NO. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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TOWN OF APEX,	)	
	)	
Petitioner/Cross-Respondent,	)	
	)	
v.	)	From Wake County
	)	No. COA20-304
BEVERLY L. RUBIN,	)	
	)	
Respondent/Cross-Petitioner.	)	
	)	
	)	

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

****

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondent/Cross-Petitioner, Beverly Rubin.[1]

INTRODUCTION

In a free society, we should not expect that when a court tells the government that a taking is illegal and unconstitutional, that it would just go ahead and seize the property anyway. Yet that is exactly what the Town of Apex did. Having been told it was acting unconstitutionally, it did not do the right thing and stand down. Instead, its only response to the court's lawful order that the taking lacked a public use was to occupy Ms. Rubin's land, and then claim it was too late for Ms. Rubin or the court to do anything about it. This isn't the rule of law, but predatory government conduct that a court has the power to address even in the absence of the property owner's trespass claim.

This case is an opportunity to reaffirm a foundational principle of limited government: the sovereign power of eminent domain does not

[1] Pursuant to Rule 28.1(b)(3)c. of the North Carolina Rules of Appellate Procedure, PLF certifies that no other person or entity (other than the amicus curiae, its members, or its counsel) helped write this brief or contributed money for its preparation.

extend to taking private property for private use, and the Town's attempt to do so was utterly void—not merely voidable. Neither North Carolina's Law of the Land Clause, nor the U.S. Constitution's Public Use Clause, is so toothless that it permits the Town to purposely violate Ms. Rubin's property rights, with the court powerless to do anything unless and until she pursues and wins a common law trespass claim.

Underlying the Court of Appeals decision is the incorrect assumption that the Town's invasion and occupation of Ms. Rubin's land was a run-of-the-mill tort, redressable solely by a separate trespass action. But exercising the sovereign power of eminent domain to seize property—especially after the courts have held that the taking is not appropriate—is not merely a civil wrong, but the government acting well outside its constitutionally delegated powers. This principle goes back to the foundation of this nation. *See, e.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798) ("It is against all reason and justice for a people to entrust a legislature with such powers [to take property for another's private use], and therefore it cannot be presumed that it has done it."). Put another way, in addition to recognizing a property owner's individual civil right to keep and use their property unless a taking is for public use,

the public use requirement acknowledges an inherent limitation on sovereign power: takings for private benefit are simply beyond the power of government. In other words, the public use requirement is self-executing and does not merely give rise to a cause of action in trespass. As such, the courts of North Carolina, like any other, inherently have the power to enforce it.

Thus, once the court in the eminent domain action determined that the Town's attempt to take Ms. Rubin's property for private benefit was an illegitimate exercise of governmental power, she need have done nothing more. As a party which acted unconstitutionally and in derogation of fundamental property rights, the Town—and not the innocent property owner—bore the risk when the Town installed the sewer line. The Town thus also bears the affirmative burden to *remove* it when its gamble that it could install the sewer line, contrary to the court's order, went bad.

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF represents the views of thousands of supporters nationwide who

believe in limited government and private property rights. The scope of PLF's mission is nationwide. And despite its name, PLF litigates matters affecting the public interest at all levels of state and federal courts, including this Court.

PLF attorneys have participated as lead counsel or amicus curiae in every recent landmark case before the U.S. Supreme Court in defense of the right of individuals to make reasonable use of their property, and the right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997). PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues presented by the petition in this case.

ISSUES PRESENTED

After a court determines that a condemnor's attempt to take property by eminent domain violates the Constitution because it lacks a

public use or purpose—but the condemnor takes the property anyway—may it keep the property until the owner pursues and wins a separate trespass claim?

SHORT ANSWER

No. A judicial order determining that an attempted taking is not for public use and is unconstitutional confirms the private property rights of the owner and that the government acted beyond its legitimate power, and of its own force empowers courts to compel the government to remove any invasions without the owner raising a separate claim.

STATEMENT OF THE FACTS

Amicus adopts by reference the Statement of Facts described in Respondent/Cross-Petitioner's New Brief. *See* N.C. R. App. P. 28(f).

ARGUMENT

I. The Public Use Requirement Is an Inherent Limitation on Government Power That Courts May Enforce in Eminent Domain Actions

The U.S. Constitution's Fifth Amendment—which limits states' and their instrumentalities' exercise of sovereign powers via the Fourteenth Amendment's Due Process Clause—requires that all takings be for a public use, and with just compensation. U.S. Const. amend. V ("nor shall private property be taken for public use, without just

compensation"); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 234 (1897) ("the prohibitions of the [Fifth] amendment refer to all the instrumentalities of the State"). This Court has long held that "although the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation," it is "a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Finch v. City of Durham*, 325 N.C. 352, 362–63, 384 S.E.2d 8, 14 (1989) (citations omitted).

A. Taking Property Without a Public Use Is Beyond the Legitimate Power of Government

A taking lacking a public use is an illegitimate exercise of government powers. *See* N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."). This is not an empty promise, or merely a right that can be ignored unless and until a property owner enforces it—but a fundamental limitation on government power. Consequently, the Town's seizure and occupation of Ms. Rubin's property was beyond its legitimate governmental powers, and therefore void and

not merely voidable in a separate trespass action.[2] The North Carolina Constitution itself empowers courts in eminent domain actions which conclude a taking lacks a public use to enforce that conclusion if the government just goes ahead and takes the property anyway, as the Town did here.

The principle that takings lacking a public use are simply beyond the legitimate authority of the government was fundamental to the Founding of the Nation and North Carolina. For example, in the early days of the Republic, Justice Chase wrote that such a taking is "against all reason and justice" because the people have not delegated such powers to their government:

> A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; *or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.* The genius, the nature, and the spirit, of our State Governments,

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[2] One of the Town's arguments below was that the trial court's order that the taking was for private use rendered the eminent domain action "void." *See Town of Apex v. Rubin*, 277 N.C. App. 328, 336, 858 S.E.2d 387, 393 (2021) ("The Judgment is void as it relates to the installed sewer pipe ….").

> amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

Calder, 3 U.S. (3 Dall.) at 388–89 (emphasis added); *see also Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("On the one hand, 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."); *State Highway Comm'n v. Batts*, 265 N.C. 346, 360, 144 S.E.2d 126, 136 (1965) ("The existence of a public use is a *prerequisite* to the right of the State Highway Commission to exercise the power of eminent domain to condemn private property ...") (emphasis added). In short, an attempt to take property without a public use is *ultra vires* and wholly void, in the same way that *ultra vires* contracts are "wholly void" and a null act. *See Madry v. Town of Scotland Neck*, 214 N.C. 461, 199 S.E. 618, 619 (1938).

Both the Law of the Land Clause and the Fifth Amendment's Public Use Clause enshrine the preexisting understanding that the sovereign power to take property includes government's promise to take only for public use, and upon payment of compensation. *See*, *e.g.*, *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation[.]"). The state's sovereign power to take property encompasses a promise to adhere to these limitations. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884). The adoption of the Fourteenth Amendment then confirmed that the states' power of eminent domain, like that of the federal government, is subject to the limitations of the Fifth Amendment. *Chicago, Burlington*, 166 U.S. at 233–41.

A property owner cannot be compelled to sue in tort, because an owner whose land has been invaded by illegal and unconstitutional government action even after a court has held the action unconstitutional has not merely suffered a civil harm redressable by tort, but is the victim of a unique wrong: an abuse of sovereign power. Courts are empowered to remedy this wrong in an eminent domain action, because the

government is engaging in a continuing constitutional wrong, outside the scope of its legitimate power.

B. The Public Use Requirement Is Self-Executing

This Court has recognized that the public use and compensation requirements are "self-executing," meaning that they are remediable of their own force. *See Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955) ("A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation."). In much the same way that the just compensation requirement's function is to ensure that property owners are "put in the same financial position as prior to the taking" (a burden that is squarely on the government), *see Town of Midland v. Wayne*, 368 N.C. 55, 63, 773 S.E.2d 301, 307 (2015) (just compensation means "that persons being required to provide land for public projects are put in the same financial position as prior to the taking"), the public use requirement places the burden on an attempted, but failed, condemnor to put the property in the same physical condition as it was prior to an unconstitutional taking. And if the failed condemnor

does not to do the right thing, a court is empowered by the Fifth and the Fourteenth Amendments and the Law of the Land Clause to compel the government to return the property to its pre-taking state, even without the owner seeking an injunction. In short, a taking lacking a public use is void *ab initio*, and not merely voidable in a separate trespass action.

Recently, the U.S. Supreme Court heard oral arguments in a case that raises a similar issue: whether a property owner must resort to a statutory cause of action in order for a court to order the government to pay just compensation under the "self-executing" Fifth Amendment. *See Devillier v. Texas*, No. 22-913 (U.S. Jan. 16, 2024). The Court did not seem terribly concerned with technical and overly crabbed readings of the Takings Clause, but was more focused on ensuring that overwhelming governmental powers such as eminent domain are subject to the inherent judicial power of the courts to "do something" to address governmental overreach. For example, Justice Kagan asked the government's advocate whether courts lack the power to enforce the Constitution's requirements in takings and eminent domain cases:

> JUSTICE KAGAN: But, General, do you agree with Mr. McNamara that if a state takes a person's property and doesn't give compensation, that state is violating the

Constitution every day? It's an ongoing violation. Do you agree with that?

MR. NIELSON: That's not how the Court has — I — I — I believe — I certainly agree that's a violation of the Constitution. I don't think this Court's cases have ever —

JUSTICE KAGAN: But that's what I want to know. It's an ongoing violation of the Constitution, right? I've taken Mr. McNamara's property. I haven't paid him. Every day I'm violating the Constitution, correct?

MR. NIELSON: Yes, Your Honor.

JUSTICE KAGAN: Okay. *So aren't courts supposed to do something about that?*

MR. NIELSON: Yes, Your Honor. And what this Court said in *Knick* is, when there's not a cause of action, which remember there wasn't a cause of action, there were — you have — there's no remedies.

JUSTICE KAGAN: Yeah.

MR. NIELSON: What is injunctive relief —

JUSTICE KAGAN: But this is — this is very different.

MR. NIELSON: Sure.

JUSTICE KAGAN: You know, in the usual case, we have a constitutional — let's take a Fourth Amendment case. You know, it's you've searched somebody's home illegally.

MR. NIELSON: Mm-hmm.

JUSTICE KAGAN: It's happened, and then it's over, and then the question is what remedy are you going to be giving for that violation. But this is a different kind of violation. It's not — it's not even clear that the word "remedy" is appropriate here. It's a right to compensation. And the state, by taking the land and not compensating, is violating that right every day. It's not that the state —

> MR. NIELSON: Mm-hmm.
>
> JUSTICE KAGAN: — is failing to provide a remedy. The state is violating the right to be paid.

Transcript, *Devillier v. Texas*, No. 22-913, at 46–48 (emphasis added).

The same applies here: courts are empowered to "do something" and do not have to wait for the property owner to file a trespass action. The Court of Appeals' conclusion that even after a judicial determination that an attempted taking is unconstitutional the Town can keep what it illegally seized—unless and until Rubin undertakes the effort and expense to seek and obtain a common-law trespass remedy—is irreconcilable with our understandings about the conditional nature of the power to take property stretching back to the founding era. If that alone was not sufficient, the Fourteenth Amendment confirmed that states and their instrumentalities are similarly limited.

Affirming the Court of Appeals' rationale would also have the effect of encouraging other governments, when caught red-handed as the Town was here, to react the same way: To "just do it," and attempt to render the court's order *fait accompli* and meaningless. The law should not incentivize governments to engage in aggressive and unconstitutional use of their sovereign powers to appropriate property and maintain that

power even when caught.

II. The Government Bears the Burden When Exercising Its Eminent Domain Power in Derogation of the Right to Keep Property

This Court has consistently reaffirmed North Carolina's strong protection of fundamental rights, including the right to private property, by giving the state's constitution "a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Property rights are at the heart of this case, and both the North Carolina and U.S. Constitutions recognize the central role of property rights in our constitutional order. As the U.S. Supreme affirmed in *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993), "[i]ndividual freedom finds tangible expression in property rights." The Court also has observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted).

The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights,* at 3-9, 43 (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist"). The U.S. and the North Carolina Constitutions embrace the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society." John Locke, *The Second Treatise on Civil Government*, XI § 138. *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). James Madison declared, "Government is instituted to protect property of every sort. … This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." *The Complete Madison* 267–68 (Saul K. Padover ed., 1953), *published in National Gazette* (Mar. 29, 1792).

These foundational principles affirm that the people's right to be secure in their property is undermined—or, as in the present case, abrogated entirely—when the demarcation between the government's legitimate powers and its despotic exercise of such powers is blurred, as

the Town does here. The Town did not simply make a mistake; it purposely abused its delegated sovereign power as an "Apex" predator would. Its response to Ms. Rubin and the courts that the only thing they could do is to "sue me," only highlights this abuse.

This abuse of the most awesome sovereign power a government possesses—to force a property owner to give it up against her will and in derogation of her rights—must be strictly viewed in favor of the property owner, and against the government. North Carolina's courts have long-recognized that the sovereign power of eminent domain derogates the common law right to keep one's property. *See Durham & N. Ry. Co. v. Richmond & D.R. Co.*, 106 N.C. 16, 10 S.E. 1041, 1042 (1890) ("The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed."); *Dare Cnty. Bd. of Educ. v. Sakaria*, 118 N.C. App. 609, 614, 456 S.E.2d 842, 845–46 (1995) ("the exercise of the power of eminent domain is in derogation of property rights"), *aff'd*, 342 N.C. 648, 466 S.E.2d 717 (1996). This principle is at its zenith in cases such as this, in which Ms. Rubin has been on the target end of the Town for a decade and the Town ignores even the courts' most solemn decisions.

CONCLUSION

For the reasons stated herein, amicus respectfully requests this Honorable Court reverse the judgment and vacate the preliminary injunction, and to order the Town to stop unconstitutionally occupying Ms. Rubin's land.

Respectfully submitted, this 7th day of February 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION is in compliance with N.C. R. App. P. 28(j) and contains 3,509 words.

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I certify that I directed BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION to be served by email on February 7, 2024, to the following:

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