

No. 410PA18-2

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY L. RUBIN,

Respondent/Cross-Petitioner,

From the Court of Appeals

No. COA 20-304

21-NCCOA-187

From Wake County

15 CVS 5836

No. 206PA21

TENTH JUDICIAL DISTRICT

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY L. RUBIN,

Respondent/Cross-Petitioner,

From the Court of Appeals

No. COA 20-305

21-NCCOA-188

From Wake County

19 CVS 6295

**MOTION OF NORTH CAROLINA ADVOCATES FOR JUSTICE FOR
PERMISSION TO SUBMIT CONSOLIDATED *AMICUS CURIAE* BRIEF**

No. 410PA18-2

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY L. RUBIN,

Respondent/Cross-Petitioner,

From the Court of Appeals

No. COA 20-304

21-NCCOA-187

From Wake County

15 CVS 5836

No. 206PA21

TENTH JUDICIAL DISTRICT

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY L. RUBIN,

Respondent/Cross-Petitioner,

From the Court of Appeals

No. COA 20-305

21-NCCOA-188

From Wake County

19 CVS 6295

**MOTION OF NORTH CAROLINA ADVOCATES FOR JUSTICE FOR
PERMISSION TO SUBMIT CONSOLIDATED *AMICUS CURIAE* BRIEF**

The North Carolina Advocates for Justice (“NCAJ”) respectfully moves this Court, pursuant to Rule 28.1 of the North Carolina Rules of Appellate Procedure, for leave to file a consolidated *amicus curiae* brief in support of Respondent/Cross-Petitioner Beverly L. Rubin (“Respondent/Cross-Petitioner” or “Ms. Rubin”) in the

above captioned matters. NCAJ is conditionally filing its *amicus curiae* brief along with this motion, pursuant to Rule 28.1(b)(1). Pursuant to Rule 37(c) of the North Carolina Rules of Appellate Procedure, NCAJ as *amicus curiae*, made a good faith effort to inform counsel for all other parties of the intended filing of this motion.

THE NATURE OF *AMICUS CURIAE*'S INTEREST

NCAJ is a non-partisan professional association of more than 2,500 North Carolina lawyers. A primary purpose of NCAJ is to advance and protect the rights and interests of those that have been injured or damaged by the wrongful acts of others. In furtherance of its mission, NCAJ regularly conducts continuing legal education seminars and appears as *amicus curiae* before state and federal courts.

NCAJ boasts an active Eminent Domain section that strives to educate the public, lawmakers, judges and members of the North Carolina State Bar on the complexities of eminent domain law. NCAJ members frequently represent North Carolina citizens whose land has been forcibly taken from them via the power of eminent domain. The members of the Eminent Domain section of the NCAJ regularly represent North Carolina property owners whose Constitutional rights have been violated by the taking of their private property for public use without just compensation. This case concerns a fundamental right of landowners in North Carolina to be protected against the unconstitutional taking of their property by the government when said taking is not for a public use or benefit. This is important to NCAJ's mission to protect the property rights of North Carolina citizens.

The Fifth and Fourteenth Amendments of the U.S. Constitution and the “Law of the Land” clause of the North Carolina Constitution prohibit the taking of private property from North Carolina property owners unless the taking is for a public purpose and compensation made. A taking that lacks public purpose is unlawful. These cases involve the unconstitutional taking of Ms. Rubin’s property by the Town of Apex in a direct condemnation action. The taking was declared null and void by the trial court (and affirmed by the appellate court) as lacking a public purpose. To date, the Town of Apex has ignored the court’s ruling and refuses to vacate Ms. Rubin’s property.

THE REASONS WHY AN *AMICUS CURIAE* BRIEF IS BENEFICIAL

This case involves the protection and preservation of the constitutional rights guaranteed to Ms. Rubin and all other North Carolina property owners against the unlawful seizure of private property. In its brief, NCAJ evaluates the basis of the decision of the Court of Appeals and shows that it erred by failing to recognize that an unconstitutional taking is void *ab initio* with self-executing remedies that do not require a separate injunctive procedure. In doing so, NCAJ is fulfilling the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court’s attention to legal precedent in a matter the outcome of which will affect many North Carolinians.

THE ISSUES TO BE ADDRESSED IN THE *AMICUS CURIAE* BRIEF

The question of law to be addressed in the amicus brief is: what is the procedural and substantive relief required to remedy a governmental taking from a property owner that has been adjudicated as unconstitutional and void?

THE POSITION OF *AMICUS CURIAE* ON THOSE ISSUES

NCAJ's position is that the Court of Appeals erred by failing to recognize that an unconstitutional taking is void *ab initio* with self-executing remedies that do not require a separate injunctive procedure and failed to apply the correct standard and give full effect of the original judgment and the courts' inherent remedial powers. The appeals court incorrectly held Rubin's original action was no longer pending, and that she should plead for injunctive relief in still another proceeding. The Court of Appeals' decision in this matter could negate the guarantees of the Fifth and Fourteenth Amendment to the U. S. Constitution and the North Carolina "Law of the Land" that citizens shall not be deprived of their property except for a public purpose and payment of just compensation.

CONCLUSION

For the foregoing reasons, NCAJ respectfully requests this Court grant it leave to file a consolidated *amicus curiae* brief in the above captioned matters.

Respectfully submitted, this 7th day of February, 2024.

JOHNSTON ALLISON & HORD, P.A.

Electronically Submitted

R. Susanne Todd, N.C. Bar No. 16817

stodd@jahlaw.com

1065 East Morehead Street

Charlotte, NC 28204

Telephone: 704 998-2306

N.C. R. App. P. 33(b) Certification: I certify that all of the attorney(s) listed below have authorized me to list their names on this document as if they had personally signed it.

SEVER STOREY WALKER, LLP

Electronically Submitted

Shiloh Daum, N.C. Bar No. 33611

Shiloh@landownerattorneys.com

301 North Main Street, Suite 2400

Winston-Salem, NC 27101

Telephone: 336-245-1155

Counsel for NCAJ

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **MOTION OF NORTH CAROLINA ADVOCATES FOR JUSTICE FOR PERMISSION TO SUBMIT CONSOLIDATED AMICUS CURIAE BRIEF** on counsel for the parties by attachment to electronic mail and U.S. Mail addressed to the attorneys listed below on this date:

Matthew Nis Leerberg
Troy D. Shelton
FOX ROTHSCHILD LLP
434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
mleerberg@foxrothschild.com
tshelton@foxrothschild.com
Counsel for Defendant 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
khaywood@hsfh.com
jdavis@hsfh.com
Counsel for Defendant Beverly L. Rubin

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

Dated this 7th day of February, 2024.

JOHNSTON ALLISON & HORD, P.A.

/s/ R. Susanne Todd

R. Susanne Todd, N.C. Bar No. 16817