No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
**********

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

---

No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
**********

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

---

**********

# NEW BRIEF OF RESPONDENT/CROSS-PETITIONER BEVERLY RUBIN

**********

## INDEX

## TABLE OF CASES AND AUTHORITIES

**Cases:**

**Statutes:**



**Other Authorities:**



**Constitutional Provisions:**

No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
**********

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

---

No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
**********

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

---

**********

# NEW BRIEF OF RESPONDENT/CROSS-PETITIONER BEVERLY RUBIN

**********

## INTRODUCTION

The government can take private property for a public purpose, provided it pays the property owner just compensation. But no amount of money permits the government to take private property without a public purpose. Our state and federal constitutions foreclose any debate over these principles.

The Town of Apex would prefer that were not so.

In 2016, a superior court judge told the Town of Apex it had no right to take Ms. Rubin's property. That judgment was upheld on appeal. At that point, there was nothing left to be done except for the Town to leave Ms. Rubin's property.

But the Town refused to leave. The Town convinced the Honorable G. Bryan Collins that it had the right to stay on the land and pay just compensation after all, based on a series of confusing and flat-wrong legal theories. The Court of Appeals correctly disregarded the Town's inventions, reversing Judge Collins in part and reaffirming the trial court's underlying 2016 judgment.

Yet, the Court of Appeals failed to go far enough to protect Ms. Rubin's property rights. Writing for the panel, the Honorable Lucy Inman opined that, since the Town refuses to leave her land, Ms. Rubin now needs to pursue a trespass claim in a new action, under which the government might be allowed to continue to occupy her property.

That holding is not the law, and it is dangerous. When a North Carolina court tells the government it has no right to invade the property of a North Carolinian, *the government must leave*. A citizen like Ms. Rubin does not need to separately ask the courts to enjoin the government from violating a valid judgment. The citizens of this state have the right to expect that the government will obey court orders.

The Town invaded Ms. Rubin's property nearly a decade ago. It is past time for the Town to leave. That is what our state and federal constitutions require.

## ISSUE PRESENTED

Is a municipal government entitled to permanently possess private property even though the courts have already told the government that its occupation is unconstitutional?

## STATEMENT OF THE CASE

On 30 April 2015, the Town of Apex commenced this case by filing a direct-condemnation action against property owner Beverly Rubin seeking to install a sewer pipe. (R pp 3-4.)[1] On 18 October 2016, after an evidentiary

[1] These two related cases have been consolidated by Order signed 20 December 2023. Unless otherwise noted, record citations are to the original condemnation action (No. COA20-304 in the Court of Appeals).

hearing, the Honorable Elaine M. O'Neal entered a final judgment, determining that the Town's taking of Ms. Rubin's property was unconstitutional because it lacked a public purpose. (R pp 33-38.)

The Town eventually attempted to appeal. (R p 103.) On 16 October 2018, the Court of Appeals issued a published opinion dismissing the Town's appeal because it was too late. *Town of Apex v. Rubin*, 262 N.C. App. 148, 153, 821 S.E.2d 613, 616 (2018) ("*Rubin I*"). The Town petitioned this Court for discretionary review, but that petition was denied. (R p 136); 372 N.C. 107, 825 S.E.2d 253 (2019).

On 10 April 2019, the same day that the case was certified back to the trial court, Ms. Rubin moved to enforce the final judgment (since the sewer pipe was still on her property) or alternatively for a writ of mandamus "directing the Town of Apex to remove the sewer line." (R pp 122-126.)

The Town responded by filing a new lawsuit. (R pp 3-7 in No. COA20-305.) The Town amended that complaint on 30 August 2019. (R pp 83-88 in No. COA20-305.) The same day, the Town moved to vacate the final judgment in the original condemnation action—the judgment that had already been upheld on appeal. (R pp 145-148.)

On 9 January 2020, the trial court (the Honorable G. Bryan Collins presiding) heard Ms. Rubin's motion to dismiss and the Town's motion for a preliminary injunction in the new action, as well as the two motions in the Town's

original condemnation action. (Jan. 2020 T p 4.) The trial court entered orders denying each of Ms. Rubin's motions in the two cases and granting each of the Town's. (R pp 143-144, 162-168; R pp 102-111 in No. COA20-305.)

On 29 January 2020, Ms. Rubin timely appealed from all four of these orders in each of the two cases. (R pp 169-170; R pp 112-113 in No. COA20-305.) On 4 May 2021, the Court of Appeals published two opinions affirming in part, vacating in part, and reversing in part the trial court's orders. *Town of Apex v. Rubin*, 277 N.C. App. 328, 858 S.E.2d 387 (2021) ("*Rubin II*"); *Town of Apex v. Rubin*, 277 N.C. App. 357, 858 S.E.2d 364 (2021) ("*Rubin III*").

The Town petitioned this Court for discretionary review, and Ms. Rubin filed a conditional petition for discretionary review. By Orders signed 20 October 2023, the Court allowed both petitions.

## STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Review is authorized under N.C. Gen. Stat. § 7A-31.

## STATEMENT OF FACTS

This saga began almost a decade ago. A private land developer and the Town of Apex entered into a deal to take Ms. Rubin's land away from her. Courts have repeatedly rejected their scheme as unconstitutional, but the Town refuses—to this day—to leave Ms. Rubin's property.

**A. A Developer Strikes a Deal to Steal Ms. Rubin's Land.**

Ms. Rubin has been living at her Wake County home since 2010. (May 2019 T pp 6, 63.) At that time, her home was in a rural part of Wake County. Then, and now, her home was not in the Town of Apex. Like many others in her area, Ms. Rubin has always used a septic system instead of sewer. (R S (I) p 201.)

Mr. Zadell, a real-estate speculator, had dreams to develop the countryside around Ms. Rubin's home. In 2012 and 2013, he began buying up and developing land in the area. (R S (I) pp 269-275.) Since the surrounding properties did not have sewer access, Mr. Zadell bought all these properties cheaply.

But the empty land Mr. Zadell was buying would be worth much more if it had sewer access. The cheapest way for Mr. Zadell to run sewer to the vacant land was to install a sewer pipe that would bisect Ms. Rubin's rural homestead. (R S (I) pp 201-202.) He repeatedly asked Ms. Rubin to sell her land (or at least give an easement) to him, but she refused. *Rubin I*, 262 N.C. App. at 49, 821 S.E.2d at 614.

Unable to get what he wanted through negotiation, Mr. Zadell turned to compulsion. Mr. Zadell went to the Town of Apex, "pressuring" it to use its eminent domain power to condemn a sewer easement across Ms. Rubin's property. (R p 34 (Judgment ¶ 9).) The Town eventually relented. Mr. Zadell,

through his company Parkside Builders, signed a contract in which they agreed to pay all just compensation, expenses, costs, and attorney's fees that the Town would incur in acquiring a sewer easement across Ms. Rubin's land. (R p 35 (Judgment ¶¶ 11-12).)

**B. The Courts Reject the Town's Unconstitutional Conduct.**

On 30 April 2015, the Town filed a direct-condemnation action (the "2015 case") against Ms. Rubin. (R pp 3-4.) The Town estimated the compensation due to Ms. Rubin as $10,771. (R p 13.) Shortly after the condemnation complaint was filed, Mr. Zadell sold the nearby vacant property for a $2.5 million profit. (R p 35.)

On 19 May 2015, just after the direct-condemnation action was filed, Ms. Rubin's counsel put the Town on notice that she intended "to challenge[] the right to take[] by the Town of Apex in this matter." (R p 24.)

Then, on 8 July 2015, Ms. Rubin answered, formally contesting the Town's ability to use its eminent domain power for the financial gain of a private developer. (R pp 20-22.) Ms. Rubin asked the court to declare that the Town's taking was illegal. (R p 21.) Ms. Rubin again warned the Town that, if it began construction of its sewer pipe while the case was pending, the risk was on the Town if the invasion turned out to be unconstitutional. (R pp 21, 24.)

At the time of the letter and Ms. Rubin's answer, construction had not yet begun on the sewer pipe. Despite the warnings therein, the Town began constructing the sewer pipe anyway, while its condemnation action was pending, under its statutory "quick-take" powers. (R pp 163-64; R p 84 in No. COA20-305; May 2019 T p 6.) The constructed pipe bisects Ms. Rubin's property, creating significant development challenges should Ms. Rubin or a subsequent owner choose to subdivide the property. (R S (I) p 202.) The Town had the option of installing a sewer pipe that wouldn't interfere with Ms. Rubin's property, but instead chose a more disruptive option because that was cheapest for the Town. (R S (I) pp 201-202.) Accordingly, Ms. Rubin moved for a hearing to determine the Town's authority to invade her property. (R p 25.)

On 1 August 2016, the Honorable Elaine M. O'Neal conducted an evidentiary hearing on whether the Town's invasion was unconstitutional. (R p 33.) At the time of the hearing, the land to be served by the sewer (and owned by a private developer) was still vacant. (R S (I) p 292.) No houses had been built. (R S (I) p 292.) No lot had even closed. (R S (I) p 292.)

After the hearing, Judge O'Neal entered a final judgment, determining that "[t]he paramount reason for the taking of the sewer easement is for a private interest and the public's interest [is] merely incidental." (R pp 33-38.) The judgment declared the Town's condemnation action regarding Ms. Rubin's property to be "null and void" and dismissed the Town's claim. (R p 38.)

After the Town lost, rather than appeal, it filed a motion for reconsideration—purportedly under Rules 59 and 60 of the Rules of Civil Procedure. (R pp 40-55.) The trial court found the motion improper and meritless and denied it on 24 January 2017. (R p 101); *Rubin I*, 262 N.C. App. at 150, 821 S.E.2d at 615.

Only then did the Town attempt to appeal. (R p 103.) But because the Town's motion for reconsideration was improper, it did not toll the time for the Town to appeal from the final judgment. The Court of Appeals, therefore, dismissed the appeal as untimely in a published opinion. *Rubin I*, 262 N.C. App. 148, 821 S.E.2d 613. The Court went further, though, and noted "for [the Town's] benefit" that it had also reviewed the merits and found no error in the trial court's judgment. *Id.* at 153 n.2, 821 S.E.2d at 617 n.2. This Court denied the Town's petition for discretionary review and certified the case back to the trial court. (R pp 136, 139.)

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

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

So, on the same day the case was remanded, Ms. Rubin moved to enforce the final judgment or alternatively for an order directing the Town to remove the sewer pipe. (R pp 122-126.) Rather than respond to that motion, the Town filed a new, duplicative action against Ms. Rubin. (R pp 3-7 in No. COA20-305.) In that action (the "2019 case"), the Town asked that the trial court declare that *the Town* is the rightful owner of the sewer easement and that Ms. Rubin's sole remedy for the taking is just compensation. (R pp 87-88 in No. COA20-305.) Ms. Rubin moved to dismiss the 2019 case because the action's legal theory was flawed and because it was barred by either res judicata or the prior-action-pending doctrine. (R pp 91-93 in No. COA20-305.) The Town also moved to enjoin Ms. Rubin from interfering with the sewer pipe, even though the trial court had already concluded that its installation was unconstitutional. (R pp 18-24 in No. COA20-305.) Meanwhile, the Town moved to vacate the final judgment in its original condemnation case—a judgment that had already been upheld on appeal. (R pp 145-148.)

With Judge O'Neal having retired from the bench, all motions in both cases were heard at the same time by the Honorable G. Bryan Collins. Even though the judgment was final and affirmed, Judge Collins stayed the cases and ordered the parties to mediate. (R pp 143-144.) When the mediation impassed, the motions in both cases were heard together. (Jan. 2020 T pp 3-7.)

Judge Collins denied both of Ms. Rubin's motions and granted both of the Town's. Judge Collins:

- denied Ms. Rubin's motion to enforce the final judgment in the original condemnation action or require removal of the sewer pipe (R pp 155-161);
- granted the Town's motion to vacate Judge O'Neal's final judgment in the original condemnation action (R pp 162-168);
- denied Ms. Rubin's motion to dismiss the 2019 case (R pp 102-03 in No. COA20-305); and
- granted the Town a preliminary injunction, ordering Ms. Rubin not to remove the sewer pipe that the Town unconstitutionally installed (R pp 104-11 in No. COA20-305).

Ms. Rubin appealed from all these orders. In *Rubin II*, the Court of Appeals vacated the trial court's order denying Ms. Rubin's motion to enforce the judgment, and reversed the trial court's order granting the Town relief from the judgment, but held that mandatory injunctive relief is "available only through a separate claim against the Town." 277 N.C. App. at 356, 858 S.E.2d at 406. In *Rubin III*, the Court of Appeals partially reversed the trial court's denial of Ms. Rubin's motion to dismiss the 2019 case and affirmed in part and vacated in part the trial court's preliminary injunction order. 277 N.C. App. at 371, 858 S.E.2d at 374-75.

The sewer pipe remains on Ms. Rubin's property, in violation of the judgment and the state and federal constitutions.

## ARGUMENT

### I. STANDARD OF REVIEW.

Much of the Court of Appeals opinions is correct. Under the agreed briefing schedule, this brief focuses on the ways in which the Court of Appeals erred.

The Court of Appeals' central mistake was in holding as a matter of law that mandatory injunctive relief "is not available" to Ms. Rubin in the current cases and that she may only seek relief "through a claim for trespass" in a new, separate action. *Rubin II*, 277 N.C. App. at 329, 858 S.E.2d at 390. Further, had the Court of Appeals properly held in *Rubin II* that the original judgment is self-executing, or that Ms. Rubin was entitled to an injunction commanding the Town to cease its unconstitutional occupation, it likewise would have dismissed the Town's 2019 case and would not have allowed the Town's preliminary injunction *against Ms. Rubin* to stand in *Rubin III*. 277 N.C. App. at 371, 858 S.E.2d at 374-75.

These are legal errors, which this Court reviews de novo. *See, e.g.*, *State v. Fritsche*, --- N.C. ---, 895 S.E.2d 347, 349 (2023).

## II. THE TOWN SHOULD HAVE OBEYED THE FINAL JUDGMENT THAT WAS AFFIRMED ON APPEAL.

The Town lost its direct-condemnation case, and that judgment was upheld on appeal. That should have been the end of the matter. The government's intrusion was determined to be unconstitutional, and therefore unlawful.

When a court tells a private party that its conduct is unlawful, it reasonably expects the party to stop the conduct. The court does not need to separately require the party to obey its orders. Courts expect compliance with their judgments.

The same goes for the government when it acts as a litigant. If anything, the government should be held to *a higher* standard than private litigants. Yet here, eight years after the Town first invaded Ms. Rubin's property, it refuses to leave. The Town and now the Court of Appeals have laid the onus on Ms. Rubin to convince a court to award separate injunctive relief that would require the Town to stop its unconstitutional conduct.

Ms. Rubin shouldn't be required to do anything at this point. She won. The courts do not need to wait on Ms. Rubin to file the right motion or seek the right relief. If the Town will not voluntarily cease its unlawful conduct, then the courts have ample authority to put the Town in its place without Ms. Rubin's help.

Accordingly, the Court of Appeals erred in both *Rubin II* and *Rubin III* by allowing the Town to continue to occupy Ms. Rubin's property. The Town must be ordered to leave, which would also render the 2019 case subject to immediate dismissal.

## III. A PROPERTY OWNER WHOSE LAND IS OCCUPIED IS ENTITLED TO AN INJUNCTION TO STOP THE OCCUPATION.

Alternatively, Ms. Rubin moved for injunctive relief: an order commanding the Town to cease its unconstitutional conduct and leave her property. (R pp 122-126.) The Court of Appeals erred by failing to issue such an order (or remand for issuance of such an order).

### A. When the Government Occupies Private Property in Violation of the Constitution, the Courts Must Tell the Government to Leave.

The unconstitutionality of the Town's conduct was conclusively established in *Rubin I*, in which this Court denied discretionary review. In other words, the Town cannot deny at this late hour that it violated the federal and state constitutions by occupying Ms. Rubin's property not for a public use.

"From the very beginnings of our republic we have jealously guarded against the governmental taking of property." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 853, 786 S.E.2d 919, 924 (2016). These protections are enshrined in the Fifth Amendment to the United States Constitution, which ensures that

private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V.

Our North Carolina Constitution secures private property from government intrusion to at least the same extent as the U.S. Constitution, grounding these rights as "an integral part of the law of the land within the meaning of Article 1, Section 19 of our North Carolina Constitution." *Kirby*, 368 N.C. at 853, 786 S.E.2d at 924 (cleaned up); *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 67–72 (2d ed. 2013) (discussing the development and interpretation of the Law of the Land Clause).

Both constitutions forbid the government from taking private property for a private purpose. Under our North Carolina Constitution, "private property can be taken only for a public purpose, or more properly speaking a public use, and upon the payment of just compensation." *Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 603, 114 S.E.2d 688, 694 (1960). Federal law is the same: "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Such a purely private "taking" is not a taking at all; "it would serve no legitimate purpose of government and would thus be void." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *see also Calder v. Bull*, 3 U.S. 386, 388 (1798) (describing such government misconduct

as being "against all reason and justice"). Once it has been established that the invasion is for a private purpose, "that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). In fact, such conduct implicates another constitutional provision: "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article or amendment of the constitution of the United States." *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896); *see also Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 605 (1908). The fourteenth amendment "furnishes a guaranty against any encroachment by the State on the fundamental rights belonging to every citizen." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955). There is no question that the Town engaged in unconstitutional conduct. The only question remaining is whether the Town can continue to engage in that unconstitutional conduct, or whether it has to stop.

This Court has already indicated what the appropriate remedy is. In *State Highway Commission v. Batts*, the commission sought to condemn a right-of-way for a road which would end in a cul-de-sac for the dominant use and benefit of one family. 265 N.C. 346, 144 S.E.2d 126 (1965). Because the purported taking was actually a private appropriation for a private benefit,

this Court held that the trial court should have not only dismissed the condemnation complaint but also "should have issued an injunction permanently restraining [the commission] from proceeding with the condemnation and appropriation of [the property owners'] lands." *Id.* at 361, 144 S.E.2d at 137.

An injunction was also the appropriate remedy in *Bradshaw v. Hilton Lumber Co.*, 179 N.C. 501, 103 S.E. 69 (1920). There, the Court reiterated that "the property of one individual cannot be taken for appropriation to the use of another, even for full compensation," as doing so "would be nothing but the exercise of arbitrary and despotic power and not according to the law of the land as these words are employed in our Constitution." *Id.* at 504, 103 S.E. at 70. The logging company's use of a road across the plaintiff's property for a private purpose was "forbidden by law." *Id.* at 504, 103 S.E. at 71. When such trespasses "are constantly recurring, and threatened to be continued, they may be redressed by injunction." *Id.* Damages are not the exclusive solution; "an injunction is a proper additional remedy." *Id.* at 508, 103 S.E. at 73.

The General Assembly has recognized this principle as well. In amending the condemnation statutes, the legislature has explicitly preserved the right to obtain injunctive relief. *Nelson v. Town of Highlands*, 159 N.C. App. 393, 399-400, 583 S.E.2d 313, 317-18 (2003) (Hudson, J., dissenting) (citing N.C. Gen. Stat. §§ 40A-28(g) and 40A-42(f) [App. 6, 8]), *dissenting opinion adopted by* 358 N.C. 210, 594 S.E.2d 21 (2004) (per curiam).

Prior to the opinions in this case, the Court of Appeals agreed—under very similar facts. In *City of Statesville v. Roth,* a city sought to condemn property to install sewer and water lines. 77 N.C. App. 803, 336 S.E.2d 142 (1985), *abrogated on other grounds as recognized in Tucker v. City of Kannapolis*, 159 N.C. App. 174, 582 S.E.2d 697 (2003). However, the purported condemnation was only for the benefit of an adjacent property owner. *Id.* at 804-05, 336 S.E.2d at 142-43. The Court recognized that "such use for one particular individual or enterprise was a private use." *Id.* at 807, 336 S.E.2d at 144. Thus, the Court affirmed the trial court's order that required the city "to remove the [lines] from the property and to restore the same to its former condition." *Id.* at 806, 336 S.E.2d at 143.

Courts in other jurisdictions have recognized the same principles when faced with facts similar to those presented here. For example, the Supreme Court of Hawaii affirmed a judgment ordering the removal of sewer lines that a municipal corporation had unlawfully installed under a property owner's land. *Honolulu Mem'l Park, Inc. v. City & Cnty. of Honolulu*, 436 P.2d 207 (Haw. 1967). The presence of the sewer line, "albeit underground, [had] unlawfully deprived the appellee of the unrestricted possession of its premises," and therefore ejectment was the proper remedy "for restoration to the appellee of that part of its premises from which it [had] been ousted." *Id.* at 210-11; *see also Peter v. City & Cnty. of Honolulu*, 35 Haw. 225, 230 (1939) ("The mere fact

that the structure sought to be removed is below the surface of the ground is no reason why ejectment is not the proper remedy. Plaintiff is entitled to the unrestricted possession of the premises of which he holds the fee. For the restitution of that part of his premises from which he has been unlawfully ousted ejectment is the proper remedy.").

Thus, the "accepted doctrine" is that a property owner "may have his action for damages or for the value of the land *or may maintain ejectment or other possessory action*, or may enjoin the company from appropriating or using such land." *Carolina & Nw. Ry. Co. v. Piedmont Wagon & Mfg. Co.*, 229 N.C. 695, 698, 51 S.E.2d 301, 304 (1949) (emphasis added). When a governmental entity acts unconstitutionally by invading property, the property owner "still has relief in the form of the return of his property." *In re Rapp*, 621 N.W.2d 781, 784 (Minn. Ct. App. 2001); *see also Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 308 (3d Cir. 2008) ("A plaintiff that proves that a government entity has taken its property for a private, not a public, use is entitled to an injunction against the unconstitutional taking, not simply compensation.").

The remedy here, therefore, is simple: an injunction requiring the Town to stop its unconstitutional occupation of Ms. Rubin's property. The Town must remove the pipe.

### B. No Separate Proceeding Is Needed or Appropriate.

There is a good reason why our courts, and courts across the country, recognize that mandatory injunctive relief is required if the government will not cease unconstitutional conduct. The injunction is needed "to prevent the continuous adverse user from creating the right to an easement, and to avoid a multiplicity of suits." *Bradshaw*, 179 N.C. at 508, 103 S.E. at 73. Yet, that "multiplicity of suits" is exactly what the Court of Appeals opinion in *Rubin II* would require.

The Court of Appeals correctly held "that the [*Rubin I*] Judgment reverted title to Ms. Rubin in fee, restoring to her exclusive rights in the tract and divesting the Town of any legal title or lawful claim to encroach on it." *Rubin II*, 277 N.C. App. at 344, 858 S.E.2d at 398. But the panel was wrong to suggest that Ms. Rubin is not entitled to an injunction in the 2015 case because she "did not seek mandatory injunctive relief." *Id.*

For one, the Town was on notice from the start that Ms. Rubin was challenging the Town's right to invade her property. (R pp 21, 24.) Yet, it moved ahead with construction anyway. That is a risk the Town assumed with its eyes open.

Second, Ms. Rubin *did* seek mandatory injunctive relief at the appropriate time. The Town's right to take came before the trial court in 2016. The Town lost. (R pp 33-38.) When the government files a condemnation action

and loses because the proposed taking lacks a public purpose, then the trial court should dismiss the condemnation action. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 236-37, 156 S.E.2d 248, 255-56 (1967). That is exactly what Judge O'Neal did here in the *Rubin I* judgment. (R p 38.) That dismissal should have the same functional effect and benefit to the landowner as granting an injunction against the government. *Thornton*, 271 N.C. at 236-37, 156 S.E.2d at 255.

It was not until the Town refused to abide by the final judgment that injunctive relief became necessary. That is precisely why Ms. Rubin filed a "Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus" on 10 April 2019, after the Town had exhausted its appellate rights. (R pp 122-26.) In that filing, Ms. Rubin specifically requested that the trial court "order the Town of Apex to remove the sewer lines on Ms. Rubin's property within thirty days." That is, she expressly sought a mandatory injunction.

Ms. Rubin did not need to rely on a separate tort or statutory cause of action. "When the provision of a Constitution . . . forbids damage to private property, and points out no remedy, and no statute affords one," then "the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." *Sale*, 242 N.C. at 618, 89 S.E.2d at 296. This has been the law since our nation's founding. "[I]t is a general and indisputable rule, that where there

is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Ms. Rubin gave the trial court several independent legal grounds on which it could base the issuance of an injunction, including Civil Procedure Rule 70 [App. 1], legislative grants of authority under N.C. Gen. Stat. §§ 1-259, -298, and -302 [App. 2-4], the court's authority to issue a writ of mandamus, and the court's inherent authority.[2] (R pp 122-26.) Any one of those was sufficient to justify an injunction.

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

[2] Ms. Rubin focused on Rule 70, section 1-302, and the court's inherent authority in her appeal to the Court of Appeals. Sections 1-259 and 1-298 provide alternative grounds for a court to issue injunctive relief where appropriate. *See* N.C. Gen. Stat. § 1-259 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."); *id.* § 1-298 (providing that on remand after a judgment is affirmed on appeal, "the court below shall direct the execution thereof to proceed").

The Court of Appeals deemed these procedures inadequate because it didn't think the judgment explicitly required the return of Ms. Rubin's property. (R p 158.) But the final judgment had already dismissed the Town's claim to Ms. Rubin's property, and thus reverted title of the land to Ms. Rubin. (R pp 37-38); *Town of Midland v. Morris*, 209 N.C. App. 208, 213-14, 704 S.E.2d 329, 334 (2011). The Town no longer had a right to have its sewer pipe on Ms. Rubin's land, and the trial court erred by letting the Town defy the judgment.

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

(1) The final judgment gave Ms. Rubin a clear right to have her property cleared of the Town's occupation.

(2) The Town's duty to leave was clear under the state and federal constitutions.

(3) The Town's duty to end its occupation left nothing to the Town's discretion.

(4) Because the judgment had become final, and the Town's temporary appellate stay was dissolved, (R p 136), the Town's time for removing the pipe had passed.

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

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

This is another reason why the Court of Appeals erred in concluding that Ms. Rubin did not request an injunction. After all, "there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction" since either may be "invoked to compel the undoing of something wrongfully done." *State ex rel. Shartel v. Humphreys*, 93 S.W.2d 924, 926-27 (Mo. 1936).

***Inherent authority***. Regardless of other avenues to injunctive relief, courts always have the authority to enter such an equitable remedy. Even the Court of Appeals below recognized as much. *Rubin II*, 277 N.C. App. at 343-44, 858 S.E.2d at 398 (quoting *Wildcatt v. Smith*, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984) ("[W]hile a court loses jurisdiction over a cause after it renders a final decree, it retains jurisdiction to correct or enforce its judgment.")). This Court has also reaffirmed this basic principle supporting the rule of law. *State v. Buckner*, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000) (reiterating that

inherent power "is essential to the court's existence and the orderly and efficient administration of justice" and includes the "authority to do all things that are reasonably necessary for the proper administration of justice").

That is all the more true when constitutional violations are involved. The Supreme Court of Oregon explained it well more than a century ago. *Myers v. Clackamas Cnty.*, 194 P. 176, 178 (Ore. 1921). In *Myers,* a county complained that a road it had unlawfully built should stay as is. *Id.* The court said it made no difference whether the land invaded was "of but little value," because "the question involved is a constitutional right." *Id.* Only one remedy was appropriate: a decree "enjoining the [county] from trespassing or using the lands." *Id.*

Contrary to the Court of Appeals' reasoning, there is no need to complicate a dispute by requiring separate litigation. "When an illegal entry upon private land under color of the power of eminent domain is attempted, it will be restrained by a court of equity without regard to the usual conditions for the exercise of equitable jurisdiction." *Gulf Lines Connecting R.R. of Ill. v. Golconda N. Ry.*, 125 N.E. 357, 360 (Ill. 1919). "The action is based upon the attempted misuse of the sovereign power delegated by the Legislature and the protection of the individual right against the wrong." *Id.* Without authority

to condemn, trespassers are "mere intruders upon the land," and the landowner is "entitled to an injunction to prevent the taking and use of the land in that manner." *Id.*

In failing to recognize the appropriate remedy, the Court of Appeals seemed to overlook the admonition of this Court:

> the courts may not violate or weaken a fundamental principle, upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

*Cozad v. Kanawha Hardwood Co.*, 139 N.C. 283, 297-97, 51 S.E. 932, 937 (1905).

When a governmental entity invades property for a private purpose, it is not acting in a governmental function but is rather acting like any other private actor. It should be treated as such. If a next-door neighbor parks a car or builds a wall on someone else's property, that property owner is entitled to mandatory injunctive relief to remove the car or wall. The same is true here. *See O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937) (affirming a mandatory injunction that required the defendants to remove a portion of their wharf that extended into the plaintiffs' property).

The Court of Appeals erred in holding that Ms. Rubin was required to institute a separate action seeking injunctive relief; that relief should have been self-executing.

### C. The Court of Appeals Opinion Undermines Fundamental Property Rights by Subjecting Them to a Balancing Test.

It has already been conclusively established that the Town's actions—for a private purpose—"were ultra vires and void." *See Stratford v. City of Greensboro*, 124 N.C. 127, 133, 32 S.E. 394, 397 (1899). The appropriate remedy is to hold the Town accountable for its actions by ordering it to remove the sewer line from Ms. Rubin's property. The Court of Appeals decision, however, provides a pathway for the Town to avoid that remedy by asserting equitable arguments to avoid constitutional restrictions on its power. That is improper. The Town should not be permitted to openly violate a court order and then benefit from its brazenness.

The Court of Appeals appeared to base its "balancing test" approach on this Court's decision in *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986). As the Court of Appeals correctly noted, *Clark* considered the availability of injunctive relief against the *State*, not against a *municipality*, and regardless should not be read too broadly in light of this Court's later decision in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). *See Rubin II*, 277 N.C. App. at 351-52, 858 S.E.2d 403-04. The

Court of Appeals even held that *Clark* is distinguishable from this case for those reasons. *Id.*

Yet, later in its opinion, the Court of Appeals apparently held that *Clark* controlled here, justifying a remand "for further findings of fact that consider the relative convenience-inconvenience and the comparative injuries to the parties." *Rubin II*, 277 N.C. App. at 354, 858 S.E.2d at 405 (cleaned up).

The Court of Appeals was right the first time. *Clark* is indeed distinguishable for the two reasons cited.

A question this Court has previously asked bears repeating here: "Why should a municipality which has not exercised a right conferred upon it by the sovereignty in the manner defined by the author of the right gain an additional advantage over a private owner by virtue of its own unauthorized procedure?" *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372-73, 163 S.E.2d 363, 371 (1968). The U.S. Supreme Court expressed a similar sentiment long ago:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional

> provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

*Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871).

After all, "[i] is not a trivial thing to take another's land." *Thornton*, 271 N.C. at 233, 156 S.E.2d at 253. The land at issue is Ms. Rubin's, and she "may not be compelled to accept its value in lieu of it unless it is taken from [her] for a public use." *Id.* at 241, 156 S.E.2d at 259. This Court has previously explained the importance of such rights:

> The fundamental right to property is as old as our state. Public policy has long favored the free and unrestricted use and enjoyment of land. "Property" encompasses every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value and includes not only the thing possessed but the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use.

*Kirby*, 368 N.C. at 853, 786 S.E.2d at 923-24 (internal citations and quotations omitted).

Similarly, in *Stratford v. City of Greensboro* this Court reiterated that when a town has taken private property for private use, a property owner "may have his remedy in the courts against the proceedings, and may have them declared ultra vires and void." 124 N.C. at 133, 32 S.E. at 396. The Court specifically noted that "[i]f such rights were denied to exist against municipal

corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities." *Id.* at 133-34, 32 S.E. at 396.

Adopting the Court of Appeals' approach "would result in effectively holding that, in all public purpose challenges, even if there was an unconstitutional taking, the transfer of title immediately renders any effective relief impossible at any point thereafter." *Hous. & Redevelopment Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885, 890 (Minn. 2002). The better rule is that a governmental entity "may be compelled to return all or part of appellants' property if it took the property in an unconstitutional manner." *Id.* at 891. "To hold otherwise would actually insulate and arguably reward condemning authorities who fail to meet the public purpose requirements, but begin improvements prior to the conclusion of the very litigation challenging this authority." *Id.* at 891 n.2.

"Even if the [Town] now finds itself embarrassed" by its actions, it "may not assert such embarrassment as a bar to this right of [Ms. Rubin]." *Thornton*, 271 N.C. at 237, 156 S.E.2d at 256. Because the Town could have created sewer access another way, without invading Ms. Rubin's property, "it was its duty to do so." *Walther v. City of Cape Girardeau*, 149 S.W. 36, 39 (Mo. Ct. App. 1912). In *Walther*, the court upheld a mandatory injunction that required a city to

remove a sewer pipe that had been unlawfully installed. "The act of the city in this case was a naked trespass, committed not only without sanction of law, but in violation both of the mandates of the constitution and of statutory enactments." *Id.* at 41. In that case, as here, "there was not only no acquiescence or consent but there was determined and positive objection, followed by an appeal to the court, of which appeal defendant was duly notified before it had completed the acts sought to be enjoined." *Id.* at 39. The court rejected the same argument that the Town of Apex makes here:

> Having completed the trespass these defendants now say: "You cannot make us undo what we have done—sue us at law for damages." If individuals, or municipalities, by such high handed proceedings, tending to a breach of the peace, and in flagrant disrespect of the courts and in an attempt to thwart their jurisdiction, can, in this manner, evade the power of the chancellor and put the process of law and the orderly proceedings of the court at defiance in an attempt to render any action the court may take abortive, we have a government of force and not of law.

*Id.* at 40. Thus, the court upheld the mandatory injunction "compelling the undoing of what had been done." *Id.* When entities "exceed their statutory powers in dealing with other people's property, no question of damage is raised when an injunction is applied for; but simply one of the invasion of a right." *Id.* at 41. Such entities "are liable to be enjoined from further trespass and a court of equity has power to cause them to undo what they have illegally done, irrespective of the amount of damage." *Id.*

In short, the injunction necessarily follows from the unconstitutional conduct. There are no equities to be balanced. *Higday v. Nickolaus*, 469 S.W.2d 859, 870 (Mo. Ct. App. 1971) ("Such a wrong will be enjoined without the customary requirements of equitable jurisdiction, and more particularly, without regard to the questions of irreparable damage or the existence of a legal remedy which may afford a money compensation.").

The Court of Appeals erred by holding otherwise.

## IV. THE 2019 CASE SHOULD HAVE BEEN DISMISSED.

As shown above, there is no need for a second lawsuit here. Injunctive relief is available—indeed, mandatory—in the 2015 case.

That is why the Town's 2019 case failed from the start. Once an injunction issues in the 2015 case, the 2019 case serves no purpose. There is no need for a declaratory judgment delineating the rights of the parties; those were conclusively established in the 2015 case. Nor is there any basis for an injunction *in favor of the Town* in the 2019 case. Since the Town has no right to occupy Ms. Rubin's property, then it likewise has no right to prevent her from using her own property as she sees fit. If the Town does not want interference with its sewer line, it should be rerouted around Ms. Rubin's property, as the Town should have and could have done from the start. (R S (I) pp 201-202.)

The Court of Appeals, however, allowed the 2019 case to proceed despite Ms. Rubin's motion to dismiss. *Rubin III*, 277 N.C. App. at 371, 858 S.E.2d at

374. The Court reasoned that the final judgment in the 2015 case "did not address what must be done with the Town's pipe under her land." *Id.* at 369, 858 S.E.2d at 373. As discussed, that conclusion is incorrect, because the judgment was self-executing and the Town should have ceased its unconstitutional conduct rather than flout the judgment.

It necessarily follows that the Town's 2019 case—including its requests for a declaratory judgment and a preliminary injunction—is barred by the prior-action-pending doctrine or res judicata. *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990) (prior action pending); *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (res judicata). Either the 2015 case is still pending (in which case the 2019 case was barred by the prior-action-pending doctrine), or the 2015 case is not still pending (in which case the 2019 case was barred by res judicata).

For these reasons, the 2019 case should have been dismissed outright.

## CONCLUSION

For the foregoing reasons, the Court of Appeals opinions should be reversed to the extent that (1) they held that Ms. Rubin was not entitled to mandatory injunctive relief; and (2) they failed to dismiss the 2019 case and vacate the preliminary injunction issued therein in favor of the Town. Ms. Rubin asks this Court to order the Town to cease its unconstitutional occupation of her private property and remove the sewer pipe.

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

FOX ROTHSCHILD LLP

Electronically submitted

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

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.

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

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

Kenneth C. Haywood
N.C. State Bar No. 19066
khaywood@hsfh.com
B. Joan Davis
N.C. State Bar No. 17379
5410 Trinity Road, Suite 210
Raleigh, NC 27607
Telephone: 919.821.7700
Facsimile: 919.821.7703

*Counsel for Beverly Rubin*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing brief was electronically filed and served this day via email addressed as follows:

David P. Ferrell
George T. Smith
MAYNARD NEXSEN PC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612
dferrell@maynardnexsen.com
gtsmith@maynardnexsen.com

This the 31st day of January, 2024.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

No. 410P18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
**********

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

---

No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
**********

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

---

**********

**CONTENTS OF APPENDIX**

**********

Appendix Pages

West's North Carolina General Statutes Annotated
Chapter 1A. Rules of Civil Procedure (Refs & Annos)
Article 8. Miscellaneous

Rules Civ.Proc., G.S. § 1A-1, Rule 70

# Rule 70. Judgment for specific acts; vesting title

Currentness

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt. If real or personal property is within the State, the judge in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to execution upon application to the clerk upon payment of the necessary fees.

**Credits**
Added by Laws 1967, c. 954, § 1.

Rules Civ. Proc., G.S. § 1A-1, Rule 70, NC ST RCP § 1A-1, Rule 70
The statutes and Constitution are current through S.L. 2023-133 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

**End of Document**

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter VIII. Judgment
Article 26. Declaratory Judgments (Refs & Annos)

N.C.G.S.A. § 1-259

§ 1-259. Supplemental relief

Currentness

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

N.C.G.S.A. § 1-259, NC ST § 1-259
The statutes and Constitution are current through S.L. 2023-133 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter IX. Appeal
Article 27. Appeal (Refs & Annos)

N.C.G.S.A. § 1-298

§ 1-298. Procedure after determination of appeal

Currentness

In civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first session after the receipt of the certificate from the Appellate Division.

**Credits**
Amended by Laws 1969, c. 44, § 11; Laws 1971, c. 268, § 13.

N.C.G.S.A. § 1-298, NC ST § 1-298
The statutes and Constitution are current through S.L. 2023-133 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

**End of Document**

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter X. Execution
Article 28. Execution (Refs & Annos)

N.C.G.S.A. § 1-302

§ 1-302. Judgment enforced by execution

Currentness

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

N.C.G.S.A. § 1-302, NC ST § 1-302
The statutes and Constitution are current through S.L. 2023-133 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's North Carolina General Statutes Annotated
Chapter 40A. Eminent Domain (Refs & Annos)
Article 2. Condemnation Proceedings by Private Condemnors (Refs & Annos)

N.C.G.S.A. § 40A-28

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution

Currentness

(a) Upon the filing of the report, the clerk shall forthwith mail copies to the parties. Within 20 days after the filing of the report any party to the proceedings may file exceptions thereto. The clerk, after notice to the parties, shall hear any exceptions so filed and may thereafter direct a new appraisal, modify or confirm the report, or make such other orders as the clerk may deem right and proper.

(b) If no exceptions are filed to the report, and if the clerk's final judgment rendered upon the petition and proceedings shall be in favor of the condemnor, and upon the deposit by the condemnor of the sum adjudged, together with all costs allowed, into the office of the clerk of superior court, then, in that event, all owners who have been made parties to the proceedings shall be divested of the property or interest therein to the extent set forth in the proceedings. A copy of the judgment, certified under the seal of the court, shall be registered in the county or counties where the land is situated, and the original judgment, or a certified copy thereof, or a certified copy of the registered judgment, may be given in evidence in all actions and proceedings as deeds for property are now allowed in evidence.

(c) Any party to the proceedings may file exceptions to the clerk's final determination on any exceptions to the report and may appeal to the judge of superior court having jurisdiction. Notice of appeal shall be filed within 10 days of the clerk's final determination. Upon appeal the clerk shall transfer the proceedings to the civil issue docket of the superior court. A judge in session shall hear and determine all matters in controversy and, subject to G.S. 40A-29 regarding trial by jury, shall determine any issues of compensation to be awarded in accordance with the provisions of Article 4 of this Chapter.

(d) Notwithstanding the filing of exceptions by any party to any orders or final determination of the clerk or the filing of a notice of appeal to the superior court, the condemnor may, at the time of the filing of the report of commissioners, deposit with the clerk of superior court in the proceedings the sum appraised by the commissioners and, in that event, the condemnor may enter, take possession of, and hold said property in the manner and to the extent sought to be acquired by the proceedings until final judgment is rendered on any appeal.

(e) If, on appeal, the judge shall refuse to condemn the property, then the money deposited with the clerk of court in the proceedings, or so much thereof as shall be adjudged, shall be refunded to the condemnor and the condemnor shall have no right to the property and shall surrender possession of the same, on demand, to the owner. The judge shall have full power and authority to make such orders, judgments and decrees as may be necessary to carry into effect the final judgment rendered in such proceedings, including compensation in accordance with the provisions of G.S. 40A-8.

 © 2024 Thomson Reuters. No claim to original U.S. Government Works. 

(f) If the amount adjudged to be paid the owner of any property condemned under this Article shall not be paid within 60 days after final judgment in the proceedings, the right under the judgment to take the property shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against said claimant except the compensation awarded for the taking of the property.

(g) The provisions of this section shall not preclude any injunctive relief otherwise available to the owner or the condemnor.

**Credits**
Added by Laws 1981, c. 919, § 1.

N.C.G.S.A. § 40A-28, NC ST § 40A-28
The statutes and Constitution are current through S.L. 2023-133 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

**End of Document**

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

West's North Carolina General Statutes Annotated
Chapter 40A. Eminent Domain (Refs & Annos)
Article 3. Condemnation by Public Condemnors (Refs & Annos)

N.C.G.S.A. § 40A-42

§ 40A-42. Vesting of title and right of possession; injunction not precluded

Effective: April 27, 2021
Currentness

(a)(1) Standard Provision.--When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b)(1), (4) or (7), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a local board of education or any combination of local boards of education is acquiring property for any purpose set forth in G.S. 115C-517, or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(1), (8), (9), (10), (12), or (13) title to the property and the right to immediate possession shall vest pursuant to this subsection. 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.

(2) Modified Provision for Certain Localities.--When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b1)(1), (4), (7), (10), or (11), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a local board of education or any combination of local boards of education is acquiring property for any purpose set forth in G.S. 115C-517, or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10), (12), or (13) title to the property and the right to immediate possession shall vest pursuant to this subsection. 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.

This subdivision applies only to Carteret and Dare Counties, the Towns of Atlantic Beach, Carolina Beach, Caswell Beach, Duck, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Oak Island, Ocean Isle Beach, Pine Knoll Shores, Southern Shores, Sunset Beach, Surf City, Topsail Beach, and Wrightsville Beach, and the Village of Bald Head Island.

(b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession shall vest in the condemnor pursuant to this subsection. 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:

(1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or

(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46; or

 © 2024 Thomson Reuters. No claim to original U.S. Government Works. 

(3) Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

(c) If the property is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

(d) If the answer raises any issues other than the issue of compensation, the issues so raised shall be determined under the provisions of G.S. 40A-47.

(e) The judge shall enter such orders in the cause as may be required to place the condemnor in possession.

(f) The provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor.

**Credits**

Added by Laws 1981, c. 919, § 1. Amended by Laws 1989 (Reg. Sess., 1990), c. 871,§ 1; S.L. 1998-212, § 9.10, eff. July 1, 1998; S.L. 2001-36, § 2, eff. April 26, 2001; S.L. 2001-239, § 1, eff. June 23, 2001; S.L. 2003-282, § 2, eff. June 30, 2003; S.L. 2004-203, § 33, eff. Aug. 17, 2004; S.L. 2009-85, § 1, eff. June 11, 2009; S.L. 2014-86, § 2, eff. July 25, 2014; S.L. 2021-14, § 2, eff. April 27, 2021.

N.C.G.S.A. § 40A-42, NC ST § 40A-42

The statutes and Constitution are current through S.L. 2023-133 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

**End of Document**

© 2024 Thomson Reuters. No claim to original U.S. Government Works.