 R pp 122-139). On 30 August 2019, the Town filed a Motion for Relief from Judgment in the 2015 case asking the Court to hold 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. (2015 R pp 145-149). Since the Court of Appeals opinion held that the O'Neal Judgment itself does not establish a right to a mandatory injunctive relief, the trial court's Order granting the Town relief from judgment is redundant and no longer necessary.

The Town filed the Declaratory Judgment Complaint on 13 May 2019 (2019 R pp 3-15), along with a Verified Motion for Preliminary Injunction to enjoin Rubin from taking any action to remove or disturb the sewer line and easement on her Property during the pendency of the action. (2019 R pp 18-37). Acknowledging Rubin's inverse condemnation claim is now time-barred, the Town amended its Declaratory Judgment Complaint on 30 August 2019, waiving the Town's defense of the statute of limitations as a bar to Rubin's claim for just compensation, so that Rubin could seek compensation for the sewer line under her property if she so chooses. (2019 R pp 83-90). Rubin filed a motion to dismiss the amended complaint on 25 September 2019. (2019 R pp 91-96).

The parties' pending motions were heard by the Honorable G. Bryan Collins on 23 May 2019 (May 2019 T.), and at a subsequent hearing on 9 January 2020. (Jan. 2020 T.). The trial court denied Rubin's motion to enforce judgment and granted the Town's motion for relief from judgment in the 2015 case. (2015 R pp 155-162, 162-168). The trial court denied Rubin's motion to dismiss and granted the Town's motion for

preliminary injunction enjoining Rubin from interfering with the underground sewer line in the 2019 case. (Jan. 2020 T. 123:17-23). These rulings in the 2019 case allow the state court to determine the rights taken in the easement by the Town and, if Rubin so chooses, how much just compensation Rubin can receive for the Town's property rights in the easement. (2019 R pp 102-103; 104-111).

Rubin filed notices of appeal for all four orders on 29 January 2020. (2015 R pp 169-172; 2019 R pp 112-115). On 4 May 2021, the Court of Appeals filed its published opinions in the COA20-304 (410PA18-2) (2021-NCCOA-187) and COA20-305 cases (206PA21) (2021-NCCOA-188), reversing in part, vacating in part, affirming in part, and remanding the COA20-305 for further proceedings.

On 8 June 2021 the Town filed a consolidated Petition for Discretionary Review in 410PA18-2 and 206PA21. On 21 June 2021 Rubin filed a consolidated Response to the Town Petition which included an additional issue which the Court construed as a conditional petition. The Court allowed the Petition and the Conditional Petition in 410PA18-2 on 20 October 2023. The Court allowed the Petition in 206PA21 on 20

October 2023. On 20 December 2023, the Court ordered the two appeals consolidated for briefing.

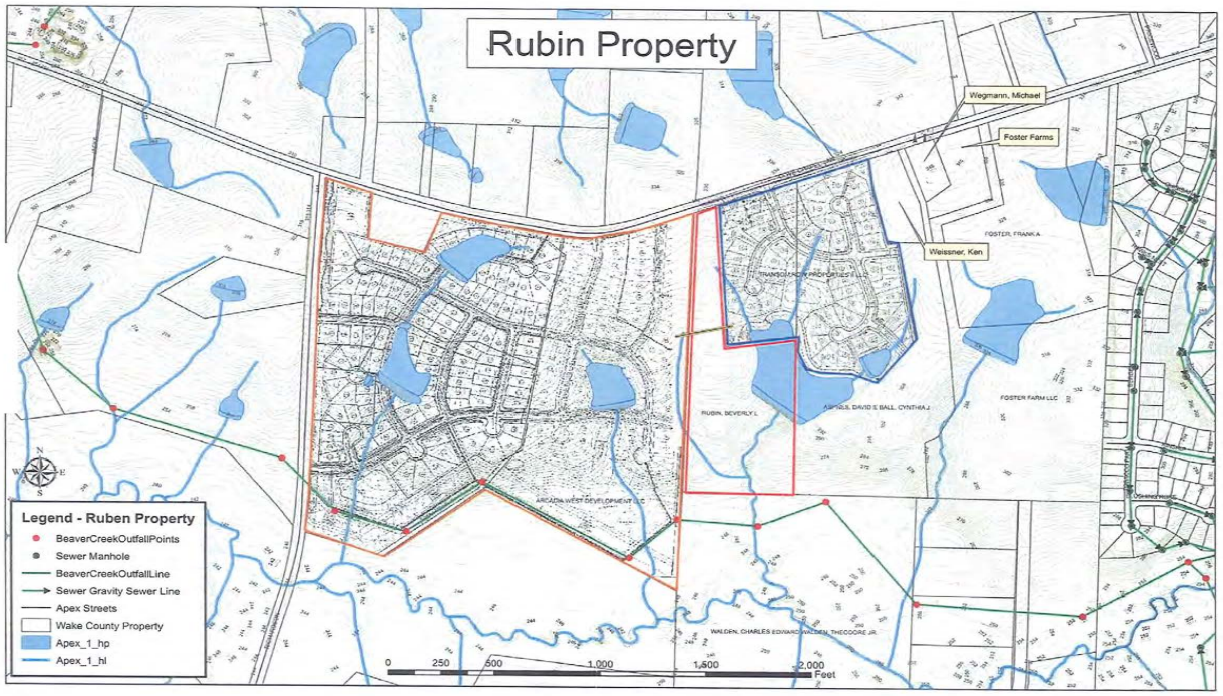
## STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This appeal is based on the issues identified in the Town's Petitions for Discretionary Review pursuant to N.C. Gen. Stat. § 7A-31, including that the issues involve legal principles of major significance to the jurisprudence of the State, they have significant public interest, and certain rulings appear likely to be in conflict with decisions of the Supreme Court.

## STATEMENT OF THE FACTS

Development of residential subdivisions occurred in the areas of Apex, Wake County, North Carolina, around and in close proximity to the Rubin's tract. The property to the immediate west of Rubin's property is known and referred to as Arcadia West, which is a residential subdivision tract ("Arcadia West"). The property to the immediate east of Rubin's property was formerly known and referred to as Arcadia East, but is now referred to as Riley's Pond, which also is a residential

subdivision tract ("Riley's Pond"). See Diagram below (2015 RS p 317; App. 6):

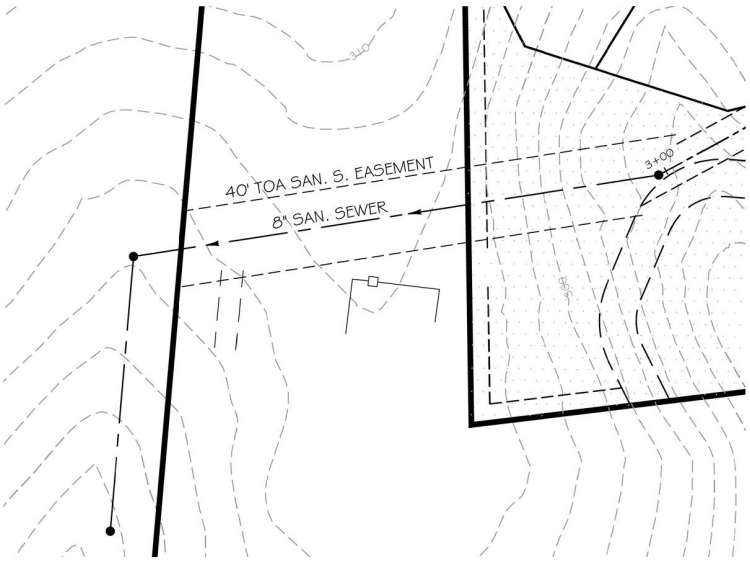



### 1. Original Condemnation Action

Prior to the Town Council's adoption of a resolution to file the Original Condemnation Action and prior to the filing of the Original Condemnation Action, the Riley's Pond subdivision property was properly, voluntarily annexed, rezoned, the subdivision plat was approved by the Town. (2015 R pp 42-43, ¶ 6-7, 9-10). With voluntary annexation, the Town had the right to serve the Riley's Pond subdivision

with Town utilities including sewer service. N.C. Gen. Stat. § 160A-31(e). (2015 R pp 43-44, ¶ 11).

The Town determined that Town-owned gravity sewer service ran to a point right next to the narrow portion of Rubin's property from the Riley's Pond subdivision, in the Arcadia West residential subdivision, at a point approximately 151 feet from the Riley's Pond tract (see dot on left side of the diagram below). (2015 R p 60). The location to serve the Riley's Pond subdivision was driven in large part by the topography of the area properties. (2015 R p 31, ¶ 14). To extend sewer from this gravity sewer tap point, the Town would have to cross this narrow-width "flag pole" portion of Rubin's property, under her driveway. (See excerpt from the "sewer exhibit" at 2015 R S (I) p 315).




On 3 March 2015, after the Town Attorney's attempt to purchase an easement from Rubin was unsuccessful, the Town Council adopted a resolution authorizing the condemnation of the 40-foot wide sewer easement across Rubin's property pursuant to Article 9 of Chapter 136 of the General Statutes and pursuant to Section 6.5 of its Charter. (2015 R pp 3-9;RS (I) pp 232-235). Ms. Rubin was notified of the Town's decision on 5 March 2015. (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.

On 30 April 2015, the Town filed the Original Condemnation Action herein under Chapter 136 of the General Statutes and its Charter (2015 R. pp 3-9), and deposited their $10,771 compensation estimate for the taking of a 40-foot wide, 151 feet long sewer easement – which amount is still held by the Clerk for Rubin. (2015 R pp 12-14).

Several weeks after filing, Rubin's attorney sent the Town a letter stating Rubin intended to contest the right to take and "will be filing a motion to be heard by the Court on an expedited basis" and that "if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to **make a claim for damages**." [emphasis supplied]. (2015 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. (2015 R p 72).

The Town responded through counsel, requesting that if Rubin intended to bring a motion, to do so soon. (2015 R pp 69-71). Counsel for the Town and Rubin exchanged correspondence, and ultimately counsel for the Town re-stated the request for Rubin to bring the motion soon. (2015 R pp 69-71). At no point did counsel for Rubin state that they

intended to bring a claim for injunctive relief, either preliminary or permanent, to prevent the sewer line from being constructed. (2015 R pp 69-71).

Rubin subsequently filed an Answer to the Complaint on 8 July 2015, requesting dismissal of the Condemnation Complaint, but did not request any injunctive relief. (2015 R pp 20-24). Rubin raised alleged constitutional claims/violations in her Answer, but did not seek injunctive relief as a remedy for any alleged constitutional claims. Also, at no point did Rubin file "a motion to be heard…on an expedited basis." On 8 April 2016, almost a year after the Original Condemnation Complaint was filed and after the sewer line was installed (discussed in detail below), Rubin filed a motion for an "all other issues" hearing, and the only issue raised by Rubin was the Town's right to take Rubin's property for the sewer easement plead in the Original Condemnation Complaint. (2015 R pp 25-26). Again, Rubin did not plead or request permanent injunctive relief.

**2. Judgment in the Original Condemnation Action.**

An "all other issues" evidentiary hearing was conducted by the Honorable Elaine M. O'Neal on 1 August 2016 pursuant to N.C. Gen. Stat. § 136-108. (Aug. 2016 T). A final judgment was entered on 18 October 2016 ("Judgment"). (2015 R pp 33-39). The Court found that the paramount reason for the taking of the sewer easement described in the Original Condemnation Complaint was for a private purpose and the public's interest was merely incidental. (2015 R pp 33-39;).

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." (2015 R pp 33-39). The Judgment rendered the Complaint and Declaration of Taking a nullity (2015 R pp 33-39), with the effect of which is as if it had not been filed. Although the Court heard testimony and evidence that the sewer line had been installed across Rubin's property approximately a year before the all other issues hearing was held, including evidence from Rubin, Rubin did not request the sewer line be removed and the Judgment did not require removal of the sewer line. (2015 R pp 33-39). The Judgment did not hold that title is reverted back

to Rubin free and clear of the sewer line or that the property is revested to Rubin. In fact, the Judgment simply states that the "[Town's] claim [in its Original Condemnation Complaint] to [Rubin's] property by Eminent Domain is null and void." (2015 R pp 33-39).

The Town filed a post-judgment Rule 59 and 60 motion, which was denied by Judge O'Neal after an in-person hearing.[2] (2015 R pp 40-100; 101-102; Jan. 2017 T). Importantly, 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 she now, several years later, makes - that the Judgment required removal and it would be unconstitutional for the sewer line to remain. (Jan. 2017 T).

The Town appealed Judge O'Neal's Judgment and Order denying the Town's post-judgment motions to this Court. (2015 R pp 103-106). The Town did not seek a stay of the Judgment in the trial court or Court

[2] Rubin misstates Judge O'Neal's ruling in Rubin's prior appellate court filings – Judge O'Neal denied the motion but did not find it "improper" or "meritless."

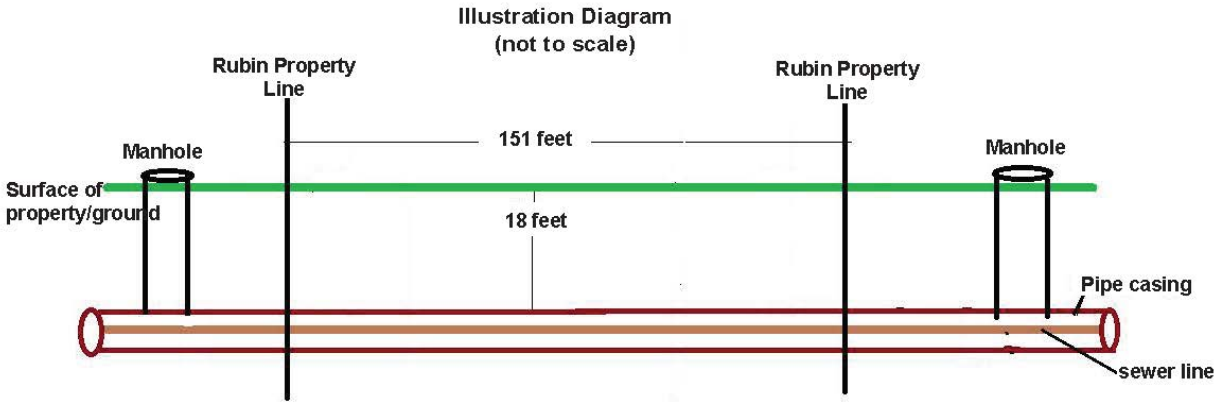
of Appeals. Rubin did not appeal Judge O'Neal's Judgment or challenge the fact that the Judgment did not order the sewer line removed. The Town's prior appeal was resolved on procedural grounds (holding the Town's post-judgment Rule 59 motion did not toll the time to appeal). *Town of Apex v. Rubin*, 262 N.C. App. 148, 821 S.E.2d 613 (2018). The Court's inclusion of a footnote classified as "dicta" related solely to the original condemnation complaint, not the existence of the sewer line on the property and/or sewer easement constructed on 27 July 2015. The Town filed a Petition for Discretionary Review and asked the Supreme Court to review this procedural decision, and the Petition was not granted.

**3. Effect of Judgment and Installation of the Sewer Line**

In July 2015, after Rubin filed her answer and did not plead or request injunctive relief, before Rubin filed her motion for an all other issues hearing, and prior to the entry of the Judgment in the Original Condemnation Action, the Town modified the sewer easement necessary to serve the Riley's Pond subdivision. The Town decided, in part as a courtesy to Rubin, to use the "bore method" to construct and install a

sewer line under the narrow portion of Rubin's property, so as not to disturb the surface of her property. (2015 R pp 29-32).

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 Rubin's property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer line was installed on 29 July 2015. (2015 R pp 145-149; 2015 Doc. Ex. 16, ¶ 10). No manholes were dug or are currently on Rubin's property – the manholes/access to the sewer line are on the neighboring properties. (2015 R p 157, ¶ 11). The physical invasion beneath Rubin's property occurred on or about 27 July 2015. (2015 R p 146, ¶3). This illustration sketch shows a profile view of the underground sewer line beneath Rubin's property:




The Town determined that a 10-foot wide Town underground sanitary sewer easement ultimately was a sufficient easement given the change in the way the Town chose to install the sewer line (bore method – sewer line placed inside a steel casing). (2015 R p 157, ¶ 11). Further, the Town was able to avoid taking any access or similar rights in the surface of Rubin's property. The surface of Rubin's property was not disturbed during construction, and the Town does not need and will not to have to access the surface of her property in the future to maintain or service the sewer line.

On 22 February 2016, the Town accepted as complete the sewer line, and it became a part of the Town's public sanitary sewer system. (2015 R pp 145-149; 2015 Doc. Ex. 16, ¶ 10). The sewer line 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. (2015 R pp 157-158, ¶14; 164, ¶7; 2015 Doc. Ex. 17, ⁋ 12). Further, the Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision. (2015 R pp 29-32; 145-149).

**4. Rubin's Post-Installation and Post-Condemnation Action Attempts to have the Sewer Line Removed**

Approximately 3 ¾ years after the installation of the sewer line and after the entry of the Judgment in the condemnation action, Rubin filed a motion on 10 April 2019, seeking a mandatory injunction to remove the Town's sewer line. (2015 R p 122-139). Rubin's motion, entitled Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus, was filed in the 2015 condemnation case and she raised eight (8) basis for the injunctive relief she sought, but she did <u>not</u> allege trespass as one of her basis for the motion/injunctive relief (2015 R p 122-139). This was Rubin's first request for injunctive relief to the trial court. (2015 R p 163, ¶4).

On 30 August 2019, the Town filed a Motion for Relief from Judgment asking the Court to hold that the 18 October 2016 Judgment that Rubin has used to support all her claims for injunction shall not be used prospectively to challenge the construction, maintenance and operation of the sewer line and easement under her property. (2015 R p 145-149).

### 5. Declaratory Judgment Action Filed to Protect the Citizens of Apex

The Town's sewer easement serves an entire subdivision within the Town. Removal of the sewer line and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm. (2019 R pp 104-111). If the sewer line is disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system. (2019 R pp 104-111). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. (2019 R pp 104-111). There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots. (2019 R pp 104-111).

In order to protect the Town's interest and the homeowners and citizens of the Town living in the Riley's Pond subdivision, as well as to maintain the status quo, the Town filed the Declaratory Judgment Complaint on 13 May 2019 (2019 R pp 3-15), along with a Verified Motion for Preliminary Injunction to enjoin Rubin from taking any action to remove or disturb the sewer line and easement on her Property during the pendency of the action. (2019 R p 18-35). Acknowledging that any claim Rubin would have for inverse condemnation due to the existence of the sewer line and easement beneath the property was time-barred, the Town amended its Declaratory Judgment Complaint on 30 August 2019, waiving the Town's defense of the statute of limitations as a bar to Rubin's claim for just compensation. (2019 R pp 83-90). The Town requested that the Court, pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, grant supplemental relief and order that a jury trial be held on the issue of the amount of compensation due Rubin for the inverse taking by the Town of the 10-foot wide underground sewer easement under Rubin's

property[3]. (2019 R pp 83-90). The Town's action is not an inverse condemnation action; for condemnors cannot file such actions. Regardless of Rubin's mischaracterization of the declaratory judgment action, the Town's action is to have the court declare that the sewer easement and line exist on Rubin's property pursuant to the Town's power of eminent domain and based on the effect of Judge O'Neal's Judgment, and Rubin has a right to just compensation for the easement taken, if she so chooses. (2019 R pp 83-90). The right to compensation is Rubin's to request/enforce or not.

Rubin filed a motion to dismiss the amended complaint. In her brief in support of the motion, Rubin did not raise constitutional concerns in response to the Town's motion. (2019 R pp 40-77; 91-96). Rubin did not file a response to the Town's motion for a preliminary injunction.

[3] This is the size, etc. of the easement the Town believes it has 18 feet under the surface of Rubin's property. Rubin is certainly free to disagree about the size and scope of the easement in the declaratory judgment action.

### 6. Trial Court's Orders and Rubin's Failed Forum Shopping Attempt

The pending motions in both cases were heard by the Honorable G. Bryan Collins on 23 May 2019. (May 2019 T.) At the hearing, the trial court announced that it was considering taking the matters in both the 2015 case and the 2019 case under advisement and would like to order the parties to mediation. The Town stated that they would be glad to mediate (May 2019 T. p. 69:8-9); Rubin said she would only agree to mediate if the Town brings "a satchel [of money] with them when they come…" to the mediation (May 2019 T. p 78:11-15). Ultimately, the trial court took the matters under advisement, and ordered the parties to mediation. (2015 R pp 143-144). After two separate days of mediation which resulted in an impasse, a subsequent hearing on pending motions occurred on 9 January 2020. (Jan. 2020 T.).

Prior to the 9 January 2020 hearing, and while the parties' motions were under advisement with the trial court, Rubin forum shopped by filing a lawsuit in federal court, Eastern District of North Carolina, on 1 October 2019, against the Town and other parties, essentially requesting the same relief that she requests from the state court – a mandatory

injunction to remove the sewer line. *Rubin v. Town of Apex, et. al.*, EDNC, file no. 5:19-cv-449-BO. Rubin filed the federal court lawsuit only after the state court mediation on 7 August 2019 resulted in an impasse and did not settle on terms acceptable to Rubin. The Town filed a motion to dismiss Rubin's forum shopping complaint which was granted by the Honorable Terrence W. Boyle on 27 March 2020. *Id.*, at Doc. 47.

With the 23 May 2019 and 9 January 2020 hearings, Judge Collins conducted in-court hearings totaling approximately 4 ½ hours on the parties' motions. (May 2019 T.; Jan. 2020 T.). At the conclusion of the 9 January 2020 hearings, the trial court took the motions in the 2015 and 2019 cases under advisement. (Jan. 2020 T. 123:17-23). After deliberating on the motions for over a week, the trial court denied Rubin's motion to enforce judgment and granted the Town's motion for relief from judgment in the 2015 case. (2015 R pp 155-161). In its Order Denying Defendant's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus, the trial court denied Rubin's motion and refused to order removal of the sewer line for a number of independent reasons. The trial court's conclusions of law 1 through 9 are sufficient to address and

deny each of the grounds raised by Rubin in her motion – and these conclusions/bases are separate and independent from the trial court's subsequent discussion of the existence of the sewer line as an inverse taking and references to the *Wilkie* and *McAdoo* cases. (2015 R pp 155-161).

The trial court denied Rubin's motion to dismiss and granted the Town's motion for preliminary injunction enjoining Rubin from interfering with the underground sewer line in the 2019 case. (Jan. 2020 T. 123:17-23). These rulings/orders are interlocutory. The trial court orders (collectively referred to herein as the "Order") were entered on 21 January 2020 (2015 R pp 155-161; 162-168).

**7. Appeals to the Court of Appeals**

Rubin filed notices of appeal for all four orders on 29 January 2020. Although Rubin's appeal of the two orders in the 2019 case were interlocutory, the Court of Appeals concluded that both orders affect a substantial right and were immediately appealable. (*Town of Apex v. Rubin,* 2021-NCCOA-188,¶14). Oral argument occurred in these appeals

on 24 February 2021. On 4 May 2021, the Court of Appeals filed its published opinions in the COA20-304 and COA20-305 cases.

In the COA20-304 case (the 2015 case), the Court of Appeals affirmed the trial court's denial of Rubin's Motion to Enforce Judgment and alternative, Petition for Writ of Mandamus. The Court of Appeals found none of the arguments raised by Rubin resulted in removal of the sewer line. The Court of Appeals held the Town was correct in not removing the sewer line including because Rubin did not ask for it and the O'Neal Judgment did not order it. However, the Court of Appeals struck and reversed certain findings and conclusions from the trial court's Order, and made certain rulings related to inverse condemnation, a new alleged trespass claim not pled by the landowner, and mandatory injunctive relief (as discussed in detail below). These findings and conclusions were made in the COA20-304 case and applied in the COA20-305 case. The Court of Appeals reversed the trial court's Order granting the Town's Motion for Relief from Judgment.

In the COA20-305 case (the 2019 case), the Court of Appeals affirmed the trial court's denial of Rubin's Motion to Dismiss. However,

the Court of Appeals granted the motion to dismiss as to declarations (1)-(7) in Paragraph 27 of the Town's Amended Complaint. Further, the Court of Appeals struck certain findings and conclusions from the trial court's Order, and made certain rulings related to inverse condemnation, a new alleged trespass claim not pled by the landowner, and mandatory injunctive relief that were carried forward from the COA20-304 case (as discussed in detail below). The Court of Appeals affirmed Judge Collins' grant of a Preliminary Injunction. The 2019 case was remanded to the trial court for further proceedings.

The Court of Appeals issued its mandate on 24 May 2021. Apex filed its Petitions for Discretionary Review in both cases with this Court on 8 June 2021. This Court granted the petitions in both cases on 20 October 2023. On 20 December 2023, the Court ordered the two appeals consolidated for briefing.

## ARGUMENT

### I. STANDARD OF REVIEW

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover,

we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) (citations omitted). Conclusions of law are generally reviewable *de novo*, *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 180, 695 S.E.2d 429, 435 (2010), and mixed questions of law and fact are fully reviewable on appeal, *Hinton v. Hinton*, 250 N.C. App. 340, 347, 792 S.E.2d 202, 206 (2016).

When the trial court reaches a legal conclusion on whether to exercise its discretionary inherent authority, "we need determine only whether they are the result of a reasoned decision." *Sisk*, 364 N.C. at 435, 695 S.E.2d at 180 (citations omitted); see also *In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) ("The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion." (citation omitted)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); see also *White v. White*,

312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.") "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion," *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted).

## II. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S DENIAL OF RUBIN'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS IN THE 2015 CONDEMNATION CASE.

### A. Judge O'Neal's Judgment did not require removal of the underground sewer line and did not grant Rubin injunctive relief.

At no point did Rubin request injunctive relief, either preliminary or permanent, from the trial court to prevent or halt the sewer line's construction or to remove the sewer line, nor did Rubin ask Judge O'Neal at any point to address the issue. Judge O'Neal did not order injunctive relief or revesting of title in her Judgement. Rubin then had the

opportunity to have Judge O'Neal clarify her Judgment or otherwise ask Judge O'Neal to address the sewer line beneath her property, yet she refused to do so. The Court of Appeals correctly found that there is no evidence in the Record to support a finding that the O'Neal Judgment granted injunctive relief or required the Town to remove the sewer line.

Judge O'Neal's Judgment does not grant injunctive relief as a matter of law. First, 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]. *Hamlin v Hamlin,* 302 N.C. 478, 484, 276 S.E.2d 381, 386 (1981). In *In re McKinney,* 158 N.C. App. 441, 581 S.E.2d 793 (2003), the Court of Appeals stated: "To be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter.:

> An application to the court for an order shall 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.* The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N. C. R. Civ. P. 7(b)(1) (2001) (emphasis added in original). *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.

Second, Judge O'Neal's Judgment cannot be viewed as *implying, self-executing,* or *automatically issuing* permanent injunctive relief, as Rubin contends. N. C. R. Civ. P. 65(d) provides that:

> (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]

This Court has held that these requirements are explicit and unambiguous, and an injunction cannot be issued in a cursory manner. **[Supreme Court case?]** *Wilner v. Cedars of Chapel Hill, LLC,* 241 N.C. App. 389, 773 S.E.2d 333 (2015). 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); *Robinson v. Coopwood,* 292 F. Supp. 926 (N.D. Miss. 1968), judgment aff'd, 415 F.2d 1377 (5th Cir. 1969); *Schmidt v. Lessard,* 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661, 18 Fed. R. Serv. 2d 13 (1974). No injunction should be so general as to leave the restrained party open to the hazard of conducting his business in the mistaken belief that his activity is not prohibited by the order. *Shuford* § 65:7 (2017); *Williams v. U.S.,* 402 F.2d 47 (10th Cir. 1967). The prohibited act or acts must be described in reasonable detail in the order itself and cannot be described by reference to acts set forth in the complaint or other document. *Shuford* § 65:7 (2017). As such, 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."

This result is not surprising. Certainly if the issue of a permanent injunction to remove the sewer line was presented to Judge O'Neal, the

Town would have requested to be heard on the injunction/removal issue, and the Judgment would have contained the specific terms of removal.[4] Further, the Town would have moved to stay the Judgment pending the appeal in 2016. Also, the trial court would not likely have ordered the disruption and removal of public sewer serve to the third party lot owners in the Riley's Pond Subdivision without giving these 50+ residents of the Town with an interest in and reliance on the public sewer line and service a right to be heard. None of this occurred – because the Judgment did not put the Town on notice of or grant any injunctive relief.

It is also important to note that in the North Carolina cases Rubin cites in support of her position that the trial court should have granted permanent injunctive relief in 2020, the landowners either plead injunctive relief at the time they challenged the taking, or filed separate lawsuits and/or motions seeking mandatory injunctive relief. Further, Rubin's arguments that the trial court should have returned her property free and clear of the Town's sewer line is not supported by North Carolina

[4] Interestingly, the Court of Appeals erred in holding that the trial court's finding that the sewer line is an inverse taking is barred by *res judicata* - nothing in the O'Neal Judgment supports such a finding.

law and ignores the procedural posture of the motion before the trial court. All the cases cited by Rubin for the return of her property differ from this case from a procedural standpoint. 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. But here, Rubin did not ask the presiding trial court judge for injunctive relief, but is asking a different trial court judge 3 ¾ years after the sewer line was installed and after the final judgment was entered – in the context of a motion for discretionary relief.

Further, 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). It was only after the injunction motions were denied that the Town of Midland constructed the pipeline. And the context of the Court's comments about the landowners' remedies was in their discussion of whether the construction on the pipeline mooted the appeal (the Court held it did not). *Id.* at 213-214, 704 S.E. 2d at 334-335. That is far different situation than we have in the case at bar. The *Midland*

plaintiffs still had a claim for permanent injunctive relief pending, a far different situation than exists in this case. The cases Rubin cites do not support her arguments that she is entitled to a permanent injunction.

Separately and distinctly, it is settled law that in a condemnation case pursuant to Chapter 136, 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 claim for mandatory injunction. *State Highway Commission v. Thornton,* 271 N.C. 227, 240-241, 156 S.E.2d 248, 258-259 (1967) .

Rubin raised constitutional rights and claims in the 2015 condemnation case. A party asserting constitutional rights still must properly plead and properly request injunctive relief from the court. The rules of civil procedure are not suspended merely because a party asserts constitutional rights – and Rubin cites no case so holding. Rubin tries to misdirect the court from the true issue at hand – and has inconsistently tried to justify why she did not request injunctive relief – from stating

she could not, to stating that she actually did, to stating that she did not need to. It is all fiction. Cases like the *Town of Midland v. Morris* and *City of Statesville v. Roth* illustrate how a landowner properly seeks injunctive relief in a condemnation case – and the trial court's judgement in *Roth* shows what a judgment ordering injunctive relief looks like. *Roth*, at 803, 336 S.E. 2d 142, 143. 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 recent attempts to receive permanent injunctive relief after the fact.

### B. Rubin's specific basis for her Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus in the 2015 case were properly denied.

The following are the bases raised by Rubin in her motion to enforce judgment in the 2015 case:

1. N. C. R. Civ. P. 70
2. N.C. Gen. Stat. § 1-302
3. N.C. Gen. Stat. § 1-298
4. Contempt
5. N.C. Gen. Stat. § 1-259
6. Writ of Mandamus
7. The Court's inherent authority

The Court of Appeals and the trial court correctly held these grounds do not provide the basis or support the grant of a permanent injunction. The Judgment does not order the Town to do any of the acts specified in N. C. R. Civ. P. 70 (to execute a conveyance of land or deliver deeds or other documents) or require the return or delivery of real property as per N.C. Gen. Stat. § 1-302. N.C. Gen. Stat. § 1-298 does not give the trial court on remand the authority to order a permanent injunction where none was plead or contained in the judgment that is remanded from the appellate courts.

The Judgment does not order the Town to perform any specific act such as removal of the underground sewer line. Therefore, the Town cannot be held in contempt for failing to remove the underground sewer line. Moreover, the Motion fails to satisfy the statutory requirement for contempt motions, that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).

The Court of Appeals and the trial court properly refused Rubin's request to use the Declaratory Judgment Act in the 2015 condemnation case to construe and/or broaden the impact of the Judgment or to read

into the Judgment injunctive relief. Such a request is improper in the 2015 case. The original condemnation action was not a declaratory judgment action, and therefore N.C. Gen. Stat. § 1-259 is inapplicable in the original condemnation action. A declaratory judgment is a separate and independent action, and may not be commenced by a motion in the cause. *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C.App. 257, 362 S.E.2d 870 (1987).

Next, Rubin moves in the alternative for a writ of mandamus to "the Town or its officers commanding them to remove the sewer lines." (R p 125). A writ of mandamus is "an extraordinary remedy which the court will grant only in the case of necessity." *Edgerton v. Kirby*, 156 N.C. 347, 72 S.E. 365, 366 (1911). Rubin's assertions fail to meet this high standard. In support of this request, Rubin alleges "the Town has a legal duty to comply with the judgment and remove the sewer lines." Rubin's request rings hollow. The Court of Appeals properly found that Rubin cannot 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. The Judgment mandated no such duty or requirement

of the Town to remove the sewer lines. In fact, the Judgment imposes no obligations whatsoever upon the Town. The absence of any duty alone warrants denial of Rubin's request for the Court to issue a writ of mandamus.

"The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *Hayes v. Benton*, 193 N.C. 379, 137 S.E. 169 (1927); *Wilkinson v. Board of Education*, 199 N.C. 669, 155 S.E. 562 (1930). Further, a writ of mandamus would not be issued to "enforce an alleged right which is in doubt." *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938). Manifestly, the Judgment does not order the Town to remove the underground sewer line, nor does it state that Rubin has a right to maintain her property without a sewer line in perpetuity. As such, the trial court properly denied Rubin's request for a writ of mandamus.

Although not contained in Rubin's motion, Rubin argued at the 9 January 2020 trial court hearing that the trial court should order the sewer line removed pursuant to N.C. Gen. Stat. § 136-114. The trial court

properly rejected this statute as a basis for permanent injunctive relief. N.C. Gen. Stat. § 136-114 allows a trial judge in a condemnation case to make any necessary order or rule of procedure, and states that the any order or rule of procedure "shall conform as near as may be to the practice in other civil actions in said courts." Given (1) that ordering a mandatory injunction is not a "procedural order", (2) Rubin's failure to request injunctive relief before Judge O'Neal (N. C. R. Civ. P. 7(b)(1)), and (3) Judge O'Neal's Judgment not ordering injunctive relief (N. C. R. Civ. P. 65(d)), the trial court properly refused to order a permanent injunction under N.C. Gen. Stat. § 136-114.

Rubin argues that the trial court should have ordered a permanent injunction pursuant to the court's "inherent authority." The Court of Appeals correctly held that the trial court properly exercised its discretion in not using its inherent authority in this manner. *Ashton v. City of Concord*, 160 N.C. App. 250, 584 S.E.2d 108 (2003). Rubin cites no case where a trial judge has granted a permanent injunction by using inherent authority in a condemnation case. Rubin raised constitutional claims and rights in her answer in the 2015 original condemnation

action, and statements involving constitutional provisions and rights were included in the O'Neal Judgment. (2015 R pp. 20-24, ¶¶ 1, 6; 33-38, ¶¶ 3 of the FoF, 5 of the CoL). Even with constitutional claims being raised in the original condemnation action, Rubin had to request injunctive relief in order to receive it. Injunctive relief is not inherent to or automatically flow from the allegation of a constitutional violation. Rubin had her day in court on her constitutional claims at the Section 108 hearing, and Judge O"Neal addressed the constitutional claims in her Judgment in the 2015 condemnation case. Rubin cannot now be heard again on these same constitutional claims to request an injunction which was not plead or requested in the original condemnation action.

The Court of Appeals and trial court were correct to hold that Rubin's arguments about constitutional claims do not change the equation for the trial court's inherent authority; and the trial court properly refused to exercise its inherent authority to order an injunction in this case.

### C. Supreme Court precedent forecloses the injunction remedy Rubin seeks in her motion regardless of the legal claim or theory.

The trial court properly denied Rubin's motion and alternative petition for writ for the reasons outlined in Conclusions of Law 1 – 9, and the inquiry can stop there. However, the trial court provided independent, alternative basis for the decision – that *Thornton* and other Supreme Court precedent were the basis to deny the motion – including because the Town's physical invasion was a taking. These were the portions of the trial court orders improperly vacated by the Court of Appeals. The Court of Appeals erred when if vacated the portion of the trial court order denying the motion and alternative petition for writ that held the Town took title to an easement by inverse condemnation.

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, except in *Thornton* the landowner pled, albeit after the project was substantially constructed, injunctive relief.[5]

The Supreme Court acknowledged that the landowner had the right to request an injunction prior to the construction of the project. The Court noted in reversing the trial court's entry of an injunction *after* the project was constructed that the landowner did not apply for a temporary restraining order to halt construction – thus acknowledging such a motion was available to the landowner. *Id*.

Under similar facts as the case at bar, the Supreme Court in *Thornton* held that since the construction of the project had occurred, it cannot be restrained and an injunction is not properly issued. *Id.* The Supreme Court eliminates as a possible remedy an injunction requiring

[5] The landowner in *Pelham Realty Corp. v. Bd. of Transp*., 303 N.C. 424, 432, 279 S.E.2d 826, 831 (1981) did as well – which explains why the court considered injunctive relief. The *Pelham* court did not state that the effect of dismissal is the removal of previously installed utilities – there nothing had been installed – and the case certainly does not stand for the proposition that Rubin is entitled to removal under Judge O'Neal's judgment given the plain language of the Judgment.

the condemnor to remove the constructed infrastructure from the landowner's property.

The Supreme Court provides the analysis when the Court is examining a challenge to the right to take for lack of public use or benefit and the request for a dismissal of a condemnation action. The Supreme Court states:

> "…we must determine whether the trial court erred in its conclusion that the road in question was not constructed for a public use. ***If that conclusion was correct, the proceeding should have been dismissed.*** If that conclusion was error, the proceeding should be remanded for a further hearing to determine the compensation to be awarded the defendants for the taking of their land. [Emphasis supplied] *Id.* at 241.
>
> "If the premise [the landowner's argument that the taking is not for public purpose] is sound, the conclusion is sound and the trial court should have entered a judgment dismissing the proceeding, ***but not an injunction***." [Emphasis supplied] *Id.* at 236.

Rubin's pointing to the constitutional claims and rights she raised in the condemnation action do not change the result. Certainly the same "constitutional issues" would have been at issue in the *Thornton* case, yet the *Thornton* court did not order removal of the public facilities that were installed on the landowner's property without a public purpose, since the

landowner did not seek to prevent the construction of the project before it was installed.

Rubin had sufficient opportunity to protect her constitutional rights with the remedies available to her – but she failed to exercise them. The trial court properly exercised its discretion to refuse to use the court's inherent authority to grant a mandatory injunction under the facts and circumstances of this case.

Although the Court has ample basis as described above to affirm Judge Collins' order, a separate basis is the trial court order denying Rubin's motion is the 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 a taking - an inverse taking.

The trial court properly found that the effect of the Judgment is that the Town physically invaded Rubin's property without an applicable condemnation complaint under Chapter 136 of the General Statutes. 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. v. N.C. Dept. of*

*Transp.*, 757 S.E. 2d 466, 473 (NC 2014); *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). The exclusive remedy for a physical invasion of private property by a municipality is inverse condemnation and the payment of compensation. *Id.*

No sewer easement was conveyed to a private individual. The 50 homeowners in the adjoining subdivision receive sewer service through the easement. None of those homeowners were conveyed or own any easement rights in Rubin's property. Consequently, the sewer line and easement exists for the use and benefit of the Town and its citizens. *State Highway Commission v. Thornton, supra.*

The trial court properly references the *Wilkie* case for providing Rubin a remedy for the Town's physical invasion and inverse condemnation.[6] It is the *Beroth Oil* and *McAdoo* cases that support the trial court's analysis that an inverse taking is what resulted from the Town's physical invasion coupled with Judge O'Neal's Judgment

[6] Finding that the sewer line left in the ground is a taking not a trespass does not weaponize *Wilkie* or any other opinion. Such a finding merely gives effect to the Judgment in this case – and recognizes that the landowner did not seek removal and the Court did not order it – so the sewer line stays. The trial court applied existing statutes and case law to reach his conclusions.

dismissing the original condemnation complaint as null and void but not ordering it removed. The effect of the Judgment is that it is as if the original condemnation complaint was not filed. *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."). The trial court's findings of fact and conclusion of law on the inverse condemnation issue are correct, and serve as another basis to affirm his denial of Rubin's motion to enforce judgment.

The Town recognizes that there is Supreme Court precedent that predates *Wilkie* that holds that the landowner has no claim under any theory against a condemnor using Chapter 136 of the General Statutes for its exercise of the power of eminent domain, when a condemnation complaint is dismissed and the project has already been installed. Although Rubin is quick to criticize the trial court's rulings in the 2015 case and the 2019 case and the Town's declaratory judgment action, they provide a path toward a remedy for Rubin. But the remedy is hers to seek, she can certainly pass on it. Rubin's all or nothing argument for an injunction rings hollow given her failure to seek injunctive relief in the 2015 condemnation case.

The Court of Appeals granted the motion to dismiss as to declarations (1)-(7) in Paragraph 27 of the Town's Amended Complaint. As discussed herein, that is error, and has the effect of forcing the trial court in the 2019 declaratory judgment action to address the sewer pipe as a trespass claim and mandatory injunction remedy. The Town recognizes that the Court of Appeals' striking certain findings from the preliminary injunction order is not a decision on the merits and is not binding on the trial court. But striking these provision coupled with its vacating certain provision of the Amended Complaint at the motion to dismiss stage is prejudicial to the Town.

## III. THE COURT OF APPEALS ERRONEOUSLY HELD THAT A TRESPASS ACTION LIES AGAINST A MUNICIPAL CONDEMNOR FOR A PHYSICAL INVASION RESULTING FROM THEIR USE OF THE POWER OF EMINENT DOMAIN.

The Court of Appeals erred in holding that a trespass action (which was not previously pled by the landowner) lies against a municipal condemnor for a physical invasion resulting from their exercise of the power of eminent domain under Chapter 136 of the General Statutes. Additionally, the Court of Appeals errs in allowing this trespass action to be brought in a subsequent, separate lawsuit as opposed to requiring the

landowner to bring this purported trespass claim in the original condemnation action. It appears the Court of Appeals' finding of a trespass was a means to an end to allow Rubin a chance to seek mandatory injunctive relief to attempt to have the sewer line removed – a remedy she failed to seek in the condemnation action and a remedy the Court of Appeals agrees is not available to Rubin in the original condemnation action. Nevertheless, a physical invasion by a condemnor exercising the power of eminent domain is not a trespass – and the Court of Appeals ruling is a departure from this Supreme Court precedent and must be reversed.

The Court of Appeals correctly found that the Town's physical invasion 18 feet under the surface of Rubin's property to install a sewer line was pursuant to its power of eminent domain – and specifically pursuant to the eminent domain powers granted to the North Carolina Department of Transportation found in N.C. Gen. Stat § 136-103, *et. seq.* (2019) as per the Town's Charter. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶6, Ft Nt 1, ¶21). The Town acted properly in exercising its inherent power of eminent domain and properly followed the statutory authority

and procedures granted by N. C. Gen. Stat 136-103, *et. seq*. (2019) in installing the sewer line on Rubin's property. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶7, Ft Nt 2, ¶21). (2015 R pp 3-9). The Court of Appeals' properly held that the Town properly installed the sewer line pursuant to Chapter 136, and therefore it is inconsistent and incorrect for the Court of Appeals to then find that the Town trespassed on Rubin's property due to the existence of the sewer line - regardless of the dismissal of the condemnation complaint. After all, the first element of a trespass claim is "an unauthorized and therefore unlawful entry" onto the land of another, *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553 (1952), and the Court of Appeals properly held that the Town was authorized and lawfully entered Rubin's property to install the sewer line at the time it was installed.

In creating a new claim for trespass against a municipal condemnor, the Court of Appeals has ignored settled condemnation law and precedent. A taking always has been found in cases involving "a permanent physical occupation" by a condemnor exercising its power of eminent domain. *Beroth Oil Co. v. N.C. Dept. of Transp.*, 367 N.C. 333,

341, 757 S.E. 2d 466, 473 (2014). This Court defined a "taking" in *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E. 2d 101, 109 (1982) as "appropriating or injuriously affecting [private property] in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." (See also *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)). It has been held that there is no common law right to bring an action for nuisance or trespass against a city. The remedy, if any, is inverse condemnation. *Long,* at 198. (See also *McAdoo v. City of Greensboro,* 91 N.C.App. 570, 573, 372 S.E.2d 742, 744 (1988), "[a]n [property] owner has no common-law right to bring a trespass action against a city."). The *McDowell v. City of Asheville,* 112 N.C. 747, 17 S.E. 537 (1893) and *Lloyd v. Venable,* 168 N.C. 531, 84 S.E. 855 (1915) opinions cited by the Court of Appeals are distinguishable in that the municipalities derived their condemnation authority solely from their charters, the opinions were issued before the legislature enacted Article 9 of Chapter 136, before the inverse condemnation statutes were enacted, the facts are distinguishable, subsequent Supreme Court cases

address the tort/trespass issue, and the cases are not authority to support a trespass claim herein.

The Supreme Court has held that no cause of action lies against a state condemnor exercising the power of eminent domain pursuant to Chapter 136 of the General Statutes**.** In *State Highway Comm'n v. Batts*, 265 N.C. 346, 360-61, 144 S.E.2d 126, 137 (1965) the Supreme Court held that the condemnation was not for a public purpose and reversed the trial court's judgment. Importantly, it held that the Commission could not be held liable for having cut down the trees in the construction/preparation of the project:

> [The private landowners] alleged that the construction of [the] highway is beyond the scope of the [eminent domain] authority vested in the Commission and inferentially that acts done in furtherance thereof are also unauthorized. We have agreed. Therefore, the cutting of the trees was not a taking of private property for public use. It was merely an *unauthorized trespass by employees of the Commission, for which no cause of action exists against the Commission in favor of [the private landowners].* . . . An agency of the State is powerless to exceed the authority conferred upon it, *and therefore cannot commit an actionable wrong*.

*Id*. at 361, 144 S.E.2d at 137-38 (citations omitted) (emphasis added). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶45).

In *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986), the Supreme Court held that the landowners could not pursue their remedy against the North Carolina Department of Transportation ("NCDOT") for an unauthorized taking:

> As the acts the plaintiffs complain of were not for a public purpose, they were beyond the authority of DOT to take property for public use in the exercise of its statutory power of eminent domain. Since DOT as a matter of law is incapable of exceeding its authority, the acts complained of could not be a condemnation and taking of property *by DOT* or an actionable tort *by DOT*. At most, the acts complained of could have been unauthorized trespasses by agents of DOT, for which no actionable claim exists against DOT.

*Id*. at 485, 342 S.E.2d at 838 (citing *Thornton*, 271 N.C at 236, 156 S.E.2d at 255; *Batts*, 265 N.C. at 361, 144 S.E.2d at 137) (additional citations omitted). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47). The Supreme Court held that NCDOT was immune to claims for both damages and injunctive relief:

> [']The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute . . . ). *It follows that he cannot maintain an action against it to restrain the commission of a tort.*[']

*Id*. at 486, 342 S.E.2d at 838 (quoting *Shingleton v. State*, 260 N.C. 451, 458, 133 S.E.2d 183, 188 (1963) (emphasis added)). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47).

The Supreme Court in *Clark* held that the aggrieved landowners had a valid cause of action against the individual public employees and officials responsible for the unauthorized taking:

> [T]he landowner is not without a remedy. When public officers whose duty it is to supervise and direct a State agency attempt or threaten to invade the property rights of a citizen in disregard of law, they are not relieved of responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State.

*Id*. (quoting *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188). The Supreme Court explained that "the acts of the defendants forming the basis of the claims by the plaintiffs . . . against DOT must be viewed as not having been a taking for a public use. Therefore, neither the plaintiffs nor the other defendants could maintain an action against NCDOT arising from those acts." *Id.* (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47).

The Town exercised the power of eminent domain pursuant to Chapter 136 of the General Statutes, and therefore was acting like the State with the power and authority of Chapter 136 in its exercise of the power of eminent domain. As such, the *Thornton, Batts* and *Clark* cases apply, and a tort action for trespass cannot lie against the Town herein.

Most recently, this Court in *Wilkie v. City of Boiling Spring Lakes* had the choice to allow a trespass claim, *Corum* claim, and/or some other claim for a landowner against a physical invasion by a municipality that lacked a public purpose, and this Court applied the state's condemnation statutes, specifically its inverse condemnation statutes, to the municipality's action. 370 N.C. 540, 809 S.E.2d 853 (2018).

Despite this precedent, the Court of Appeals rejects the physical invasion by a condemnor exercising the power of eminent domain as a taking (*Beroth Oil*), rejects the application of the *Batts*, *Clark*, and *Wilkie* cases, and concludes that a trespass claim lies. The Court of Appeals appears to reason that since the condemnation complaint was ultimately dismissed due to the trial court's ruling that the existing public interest was only incidental to the private interest, the sewer line existing under

the property as a taking was essentially converted into a trespass. This ruling is not supported by Supreme Court precedent or by the plain language of the O'Neal Judgment herein.

The Court of Appeals' conclusion is erroneously based in part on the premise that an inverse condemnation does not lie when the condemnor has filed a condemnation complaint. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶54). N. C. Gen. Stat. §136-111 states that this section applies "when land or a compensable interest therein has been taken by …. the Department of Transportation *and no complaint and declaration of taking has been filed*." [Emphasis supplied]. However, the appellate courts have recognized that this language does not prevent an inverse condemnation claim when a condemnation complaint has been filed. See *Department of Transportation v. Bragg*, 308 N.C. 367, 371, 302 S.E. 2d 227, 230 (1983)(In a case where water runoff and drainage from a project was permanent, a property owner may initiate a proceeding to receive just compensation for inverse condemnation of his property pursuant to N.C. Gen. Stat. § 136-111, or when a partial taking under N.C. Gen. Stat. § 136-103 has been instituted, the principles of judicial economy dictate

that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings); *North Carolina Dept. of Transportation v. Cromartie*, 214 N.C. App. 307, 311-12, 716 S.E. 2d 361, 365 (2011)(the Court rejected an argument by NCDOT that the landowner had no right to bring an inverse condemnation claim when a condemnation complaint had been filed for a land area outside and unauthorized in the condemnation complaint – the language of N.C. Gen. Stat. § 136-111 did not prevent the separate inverse condemnation claim).

The Court of Appeals fails to recognize and give effect to the O'Neal Judgment dismissing the condemnation claim as "null and void", and not requiring removal of the sewer line and not returning the property free and clear of the sewer line. The Judgment dismissed the condemnation claim as null and void. (R pp 33-39). "Null and void" means – "it is as if it never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E. 2d 103, 108 (1970). When this language is compared to the language of N.C. Gen. Stat. § 136-111, it is clear that the impact and effect of the Judgment is as if "…no complaint containing a declaration of taking has

been filed.." N.C. Gen. Stat. § 136-111. So the impact of the language of the Judgment, when applied to the undisputed facts that the Town physically invaded Rubin's property and the sewer line remains, is that an inverse taking results. The trial court properly applied existing statutes and case law to the facts of this case.

This reading of N. C. Gen. Stat. §136-111 is consistent with this Court's reasoning in *Wilkie*. When the municipality in *Wilkie* went outside their easement and raised the water level on the plaintiff's property for a non-public purpose, this Court held that an inverse taking resulted. *Wilkie* held that lack of a public purpose did not convert the municipality's action from a taking into a trespass, or something else – but that the landowner had an inverse condemnation claim against the condemnor. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). As such, the fact that a condemnation complaint was filed then dismissed, and the sewer line was left undisturbed by the trial court, does not convert the sewer line properly installed as a taking into a trespass. The language of N. C. Gen. Stat. §136-111 does not negatively

impact an inverse condemnation herein, and cannot be used to support the Court of Appeals' finding of a trespass claim.

The Court of Appeals misapplies *Thornton* and *Midland* in attempting to further support its creation of a trespass claim for Rubin. The Court of Appeals cites these cases for its premises that title to the property automatically revested in Rubin free and clear of the sewer line – and thus an inverse condemnation cannot lie. These cases do not recognize a trespass claim against a condemnor. These cases do not hold that a landowner automatically takes the property back free and clear of any facilities constructed on their property pursuant to a condemnation action, and do not foreclose a finding of an inverse taking for the sewer line beneath Rubin's property.

At the outset, the *Thornton* and *Midland* cases are distinguishable on a very important issue. The landowners in *Thornton* and *Midland* objected to the right to take and pled mandatory injunctive relief to prohibit the condemnor from keeping facilities on their property at the conclusion of the condemnation proceeding. *State Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E.2d (1967); *Town of Midland v. Morris,*

209 N.C.App. 208, 704 S.E.2d 329 (2011). It was the landowners' pleading of mandatory injunctive relief that allowed the courts to reach and discuss this as a possible remedy. The Court of Appeals properly held that Rubin did not plead this remedy and the Judgment did not award her this remedy.

The *Thornton* and *Midland* cases do not hold that property was automatically returned to a landowner free and clear of any physical intrusion by the condemnor. *Thornton* does not say a landowner has a trespass claim against the condemnor. In *Thornton*, the Supreme Court held that if a condemnation is filed under Chapter 136, 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 – but not a mandatory injunction. *Id*. at 240-241, 156 S.E. 2d at 258-259. The Court of Appeals cites language from a section of the opinion dealing with whether the landowner is estopped from contesting the right to take in his answer, and whether the landowner can receive the relief they pled which was mandatory injunctive relief. *Town of Apex v Rubin,* 2021-

NCCOA-187, ¶ 23. *Thornton* states that Thornton would have whatever claims exist for those that have "trespassed on upon their land and propose to continue to do so" *Id.* but would have no claim, trespass or otherwise, against the condemnor. *See Batts*; *Clark.*

The Court of Appeals in *Midland* cites *Thornton* and no other source for its statement that "in this case" if a landowner is successful in challenging the right to take, it will be entitled to relief in the form of return of title to the land. *Midland,* 209 N.C.App. 208, 213-214, 704 S.E.2d 329, 334-335 (2011). It is important to note that this comment by the *Midland* Court was in the context of whether the landowner's appeal regarding its challenge to the right to take was moot due to the completion of the construction of a pipeline (the court held it was not). *Midland,* 209 N.C.App. 208, 704 S.E.2d 329 (2011). The Court did not say a trespass claim results if the condemnation action was dismissed, and did not hold that the landowner would automatically take property free and clear of the pipeline. The landowners in *Midland* pled mandatory injunction relief so the Court said the landowners would be entitled to it. *Midland* cannot be read to award relief to Rubin not pled.

These cases can hardly support a finding by the Court of Appeals that a trespass action lies against the Town under the Judgment and facts of this case.

Regardless of what remedies *Thornton* and *Midland* make available to landowners who successfully challenging the right to take, they do not say these remedies are automatic – remedies must be pled for a landowner to be entitled to receive a remedy. Here, the Court of Appeals makes an improper leap that the revesting automatically flows from the O'Neal Judgment dismissing the condemnation claim as "null and void." However the Court of Appeals acknowledges that *Thornton* does not hold that dismissal of a condemnation action is equivalent to a mandatory injunction to undo the construction and restore the land. (*Town of Apex v. Rubin*, 2021-NCCOA-187, ¶ 35). Under *Thornton* and the ruling of the Court of Appeals herein, revesting free and clear of the sewer line cannot automatically flow given the existence of the sewer line. The Court of Appeals held the O'Neal Judgment did not require removal of the sewer line, yet ignored this holding in finding that the Judgment revested title in Rubin free and clear of the sewer line (to argue an inverse taking does

not lie). The Court of Appeals cannot have it both ways. After the O'Neal Judgment, a sewer line remains that was not ordered removed by the Judgment. The physical invasion was authorized and legal at the time it occurred, and has not been adjudicated unauthorized or illegal by a trial court, and therefore cannot be a trespass.

Additionally, a subsequent trespass claim is barred by *res judicata*. Res judicata bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action. *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004); *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336–37, disc. rev. denied, 323 N.C. 173, 373 S.E.2d 108 (1988). A final judgment "operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as 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." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), disc. review denied, 315 N.C. 590, 341 S.E.2d 29 (1986) (citation omitted). "The defense of res

judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Id*. at 30, 331 S.E.2d at 735.

If the Court of Appeals is going to recognize the ability to bring a tort claim like trespass against a condemnor in their exercise of the power of eminent domain, it seems this would open the door for other tort claims to be alleged like nuisance, conversion, and other similar tort claims.

The Court of Appeals erred in holding that a trespass action (which was not previously pled by the landowner) lies against a municipal condemnor in their exercise of the power of eminent domain under Chapter 136 of the General Statutes, and erred in allowing this trespass action to be brought in a subsequent, separate lawsuit.

## IV. THE COURT OF APPEALS ERRONEOUSLY HELD THAT A LANDOWNER WHO DID NOT SEEK MANDATORY INJUNCTIVE RELIEF IN A CONDEMNATION ACTION CAN BRING A SEPARATE LAWSUIT AFTER THE FACT AND SEEK MANDATORY INJUNCTIVE RELIEF FOR REMOVAL OF A PREVIOUSLY INSTALLED SEWER LINE.

The Court of Appeals held that a landowner who did not seek mandatory injunctive relief in a condemnation action can bring a separate lawsuit after the fact and seek mandatory injunctive relief for removal of a previously installed sewer line. Surprisingly, the Court of

Appeals also held that injunctive relief does not lie against "state" condemnors in their exercise of the power of eminent domain but does lie against "municipal" condemnors in their exercise of the power of eminent domain, even here where Chapter 136 of the General Statutes was used by the condemnor. Regardless of whether the resulting sewer line is a taking, a trespass, or results in no claim against the condemnor as outlined in *Batts* and *Clark*, Rubin is not entitled to seek mandatory injunctive relief in a subsequent, separate action against the Town.

### A. Supreme Court precedent precludes injunctive relief in a separate action.

The Court of Appeals properly cites settled Supreme Court law that private landowners cannot seek mandatory injunctive relief against state, condemnors exercising the power of eminent domain under Chapter 136 of the General Statutes to restore property/remove facilities following an unauthorized encroachment or taking for a non-pubic purpose. (*Town of Apex v. Rubin,* 2021-NCCOA-187,¶48). *Clark v. Asheville Contracting Co., Inc.,* 316 N.C. 475, 342 S.E.2d 832 (1986) (holding injunctive relief was unavailable against the Department of Transportation for an occupation of private property that was not for a

public purpose)*; State Highway Comm'n v. Batts,* 265 N.C. 346, 144 S.E.2d 126 (1965). Given that Apex condemned under Chapter 136, the Supreme Court's reasoning and holdings in the *Clark, Batts and Thornton* cases apply and should have ending this inquiry and resulting in a holding by the Court of Appeals that Rubin cannot now request mandatory injunctive relief against the Town regardless of the legal theory proffered. But it did not; and the Court of Appeals committed a number of errors in attempting to create a mandatory injunctive remedy for Rubin herein.

The Court of Appeals correctly held that the Town's condemnation action was pursuant to the eminent domain powers granted to the North Carolina Department of Transportation found in N. C. Gen. Stat § 136-103, *et. seq.* (2019) per its Charter. (*Town of Apex v. Rubin,* 2021-NCCOA-187, ¶6, Ft Nt 1, ¶21). As such, the Town acted with the same eminent domain power (pursuant to Chapter 136) as the condemnors in the *Clark* and *Batts* cases, and therefore the prohibition on mandatory injunctive relief from these cases applies to defeat Rubin's new requested injunctive remedy. Inexplicably, the Court of Appeals ignores this undisputed

finding and power in order to attempt to allow a mandatory injunction claim to be brought against the Town after the fact. The Court of Appeals cites to the Town's use of Chapter 136 in its conclusion that no inverse condemnation lies (*Town of Apex v. Rubin,* 2021-NCCOA-187, ¶61) – but fails to cite to it when it forecloses mandatory injunctive relief. The Court of Appeals cannot have it both ways.

Further, the Court of Appeals' refusal to apply this prohibition on mandatory injunctions to a municipality exercising its eminent domain power under Chapter 136 harms and calls into question the efficacy of and authority vested in the approximately 54 other municipalities that have this authority per their charters.[7] The Town's use of its legislatively

[7] There are approximately 55 municipalities with similar charter provisions that allow the use of the eminent domain power and process of Chapter 136, that will be negatively impacted by the Court of Appeals ruling (list includes effected municipality and year of the Session Law enacting this power to condemn under Chapter 136 for certain enumerated purposes including sewer):

| | | | |
|---|---|---|---|
| Winston-Salem 1967 | Morganton 1975 | Farmville 1979 | Troutman 1981 |
| Chapel Hill 1969 | Cabarrus Co 1975 | Garland 1979 | Mayodan 1981 |
| Goldsboro 1973 | Garner 1977 | Rutherfordton 1979 | Maiden 1981 |
| Zebulon 1973 | Concord 1977 | Wake Forest 1979 | Brevard 1981 |
| Fairmont 1973 | Lenoir 1977 | Fuquay-Varina 1979 | High Point 1981 |
| Raleigh 1973 | Fayetteville 1977 | Knightdale 1979 | Newton 1981 |
| Raeford 1973 | Spring Lake 1977 | Lincolnton 1979 | Kinston 1981 |
| Wilson 1973 | Cumberland Co | Albemarle 1979 | Charlotte 1983 |
| Greensboro 1973 | 1977 | Asheboro 1979 | Conover 1985 |

granted eminent domain power under Chapter 136 insulates it from a mandatory injunctive claim to be brought by Rubin under the facts of this case. *Clark*; *Batts.*

In refusing to apply *Clark* and *Batts* to bar Rubin's mandatory injunction claim, the Court of Appeals attempts to create a distinction between State and municipal condemnors and whether these condemnors are subject to a mandatory injunction claim to remove previously installed facilities. (¶49, 50). The Town does not agree that there is a distinction – and there certainly is not a distinction since the Town preceded under Chapter 136 herein. The Court of Appeals makes this leap by trying to classify the Town's actions in this case as a proprietary function – operation of a sewer system.[8] But the Court of Appeals held that the Town was exercising their power of eminent

| | | | |
|---|---|---|---|
| Reidsville 1974<br>Eden 1974<br>Durham 1975<br>Grifton 1975<br>Ramseur 1975 | Valdese 1977<br>Mint Hill 1977<br>Mount Olive 1977<br>Statesville 1977<br>Greenville 1977 | Pineville 1980<br>Mocksville 1980<br>Forest City 1981<br>Southern Pines 1981<br>Jamestown 1981 | Hickory 1985<br>Salisbury 1987<br>Apex 1987<br>Rocky Mount 2004<br>Holly Springs 2005 |

[8] The claim that the Town was conducting a proprietary function was not pled or raised by Rubin at the trial court, in either the 2015 or 2019 cases.

domain pursuant to N. C. Gen. Stat. § 136-103, *et. seq.* (2019) when they installed the sewer line. Rubin's purported mandatory injunction remedy arises out of the Town's exercise of its power of eminent domain – which resulted in the installation of the sewer line beneath Rubin's property. The power of eminent domain is an inherent power of government. The *Harrison v. City of Sanford* case cited by the Court of Appeals deals with a sewage spill resulting from a municipality's operation of a municipal sewer system – not a municipality's exercise of the power of eminent domain. 177 N.C. App. 116, 627 S.E. 2d 672 (2006). The Court of Appeals purported distinction between state and municipal condemnors should be rejected – and the Court should find that a mandatory injunction remedy does not lie against the Town herein.

The Court of Appeals cites *Corum v. Univ. of North Carolina,* 330 N.C. 761, 413 S.E.2d 276 (1992) in an attempt to justify its ruling that Rubin can seek a mandatory injunction remedy after the condemnation action is concluded. There is no Supreme Court case applying *Corum* to an eminent domain case. In fact, this Court recently rejected *Corum* as providing relief to a landowner against a physical invasion by a

municipality that lacked a public purpose; and applied the state's inverse condemnation law to address the municipality's action. *Wilkie v. City of Boiling Spring Lakes,* 370 NC 540, 809 S.E.2d 853 (2018)[9]. Under *Corum*, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782, 413 S.E.2d at 289.

Unlike the Map Act provisions at issue in the *Kirby v. N.C. Dep't of Transp.,* 368 N.C. 847, 786 S.E.2d 919 (2016) case, there is no North Carolina case that says that the statutory remedies of Article 9 of Chapter 136 (condemnation for NC Dept. of Transportation), or Article 37 of Chapter 1 (injunctions) are not adequate to address the rights of Rubin or any other landowner in a condemnation case who wishes to prevent the facilities from being installed during the pendency of a condemnation action. Cases like *Thornton* provide landowners a road map on how to plead injunctive relief and enjoin the construction of a

[9] The Court of Appeals attempts to distinguish *Wilkie* due to the relief sought by the landowner. But there is nothing in the *Wilkie* opinion that the conclusion that a public purpose is not an element of an inverse condemnation is based on the remedy sought (damages vs injunctive relief).

project during the pendency of the condemnation proceeding. *Corum* does not provide Rubin a basis for filing a subsequent lawsuit and requesting mandatory injunctive relief. Like *Corum*, Rubin plead constitutional claims in her answer to the condemnation complaint. *Corum* also plead and requested preliminary and permanent injunctive relief, whereas Rubin did not. Rubin was not prevented from pleading and requesting injunctive relief in the months after she was notified of the impending condemnation action and before the construction of the sewer line. Rubin cannot be heard to question the rememdies she failed to seek. *Corum* does not give her a do over for failing to request an adequate and available state remedy in the condemnation action that she failed to plead or request. If *Corum* applies at all to a condemnation case, the claim would need to be plead and raised in the condemnation case – which was not done here; not in a subsequent action.

By way of further comparison, N.C. Gen. Stat. § 40A-42(f) provides that "the provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor." Specifically, N.C. Gen. Stat. § 40A-42(a)(1) provides a landowner a right

to bring an injunction action in the condemnation action to halt the vesting of title and immediate possession in a condemnor after the filing of a condemnation complaint.

> "***Unless an action for injunctive relief has been initiated***, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41." [Emphasis supplied]

Article 9 of Chapter 136 of the General Statutes does not contain a similar injunction provision – but *Thornton* recognizes a landowner's ability to file an injunction to prevent or halt the construction of the project before the project is constructed. No case under Chapter 136 or Chapter 40A allows a landowner to seek injunctive relief against the condemnor in a subsequent action after a final Judgment in the condemnation case. The Court of Appeals cannot use C*orum* to create a new claim and allow a mandatory injunction remedy because there are adequate statutory remedies (remedies Rubin refused to avail herself of).

### B. The Rules of Civil Procedure, *res judicata,* and the law on "all other issues" hearings in condemnation cases preclude injunctive relief in a subsequent action.

The Court of Appeals decision to allow Rubin to bring a mandatory injunction claim in a new action to address conduct by the Town that was the subject to the prior condemnation action violates the Rules of Civil Procedure, *res judicata,* and the law on "all other issues" hearings in condemnation cases. In *In re McKinney,* 158 N.C. App. 441, 581 S.E.2d 793 (2003), the Court of Appeals stated: "To be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter.:

> An application to the court for an order shall 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.*

N. C. R. Civ. P. 7(b)(1) (2001) (emphasis added in original). N. C. R. Civ. P. 8(a)(2) provides that for a claim of relief in a pleading, it must contain "a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

The Rules of Civil Procedure do not allow a litigant to hold back relief or remedies they seek to assert – and save them for a future lawsuit.

A subsequent mandatory injunction remedy is barred by *res judicata*. Res judicata bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action. *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004); *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336–37, disc. rev. denied, 323 N.C. 173, 373 S.E.2d 108 (1988). A final judgment "operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as 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." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), disc. review denied, 315 N.C. 590, 341 S.E.2d 29 (1986) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen

the subject of the ... litigation with respect to matters which might have been brought forward in the previous proceeding." *Id*. at 23, 331 S.E.2d at 730. "The defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Id*. at 30, 331 S.E.2d at 735.

The Court of Appeals erred in failing to find that *res judicata* bars Rubin from seeking a mandatory injunction to have the sewer line removed in a subsequent proceeding. Rubin knew prior to filing her answer that the Town planned to move forward with construction of the project. (App. 2-5). Prior to construction of the sewer line, Rubin's attorney sent the Town a letter stating Rubin intended to contest the right to take and "will be filing a motion to be heard by the Court on an expedited basis" and that "if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to ***make a claim for damages***." [Emphasis supplied]. (2015 R p 72)(App. 5). At no point did counsel for Rubin state that they intended to bring a claim for injunctive relief, either preliminary or permanent, to prevent the sewer line from being constructed. (2015 R pp 69-71)(App. 2-5). Rubin

subsequently filed an Answer to the Complaint on 8 July 2015, requesting dismissal of the Condemnation Complaint, but did not request mandatory injunctive relief. (2015 R pp 20-24). Rubin had notice of the sewer line's installation and did not bring the issue before the Court at the Section 108 hearing approximately 12 months after the sewer line installation. Rubin's request for a mandatory injunction is a claim which she, exercising reasonable diligence, might have brought forward at the time of the original lawsuit. As such, Rubin's claim for mandatory injunction is barred by res judicata, and the Court of Appeals in so ordering. *Williams v. Peabody,* 217 N.C. App. 1, 719 S.E.2d 88 (2011).

The Court of Appeals' attempt to allow Rubin to bring an action for a mandatory injunction for conduct occurring in the condemnation action after the action is concluded also violates the law on Section 108 "all other issues" hearings. "[The] parties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.G.S. § 136–108." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999). "We hold that, at a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in a N.C.G.S. § 136–

108 hearing." *City of Wilson v. Batten Family, L.L.C.,* 226 N.C. App. 434, 439, 740 S.E.2d 487, 491 (2013). As the landowner and party challenging the right to take, Rubin was aware that title and possession would vest upon the filing of the condemnation action, that the Town intended to move forward with the project, and then became aware that the Town had constructed the sewer line beneath her property (Aug. 2016 T p 44) approximately 12 months before the Section 108 hearing. If Rubin wanted an injunction, she should have moved for an injunction before the lawsuit was filed, pled injunctive relief and/or moved for injunctive relief before the sewer line was installed. *Thornton* says she could have prevented the installation by requesting injunctive relief. Further, Rubin did not even raise the issue of removal at the Section 108 hearing, to give Judge O'Neal a chance to evaluate the issue. Rubin failed to avail herself of the available remedies under state law and failed to even raise the issue at the Section 108 hearing. (*Town of Apex v. Rubin,* 2021-NCCOA-187, ¶¶ 33-34). As the Court of Appeals stated in *Batten*, "we do not believe N.C.G.S. § 136–108 contemplates affording a party multiple

hearings, at least not when the party had every opportunity to argue all relevant issues in a single N.C.G.S. § 136–108 hearing." *Id*.

The Court of Appeals reliance on a compulsory counterclaim case does not save Rubin's request for a mandatory injunction. The Court of Appeals reliance on this doctrine is misplaced and not supported by Supreme Court condemnation law and precedent. The Court of Appeals is essentially allowing a bifurcated process where the landowner "protests" the right to take, but does not have to plead available injunctive remedies, or the newly created tort claims in the alternative. So, like here, the condemnor and the trial court are not aware that the landowner purportedly seeks mandatory injunctive relief. Then if successful in their challenge to the right to take, the landowner can institute a new action for trespass and possibly other torts, and can seek mandatory injunctive relief – all after title and possession have vested.

The Court of Appeals erred in holding that a landowner who did not seek mandatory injunctive relief in the condemnation action can bring a separate lawsuit after the fact and seek mandatory injunctive relief to remove a previously installed sewer line.

## CONCLUSION

For the reasons cited herein, Apex respectfully requests the Court vacate the portions of the Court of Appeals opinions that allow Rubin to bring a trespass claim against the Town, that allow Rubin to seek injunctive relief in an attempt to have the sewer line removed, and that strike or vacate portions of the trial court orders in the 2015 or 2019 cases.

Respectfully submitted, this the 31st day of January, 2024.

/s/ David P. Ferrell
David P. Ferrell
NC State Bar No. 23097
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Maynard Nexsen PC
4141 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
Telephone: (919) 573-7421

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.

/s/ George T. Smith
George T. Smith
N.C. State Bar No.: 52631
gtsmith@maynardnexsen.com
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4141 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
Telephone: (919) 653-7836
*Attorneys for Plaintiff-Appellant Town of Apex*

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **PLAINTIFF-APPELLANT'S CONSOLIDATED NEW BRIEF** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Matthew Nis Leerberg
Troy D. Shelton
Fox Rothschild LLP
PO Box 27525
Raleigh, NC 27611
*Attorneys for Defendant-Appellant Beverly L. Rubin*

Kenneth C. Haywood
B. Joan Davis
Howard, Stallings, From Atkins Angell & Davis, P.A.
5410 Trinity Road, Suite 210
Raleigh, NC 27607
*Attorneys for Defendant-Appellant Beverly L. Rubin*

This the 31st day of January, 2024.

/s/ David P. Ferrell
David P. Ferrell

## CONTENTS OF APPENDIX

Sec. 6.5. - Additional eminent domain powers.

Notwithstanding the provisions of G.S. 40A-1, in the exercise of its authority of eminent domain for the acquisition of property interests (including, without limitation, fee simple title, rights-of-way, and easements) to be used for: (i) water lines and treatment facilities; (ii) sewer lines and treatment facilities; (iii) electric distribution and transmission facilities; and (iv) opening, widening, extending, or improving public streets and roads, the town may use the procedure and authority prescribed in G.S. Article 9 of Chapter 136, as now or hereafter amended; provided further, that whenever therein the words "Secretary" or "Secretary of Transportation" appear, they shall be deemed to include the "Town Manager", and whenever therein the word "highway" appears, it is deemed to include "public works" in accordance with this section, provided further that nothing herein shall be construed to enlarge the power of the town to condemn property already devoted to public use. Provided further, just compensation for the acquisition of fee simple title, or a perpetual easement, pursuant to this section, to be used for street or road right-of-way, shall be no less than (i) one dollar ($1.00) per square foot of real property taken, or (ii) the prorated ad valorem tax value of the parent tract, whichever is less. Just compensation for the acquisition of fee simple title or a perpetual easement pursuant to this section to be used for electric distribution and transmission facilities shall be no less than: (i) fifty cents ($0.50) per square foot of real property taken, or (ii) one-half the prorated ad valorem tax value of the parent tract, whichever is less. The powers granted by this section are in addition to and supplementary to those powers granted by any local or general law.

(S.L. 1987, Ch. 170, § 1; Amend. of 7-16-03; S.L. 2003-88, § 1, 5-29-03; S.L. 2007-37, § 2, 5-8-07)

## David Ferrell

**From:** David Ferrell
**Sent:** Friday, June 12, 2015 5:28 PM
**To:** Kenneth Haywood
**Subject:** RE: Town of Apex / Rubin

Kenneth,

We disagree with your characterizations that the condemnation complaint was filed suddenly. To date we have received nothing as a result of your May 19 letter. The Town will need to move forward with the project. Let me know if you would like to discuss.

David

**David P. Ferrell**
VANDEVENTER BLACK LLP
O: 919.754.1171 | F: 919.754.1317
dferrell@vanblk.com
Bio vCard

**From:** Kenneth Haywood [mailto:KHaywood@bbghlaw.com]
**Sent:** Wednesday, June 10, 2015 4:24 PM
**To:** David Ferrell
**Subject:** RE: Town of Apex / Rubin

David,

We stand by our last letter. Prior to the initiation of the lawsuit we had prepared a public record's request to send to the Town. That was interrupted by the sudden filing of the lawsuit. We therefore have request for production of documents that will need to be responded to in order to bring on our motions. We will be sending these out to you in the next couple days. I am not aware of any urgency in moving forward with the construction and therefore best for all parties to gather the necessary documents and have the hearing.

Kenneth

Kenneth C. Haywood

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**From:** David Ferrell [mailto:DFerrell@vanblk.com]
**Sent:** Wednesday, June 10, 2015 3:49 PM
**To:** Kenneth Haywood
**Subject:** RE: Town of Apex / Rubin

Kenneth,

Given that the Town has heard nothing from Ms. Rubin regarding the issues in your May 19, 2015 letter and our exchange of correspondence on May 22, 2015, we will move the construction of the project forward. If you have questions or would like to discuss, please give me a call. Thanks.

David

**David P. Ferrell**
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O: 919.754.1171 | F: 919.754.1317
dferrell@vanblk.com
Bio vCard

**From:** Kenneth Haywood [mailto:KHaywood@bbghlaw.com]
**Sent:** Friday, May 22, 2015 5:20 PM
**To:** David Ferrell
**Subject:** RE: Town of Apex / Rubin

David,

I have signed the acceptance and it is being mailed back. Given that the Town decided to go under 136 and not issue a 30 day letter and we received the complaint out of the blue we will move this matter along at the required pace.

Kenneth

Kenneth C. Haywood

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Fax: (919) 832-3918
khaywood@bbghlaw.com
www.bbghlaw.com

**From:** David Ferrell [mailto:DFerrell@vanblk.com]
**Sent:** Friday, May 22, 2015 5:05 PM
**To:** Kenneth Haywood
**Subject:** Town of Apex / Rubin

Kenneth

I am in receipt of your letter dated May 19, 2015 in the above referenced matter. Although we disagree with the characterizations in your letter and the basis for your motion, if you plan to file the motion and schedule a hearing,

please do quickly and set the matter on a mutually agreeable hearing date. The Town's project is scheduled to move forward and we cannot put it on hold for an undetermined period of time.

Also, if you do not plan to accept service on behalf of Ms. Rubin, please let me know so we can serve her directly. Thanks.

If you have questions or want to discuss, please give me a call. Thanks.

David

**David P. Ferrell**
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dferrell@vanblk.com
**Bio** **vCard**

**App. 5**

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May 19, 2015

MAY 2 2 2015

David P. Ferrell
Vandeventer Black LLP
Post Office Box 2599
Raleigh, North Carolina 27602

VIA FACSIMILE AND
U.S. MAIL

Re: Town of Apex v. Beverly L. Rubin

Dear David:

I am writing in response to the recent complaint you filed on behalf of the Town of Apex. Our client intends to challenge, the right to take, by the Town of Apex in this matter. Therefore, we will be filing a motion to be heard by the Court on an expedited basis.

I am writing to alert you to our intent to file such a motion and would encourage your client and its partner, the developer of the tract of land on either side of Ms. Rubin to not commence any construction activities until after the motion is heard. Otherwise, if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for damages. I trust that you appreciate providing advance notice to you of our intention in order to be able to mitigate against any actions caused by premature construction activities.

Once we have a motion hearing date, I will notify you in advance.

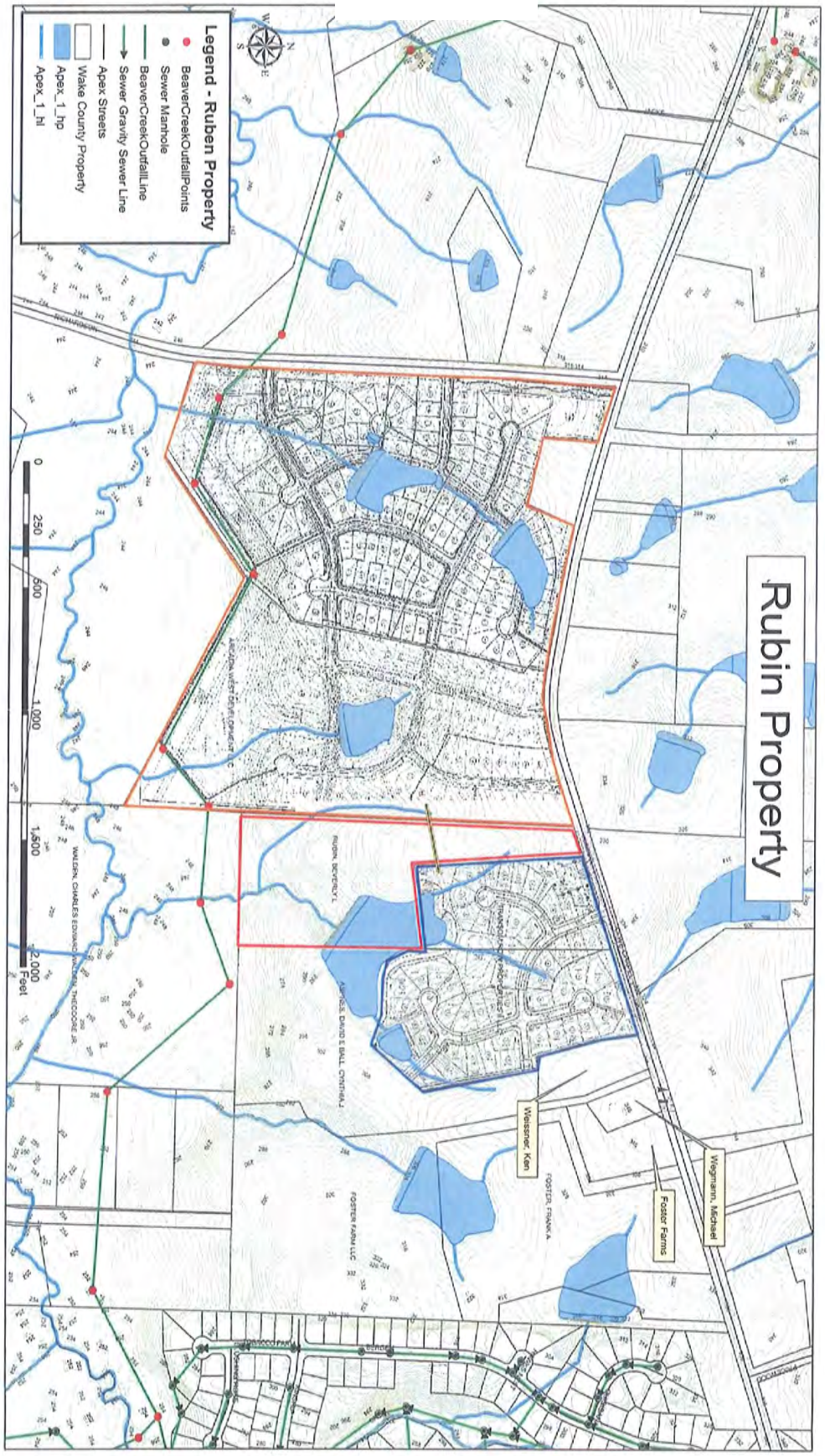
With best regards, I am

Sincerely yours,

Boxley, Bolton, Garber & Haywood, L.L.P.

Kenneth C. Haywood

KCH/lbf
cc: Beverly Rubin


Rubin Property
Legend - Ruben Property
BeaverCreekOutfallPoints
Sewer Manhole
BeaverCreekOutfallLine
Sewer Gravity Sewer Line
Apex Streets
Wake County Property
Apex_1_hp
Apex_1_hl
0
250
500
1,000
1,500
2,000
Feet
Weissner, Ken
Foster Farms
Wegmann, Michael