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,

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RESPONDENT/CROSS-PETITIONER'S NEW RESPONSE BRIEF

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INTRODUCTION

The Town's consolidated brief is an 83-page collateral attack on the 2016 Judgment. But that Judgment was already upheld by our appellate courts in 2019. It is now set in stone.

The premise of the Town's brief is that its occupation was some sort of valid taking after all. But it can't be. A taking is a government seizure of private property for a public purpose. There is no such thing as a taking for a private purpose; that's just an unconstitutional occupation. The Town's arguments to the contrary should be rejected out of hand.

RESTATEMENT OF FACTS

Ms. Rubin set forth the relevant facts in her opening brief, (Rubin's New Br. at 5-12), and will not repeat them here. The Town set forth its version of the facts in its opening brief. (Town's Consolidated New Br. at 12-31). However, several of the Town's assertions, in its Statement of the Facts and elsewhere, are incorrect and unsupported—necessitating clarification. *See* N.C. R. App. P. 28(c) (providing that if an "appellee disagrees with the appellant's statements," she can "make a restatement" to clarify the facts of record).

As has often been the case in this litigation, the Town's misstatements reveal its desire to relitigate the original 2016 Judgment (2019 R pp 33-39)—the one that was upheld on appeal and is now unassailable. *Town of Apex v.*

Rubin, 262 N.C. App. 148, 821 S.E.2d 613 (2018) ("*Rubin I*"), *discretionary review denied* 372 N.C. 107, 825 S.E.2d 253 (2019). To be clear, these findings from the 2016 Judgment, among others, are set in stone:

- "As early as May 19, 2015, less than a month after the condemnation lawsuit was filed, a letter was sent to counsel for the Town of Apex, informing the Town that Ms. Rubin intended to challenge the right to take the sanitary sewer easement by the Town of Apex." (2019 R p 34 ¶ 4).

- "For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of [the] land." (2019 R p 34 ¶ 7).

- "During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property." (2019 R p 34 ¶ 8).

- "[O]n February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request [on behalf of Mr. Zadell] for the Town to use its powers of eminent domain [against Ms. Rubin], a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars ($2,500,000) more than the original purchase price for the land." (2019 R p 35 ¶ 13).

- "There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company." (2019 R p 36 ¶ 15).

Based on those and other findings, the trial court drew several conclusions of law. Each of those is also binding at this point as the law of the case, including:

- "The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S. Constitution, Art. V; N.C. Constitution, Art. I § 19." (2019 R p 37 ¶ 5).

- "The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property." (2019 R p 37 ¶ 6).

- "The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void." (2019 R p 38 ¶ 1).

In short, the 2016 Judgment determined—once and for all—that the Town's purported taking violated the state and federal constitutions. That Judgment is "neither moot nor void." *Town of Apex v. Rubin*, 277 N.C. App. 328, 344, 858 S.E.2d 387, 398 (2021) ("*Rubin II*").

The Town never squarely denies that its continued occupation of Ms. Rubin's land is unconstitutional. But the Town is nevertheless searching for a way to keep the sewer line there, as though the 2016 Judgment did not exist.

For instance, the Town repeatedly asserts that "there are not reasonable alternatives to the existing sewer line" bisecting Ms. Rubin's land. (Town's Consolidated New Br. at 5; *see also id.* at 24). But the only "evidence" the Town cites in support is the trial court's 2019 preliminary injunction order entered in the Town's duplicative second case against Ms. Rubin. (*Id.* at 24 (citing 2019 R pp 104-11 (enjoining Ms. Rubin from interfering with the sewer pipe on her

own property))). It is true that Judge Collins signed the Town's draft order that included such an assertion, (2019 R pp 109 ¶ 28, 110 ¶ 10), but the order does not cite any evidentiary support for it. The Court of Appeals noticed the same thing and expressly vacated those paragraphs of the trial court's order. *Town of Apex v. Rubin*, 277 N.C. App. 357, 370, 858 S.E.2d 364, 374-75 (2021) ("*Rubin III*").

In fact, the only *evidence* in the record on this point is an affidavit from a land-planning expert explaining that there *were* alternatives to bisecting Ms. Rubin's land. (2015 R S (I) pp 200-03 [App. 3-6]).

The truth is that the Town does not want to reroute the sewer line because of the cost. As the Town admitted, it "will consider a pump station and force main system only when gravity sewer is not feasible." (*See* 2019 R 44 ¶ 13 (the Town's Motion for Reconsideration of the original Judgment) (citing "Exhibit E" thereto)). The support for that admission is a Town policy that "[t]he estimated installed cost of the gravity alternative must be not less than 3.5 times more costly than the pumping station alternative in order for the Town to allow a pumping station." (2019 R p 62). The Town's options were, and are, to spend more money or to continue its unconstitutional conduct. For nearly a decade, the Town has repeatedly chosen the latter.

Relatedly, the Town insists that 50 homes will be without sewer service if the Town is not allowed to continue its unconstitutional occupation of Ms.

Rubin's land. (Town's Consolidated New Br. at 4-5, 24, 37). Again, the only "evidence" the Town cites in support is the trial court's preliminary injunction order. (*Id.* at 24 (citing 2019 R pp 104-11)). If an appellant can cite the order on appeal as evidence supporting the very same order on appeal, the appellate process would be meaningless.

The Town's brief also has the timeline wrong. At the time of the evidentiary hearing on whether the Town's invasion was unconstitutional, the land to be served by the sewer (and owned by a private developer) was still vacant. (2015 R S (I) p 292 [App. 7]). No houses had been built. (2015 R S (I) p 292). No lot had even closed. (2015 R S (I) p 292). Yet, in describing that very hearing, the Town says that "the trial court would not likely have ordered the disruption and removal of public sewer serve [sic] to the third party lot owners in the Riley's Pond Subdivision without giving these 50+ residents of the Town with an interest in and reliance on the public sewer line and service a right to be heard." (Town's Consolidated New Br. at 37).

There were precisely zero such residents when the 2016 Judgment was entered. The timeline is clear: the Town received a court order declaring its sewer occupation of Ms. Rubin's land to be unconstitutional, and it did nothing in response. Had the Town ceased its unconstitutional conduct by rerouting the sewer line, zero residents would have been impacted by the change.

The Town's efforts to rewrite history continue with its repeated claim that Ms. Rubin only ever wanted money, not for the Town to build its sewer elsewhere. (*Id.* at 4, 5, 6, 16, 79, 86). In support, the Town cites only Ms. Rubin's 19 May 2015 letter, sent shortly after the Town's condemnation complaint was filed. (2015 R p 72). But in the letter, Ms. Rubin's counsel was clear: "Our client intends to challenge[] the right to take[] by the Town of Apex in this matter." (2019 R p 72). That is not a demand for damages. It is a plain statement putting the Town on notice that Ms. Rubin did not consent to the Town's actions *at all*, regardless of the price.

The law here is hardly in dispute. "The distinction is readily observed; ordinarily, private property cannot be taken for private purposes without the consent of the owner. For public purposes it can be taken only after payment of just compensation." *Winchester v. Byers*, 196 N.C. 383, 145 S.E. 774, 775 (1928). That is the "rule [that] prevails" in cases involving a government's assertion of "the *right to take* private property for public purposes." *Id.* (emphasis added). In the letter, Ms. Rubin directly challenged the threshold question of whether the government had the "right to take" in the first place.

The letter also put the Town on notice that it should "not commence any construction activities until after the motion [challenging the right to take] is heard." (2015 R p 72). The letter warned that if the Town began construction right away and her motion were later granted, Ms. Rubin would also seek

damages for whatever harm was caused to her land by those wasted construction efforts:

> Otherwise, if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for damages. I trust that you appreciate providing advance notice to you of our intention in order to be able to mitigate against any actions caused by premature construction activities.

(2015 R p 72).

The Town now feigns ignorance, suggesting that Ms. Rubin's letter was just a demand for money. That is not a reasonable reading of the letter. If Ms. Rubin were only seeking damages, she would have had no right to oppose the construction activities in the first place. And those activities could *never* have been "premature," because Ms. Rubin would have been conceding the Town's right to construct the line.

It is also misleading for the Town to characterize the letter as having been sent "[s]everal weeks after" the complaint was filed. (Town's Consolidated New Br. at 16). The letter was sent a mere 20 days after the condemnation complaint was filed. The record does not reflect the later date that the complaint was *served*, but it does show that Ms. Rubin accepted service no earlier than 20 May 2015—the day *after* the letter was sent. (2015 R p 19).

Nor did Ms. Rubin delay the proceedings, as the Town next suggests. (Town's Consolidated New Br. at 17). Ms. Rubin had 12 *months* to answer the complaint. N.C. Gen. Stat. § 136-107. Yet, she answered within 7 *weeks* of service. (2015 R pp 20-24). Further, as Ms. Rubin's counsel explained in an e-mail exchange with the Town's attorney, Ms. Rubin needed to engage in limited discovery to obtain support for her motion challenging the Town's right to take. (2015 R p 69). Ms. Rubin was preparing requests for production of documents at the time. (2015 R p 69). And Ms. Rubin again encouraged the Town not to waste its resources on construction that might be for naught: "I am not aware of any urgency in moving forward with the construction and therefore best for all parties to gather the necessary documents and have the hearing." (2015 R p 69).

Other errors in the Town's statements are integrated into the discussion below.

ARGUMENT

In its opening brief, the Town doubles down on its theory that the government can unlawfully occupy a landowner's property for a private purpose but still get to keep it, so long as it completes the action quickly and then declares it an inverse condemnation, remediable only with compensation. The Town doesn't hide its intent to ignore the 2016 Judgment; it explicitly argues that the current litigation should "determine the rights taken in the

easement by the Town and, if Rubin so chooses, how much compensation Rubin can receive for the Town's property rights in the easement." (Town's Consolidated New Br. at 11; *see also id.* at 26 (arguing that the purpose of the ongoing litigation "is to have the court declare that the sewer easement and line exist on Rubin's property pursuant to the Town's power of eminent domain . . . and Rubin has a right to just compensation for the easement taken, if she so chooses")).

The Court of Appeals saw through that mirage. No amount of compensation allows the government to occupy a citizen's property for a private purpose. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *State Highway Comm'n v. Thornton*, 271 N.C. 227, 241, 156 S.E.2d 248, 259 (1967). The only meaningful remedy that honors our state and federal constitutions is to return Ms. Rubin's property to her in its original condition before the Town unconstitutionally ran a sewer pipe through it.

The Town forecasts that its argument consists of 11 separate "Issues Presented." (Town's Consolidated New Br. at 2, 3). But the rest of the brief abandons that format in favor of a free-ranging exploration of the Town's novel view of constitutional law. The Town's arguments largely boil down to challenges to two of the Court of Appeals' holdings below: (i) that the 2016 Judgment reverted title to Ms. Rubin in fee and divested the Town of any legal title or lawful claim to encroach on it, and (ii) that the Town is a trespasser,

lacking immunity from suit should Ms. Rubin bring a trespass claim, and which could still be required to remove the sewer line on Ms. Rubin's property. Ms. Rubin responds to each in turn.

I. THE TOWN DID NOT ACQUIRE PERMANENT TITLE TO MS. RUBIN'S PROPERTY BY VIRTUE OF ITS UNCONSTITUTIONAL CONDUCT.

In these overlapping cases, the Town asked the Court of Appeals to ignore centuries of constitutional law and hold that the remedy for a governmental occupation advanced for a private purpose is the same as the remedy when a governmental taking is for a public purpose—just compensation. The Town's theory would erase both the Law of the Land Clause from the North Carolina Constitution and the Fifth Amendment from the U.S. Constitution. The Court of Appeals correctly rejected it.

A. Ms. Rubin Was Not Required to Request an Injunction In Order to Retain Ownership of Her Property That the Government Physically Invaded for a Private Purpose.[1]

This Court has already established that a government body cannot take title to private property for a non-public purpose simply by filing a direct

[1] The Town dedicates much of its opening *appellant's* brief to arguments in support of the Court of Appeals' ruling that the 2016 Judgment was not self-executing. (*See generally* Town's Consolidated New Br. at 33-52). Since Ms. Rubin disagrees with the Court of Appeals on that issue, she has already addressed those arguments in her opening appellant's brief. (*See generally* Rubin's New Br. at 13-33). In the interest of judicial economy, Ms. Rubin will refrain from repeating those arguments here.

condemnation action and hastening to complete the construction project. *Thornton,* 271 N.C. at 237, 156 S.E.2d at 256. Rather, when the government files a condemnation action and loses because the proposed taking lacks a public purpose, the court should dismiss the condemnation action altogether—just as the trial court did here in 2016. *See id.* at 236-37, 156 S.E.2d at 255-56. That dismissal has the same functional effect and benefit to the landowner as the issuance of an injunction. *Id*. at 236-37, 156 S.E.2d at 255.

The Town badly misreads *Thornton* to suggest that a landowner must prevent the government from completing the project, lest she be left with mere just compensation as her remedy. The Town claims "the *Thornton* court did not order removal of the public facilities that were installed on the landowner's property without a public purpose, since the landowner did not seek to prevent the construction of the project before it was installed." (Town's Consolidated New Br. at 48-49).

That's wrong for several reasons.

First, this Court ultimately *upheld* the taking in *Thornton* as being for a public purpose. *Id*. at 245, 156 S.E.2d at 261. So there was no reason for this Court to order the government to take any remedial action whatsoever. That outcome is impossible here, of course, because our appellate courts have already upheld the 2016 Judgment finding the Town's purported taking to be void as motivated by a private purpose. (2015 R pp 33-39).

Second, the *Thornton* Court expressly rejected the exact argument the Town now makes. The government cannot moot a landowner's challenge by racing to complete a project:

> Even if the [government] now finds itself embarrassed by its having constructed the road prematurely, upon its own assumption that the defendants would not assert a defense which the statute authorizes (i.e., the [government's] lack of power to condemn the land), the [government] may not assert such embarrassment as a bar to this right of the defendants. *The [government] may not, by precipitate entry and construction, enlarge its own powers of condemnation or shorten the time allowed by the statute for the landowners to assert his defenses.*

271 N.C. at 238, 156 S.E.2d at 256 (emphasis added).

Third, the *Thornton* Court's discussion of injunctive relief is just common sense. This Court recognized that a prohibitory injunction against the contractor hired to build the road, commanding it to halt construction, could not properly issue in a case where the contractor was not a party and after construction was already complete. *Id.* at 236, 156 S.E.2d at 255. An injunction halting the condemnation proceedings would likewise serve no purpose, the *Thornton* Court realized, when dismissal of the proceedings accomplishes the same thing. *Id.* at 236-37, 156 S.E.2d at 255.

But to be clear, the *Thornton* Court did *not* prohibit a court from issuing a mandatory injunction commanding the government to cease an unconstitutional occupation. To the contrary, this Court affirmed the right of

the defendants "to assert that the land in question still belongs to them, free of any right of way across it." *Id.* at 238, 156 S.E.2d at 257. That is:

> The Commission entered upon the land in reliance upon its own opinion as to its authority. If that opinion was correct, it entered lawfully and these proceedings cannot be dismissed, the defendants' only remedy being a determination of the reasonable compensation to be paid. *If that opinion was erroneous, the defendants are entitled to have this proceeding dismissed, leaving them to whatever rights they may have against those who have trespassed upon their land and propose to continue to do so.*

Id. at 240, 156 S.E.2d at 258 (emphasis added). As a result, if the trial court's finding of no public purpose had been affirmed in *Thornton*, the landowners could have blocked access to the road, dug it up, or otherwise treated it as their own land.

Thornton is well-reasoned and remains good law in large part. The only caveat is that *Thornton* pre-dates *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), by 25 years. To the extent *Thornton* could be read to say that there is no *judicial* remedy (setting aside self-help) against the government for an unconstitutional invasion, it would be directly superseded by *Corum*. *See Thornton*, 271 N.C. at 236, 156 S.E.2d at 255 (citing *State Highway Comm'n v. Batts*, 265 N.C. 346, 361, 144 S.E.2d 126, 137 (1965), for the proposition that no cause of action lies against the government for an unauthorized trespass). After all, under *Corum*, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a

direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289; *see also id.* ("[T]he common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right."); *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 413, 858 S.E.2d 788, 794 (2021) ("A claim that is barred by sovereign or governmental immunity is not an adequate remedy . . . . When there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." (cleaned up)).

Nevertheless, the Town persists in its misreading of *Thornton*, pointing to older Court of Appeals decisions as establishing a foil for this case. (*See* Town's Consolidated New Br. at 38 (citing *Town of Midland v. Morris*, 209 N.C. App. 208, 214, 704 S.E.2d 329, 335 (2011))). In fact, *Midland* is an illustrative and accurate application of *Thornton*.

In *Midland*, the town wanted to construct a pipeline. When the town tired of negotiating for voluntary easements, it began condemning property instead. 209 N.C. App. at 212, 704 S.E.2d at 334. The landowners argued that the pipeline project lacked a public purpose. The trial court found for the town, and the landowners appealed.

On appeal, the town argued that it had mooted the case by constructing the pipeline without waiting for the outcome of the direct-condemnation action. The Court of Appeals rejected that argument. *Id.* at 213, 704 S.E.2d at 334. If

the landowners could prove the lack of public use, the court reasoned, then they would "be entitled to relief both in the form of reimbursement for their costs in the action, as well as in the form of return of title to the land." *Id*. at 213-14, 704 S.E.2d at 334. The town's argument to the contrary was anathema to the rule of law: "We are wholly unpersuaded by Midland's argument that, even where a city flagrantly violates the statutes governing eminent domain, that city can obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment on the validity of condemnation is rendered." *Id*. at 214, 704 S.E.2d at 335; *see also In re Rapp*, 621 N.W.2d 781, 784 (Minn. Ct. App. 2001) (holding that a landowner's claim was not moot even though a highway was built on the land because the court could require return of the land).

Here, the Town insists that *Midland* is distinguishable because the landowners in that case requested injunctive relief earlier than Ms. Rubin. (*See* Town's Consolidated New Br. at 63). But there is no support for such an "exception" to *Thornton*. After all, the word "injunction" appears nowhere in the *Midland* court's analysis, and the reasoning did not in any way turn on the pending injunction request. 209 N.C. App. at 214, 704 S.E.2d at 335.

Nor could it, without violating our state and federal constitutions.

The United States Supreme Court in *Kelo*, for instance, did not leave room for the Town's proposed exception when it stated, "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*, 545 U.S. at 477. Nor did the Supreme Court of Ohio when it stated, "It is axiomatic that the federal and Ohio constitutions forbid the state to take private property for the sole benefit of a private individual, . . . even when just compensation for the taking is provided." *Norwood v. Horney*, 110 Ohio St. 3d 353, 365, 853 N.E.2d 1115, 1130 (2006) (internal citations omitted); *see also Prestonia Area Neighborhood Assn. v. Abramson,* 797 S.W.2d 708, 711 (Ky. 1990) (reiterating that "naked and unconditional government seizure of private property for private use is repugnant to our constitutional protections against the exercise of arbitrary power and fundamental unfairness"). "Indeed, looking to whether there is an adequate remedy at law—that is, financial compensation for an unconstitutional taking—turns eminent domain law on its head." *701 Niles, LLC v. AEP Ind. Mich. Transmission Co.*, 191 N.E.3d 931, 942 (Ind. Ct. App. 2022); *see also id.* (acknowledging the government's concession to that effect).

The Town's position is simple and wrong: that Ms. Rubin should have prevented the Town from completing its physical invasion of her property, and because she didn't, the Town now has permanent title to it. Yet, that would shift the blame for the Town's unconstitutional conduct to an individual citizen. Ms. Rubin is that rare citizen who has the stamina to fight against the

government and its bottomless pockets. If the Town can bulldoze her constitutional rights, then no one is safe.

Besides, the Town's proposal cannot be the law. It would render the Law of the Land Clause, the Fifth Amendment, and the 2016 Judgment nothing more than words on paper. Such a "parchment barrier" isn't the kind of fundamental right our ancestors enshrined in constitutional provisions. The Federalist No. 48, at 308 (James Madison (Clinton Rossiter ed., 1961)).

Finally, the Town spends a great deal of briefing space trying to rebut an argument that Ms. Rubin never made: that the 2016 Judgment is an implicit injunction. (*See* Town's Consolidated New Br. at 33-40). An injunction must be explicit, the Town explains, yet the 2016 Judgment did not tell the Town exactly what to do. (*See id.* at 35). The Town is generally correct that an injunction prohibiting certain conduct should be crystal clear as to what is foreclosed. But that is a red herring here. The Town cannot pretend there's any mystery as to how it could stop its unconstitutional conduct as conclusively established in the 2016 Judgment. There is only one action to take: leave.[2]

[2] Ms. Rubin explained in her opening brief that there was no need for a separate proceeding and that the trial court had several bases on which it could award injunctive relief. (Rubin's New Br. at 20-27). Ms. Rubin will not repeat those arguments here.

The Court of Appeals correctly rejected the Town's contention, holding instead that Ms. Rubin was not required to request an injunction in order to maintain ownership of her own property. This Court should hold the same.

B. This Case Has Nothing to Do with Inverse Condemnation.

The Town has persistently confused these cases with an inverse-condemnation action. But there is no support for the Town's muddled theory.

Takings law starts with our state and federal constitutions. A taking is permissible when it is for a public purpose *and* just compensation is paid. The constitutions—not any state or federal statute—create those rights. The statutes merely provide procedures for the processing of takings claims. Those statutory procedures do not, and cannot, limit individual constitutional rights.

In North Carolina, as in many other jurisdictions, our legislature has provided different procedures for processing condemnation and so-called "inverse-condemnation" actions. There are several key differences between these two procedures.

First, the procedures are initiated by different parties to address different kinds of actions.

A condemnation action is a *prospective* action filed by the government against a landowner. In a condemnation action, the government asks the court to transfer the landowner's property to the government in exchange for just compensation.

By contrast, an inverse-condemnation action is a retrospective action filed by the landowner against the government. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168 (2019); *McQuillen's The Law of Municipal Corporations* § 32:164 (3d ed. Westlaw). In inverse condemnation, the landowner asks the court to force the government to pay just compensation for a taking that has already occurred. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 552, 809 S.E.2d 853, 861-62 (2018); *Wagner v. City of Charlotte*, 269 N.C. App. 656, 662, 840 S.E.2d 799, 803 (2020).

Here, the Town filed its 2015 action as a direct-condemnation action, under chapter 136 of the General Statutes. (2015 R p 3).[3] Both the 2015 and 2019 cases were filed by the Town; neither of them is an inverse-condemnation action filed by a landowner. Indeed, the Town freely admits that its "action is not an inverse condemnation action; for condemnors cannot file such actions." (Town's Consolidated New Br. at 26).

Second, the two procedures treat the "public purpose" requirement differently. A "public purpose" is a prerequisite to a direct-condemnation

[3] The Town relies on Chapter 136—the condemnation procedures created for the Department of Transportation. (*See, e.g.*, Town's Consolidated New Br. at 70). That's not the usual mechanism for a municipality to commence a condemnation action. Usually, municipalities must use the procedures created for municipalities. N.C. Gen. Stat. § 40A-1. But the Town has specific statutory authority to elect to use the mechanisms created for the Department of Transportation under Chapter 136.

action. *Wilkie*, 370 N.C. at 552, 809 S.E.2d at 862. But landowners aren't required to prove a "public purpose" to prevail in an inverse-condemnation action. *Id*. A landowner who wants compensation for a taking, rather than return of the land, need not litigate the propriety of the government's purpose. *See id*. at 552-53, 809 S.E.2d at 862. After all, the public-purpose requirement "is for the *landowner's* protection." *Id*. (quoting *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 490 (Fla. Dist. Ct. App. 1975) (per curiam) (emphasis added)). The inverse-condemnation remedy gives the landowner flexibility because, regardless of whether the taking is for a public purpose, the remedy lets the landowner "elect to claim damages as if the taking had been lawful." *Thornton*, 271 N.C. at 241, 156 S.E.2d at 258.

The Town contends that Ms. Rubin should have filed an inverse-condemnation claim or counterclaim as a response to the original direct-condemnation action. But an inverse-condemnation action makes no sense when the government has filed a direct-condemnation action. There is no need to "compel" the government to exercise the power of eminent domain through an inverse action when the government is already trying to do so in a direct action.

Not only is the Town's contention illogical, it is barred by North Carolina statute. The Court of Appeals made quick work of the Town's argument: "N.C. Gen. Stat. § 136-111 authorizes an inverse condemnation claim against a

condemnor only when 'no complaint and declaration of taking has been filed.' Because the Town *did* file a complaint and declaration of taking to install the sewer pipe at issue, a statutory inverse condemnation claim was not available to Ms. Rubin." *Rubin II,* 277 N.C. App. at 354, 858 S.E.2d at 404. The Town offers two arguments in an effort to circumvent the plain language of N.C. Gen. Stat. § 136-111 [App. 1], but neither is compelling.

First, the Town says that a landowner *can* file an inverse-condemnation action even though the government has already filed a direct-condemnation action. (Town's Consolidated New Br. at 60). Here, the Town points to an exception to the statute: a landowner can file a separate action or counterclaim for inverse condemnation "when there is a further taking by the State after the initiation of the original condemnation action." *N.C. Dep't of Transp. v. Cromartie*, 214 N.C. App. 307, 311, 716 S.E.2d 361, 365 (2011).[4] The lone exception does not apply in this case, though, because there was no "further taking" beyond the one set out in the Town's condemnation complaint. Ms. Rubin has always contended that the *original* proposed taking was unconstitutional.

[4] Procedurally, the landowner can raise the issue through her answer as well, without ever filing a separate action or counterclaim. *City of Greensboro v. Pearce*, 121 N.C. App. 582, 587-88, 468 S.E.2d 416, 420 (1996).

Second, the Town argues that even if N.C. Gen. Stat. § 136-111 precludes a landowner from filing an inverse-condemnation action once the government files a direct-condemnation action, this Court should operate "as if" the Town never filed a direct-condemnation action. (Town's Consolidated New Br. at 18, 51, 61). The Town's theory here is that when the trial court entered the final Judgment in the condemnation action, it was just the *proceeding itself*, rather than the Town's claim, that became "null and void." (*See, e.g.*, *id.* at 26).

Those are mere word games. The 2016 Judgment determined that the Town's conduct violated the state and federal constitutions because it was for an improper private purpose rather than a public purpose. Thus, the Judgment expressly rejected the Town's *claim* to Ms. Rubin's property: "The [Town's] claim to [Ms. Rubin's] property by Eminent Domain is null and void." (2019 R p 38 ¶ 1). The property did not need to "revert" back to Ms. Rubin, as the Town suggests. (Town's Consolidated New Br. at 18-19). Rather, the Town's action was null and void from the start—and title remained with Ms. Rubin.

That's the same way that the United States Supreme Court used "void" in *Hawaii Housing Authority v. Midkiff* when it explained, "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." 467 U.S.

229, 245 (1984). The 2016 Judgment did not declare the proceeding itself to be null and void, whatever that would mean.

Nonetheless, the Town says it is as if the condemnation action never happened, and thus the Town's quick-take action was just a taking never accompanied by the filing of a complaint and declaration. So Ms. Rubin's only remedy was to file an inverse-condemnation action.

Or so the theory appears to be. The argument is difficult to follow since it's not supported by any legal authority and runs contrary to the law. The proposal is also unfair. As the Court of Appeals noted below, the Town's theory would result in "numerous constitutional harms." *See Rubin II,* 277 N.C. App. at 342, 858 S.E.2d at 397 (explaining that, under the Town's theory, a landowner who preferred his gravel driveway would have no remedy against a municipality that decided to pave his driveway for no public purpose whatsoever).

Even worse, though, is that the Town claims its reading of N.C. Gen. Stat. § 136-111 "is consistent with this Court's reasoning in *Wilkie*." (Town's Consolidated New Br. at 62). Since bringing the 2019 case, the Town has urged its tortured reading of this Court's opinion in *Wilkie*. The Town says this Court in *Wilkie* "had the choice to allow a trespass claim, *Corum* claim, and/or some other claim for a landowner against a physical invasion by a municipality that lacked a public purpose, and this Court applied the state's condemnation

statutes, specifically its inverse condemnation statutes, to the municipality's action." (*Id.* at 59).

But this Court would never have held that a statute abrogated a constitutional right. The constitution (state or federal) always wins in such a battle, as this Court has steadfastly assured. *See, e.g.*, *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212, 886 S.E.2d 16, 32 (2023); *Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991); *In re Peoples*, 296 N.C. 109, 161, 250 S.E.2d 890, 920 (1978). Instead, *Wilkie* is just one more decision affirming the rights of landowners against government overreach. Beyond that, it does not impact this case.

The issue in *Wilkie* was whether a landowner who filed an inverse-condemnation action seeking just compensation for a taking had to prove that the governmental action had a public purpose. *Wilkie*, 370 N.C. at 546, 809 S.E.2d at 858. If the government invades private property without a public purpose, then the action is unconstitutional. Period. Thus, it would make no sense to force the landowner to prove that the government had a public purpose—and acted constitutionally—when it took private property. It's the *government* that "must establish that a proposed taking will further a public purpose before a condemnation can be authorized," not the other way around. *Id.* at 552, 809 S.E.2d at 862. There is "no reason why" a landowner must be the one to prove that the government didn't violate the constitution. *Id.* If a

landowner only had a remedy for a *constitutional* taking, that result would "shock the consciences of fair-minded men." *Id.* at 549, 809 S.E.2d at 860 (quoting *Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E.2d 497, 500 (1952)).

When a landowner files an inverse-condemnation action and seeks just compensation for conduct that lacks a public purpose, she is electing her preferred remedy. The law allows the landowner to "consent[] to a taking of his property, when no legal right or power to do so exists," and it puts him in the same place as the landowner who seeks compensation where the taking "power does exist." *Id.* at 552, 809 S.E.2d at 862 (quoting *Lloyd v. Town of Venable*, 168 N.C. 531, 535, 84 S.E. 855, 857 (1915)); *see also Thornton*, 271 N.C. at 241, 156 S.E.2d at 258 ("[W]here there is a taking not within the power of eminent domain the landowner may elect to claim damages as if the taking had been lawful . . . .").

The *Wilkie* case discussed in the trial court's orders and the Town's brief is unrecognizable from the *Wilkie* opinion issued by this Court. The trial court here vacated the original condemnation Judgment because *Wilkie* held that landowners don't have to prove the lack of public purpose in inverse-condemnation cases, and so, the trial court held, the Town was allowed to take Ms. Rubin's property for an unconstitutional private purpose. (2019 R pp 167-68 ¶ 16).

This head-scratching logic contradicts *Wilkie* and the constitutional provisions underlying takings jurisprudence. *Wilkie* isn't a shield for government misbehavior. The public purpose requirement "is not placed in the Constitution as a sword to be used against the landowner when the state has summarily taken his property without due process." *Wilkie*, 370 N.C. at 552-53, 809 S.E.2d at 862 (quoting *Kirkpatrick*, 312 So. 2d at 490).

Anyway, this case has never involved inverse condemnation, and *Wilkie* was only about inverse condemnation. And even if inverse condemnation *had* played a role, *Wilkie* made the inverse-condemnation remedy *more favorable* to landowners, not *less so*, such that the trial court could not vacate the pro-landowner Judgment awarded to Ms. Rubin.

Indeed, if the Town's rewriting of *Wilkie* were correct, then the inverse-condemnation statute would be unconstitutional. By the Town's reading, the *Wilkie* decision means that landowners deprived of their property without a public purpose are only entitled to just compensation, not return of their property. The state and federal constitutions, however, *require* the return of the property. If the *Wilkie* Court had misinterpreted the inverse-condemnation statutes in the way the Town suggests, then those statutes would be unconstitutional—a result that should be resisted. *See Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985) (explaining "the familiar

canon of statutory construction" whereby courts avoid interpreting a statute in a manner that would raise serious questions about its constitutionality).

As the Court of Appeals largely realized, the trial court's misunderstanding and misapplication of inverse-condemnation law infected all of its orders. Judge Collins granted the preliminary injunction because he determined that the Town's quick-take action was retroactively transformed into "an inverse condemnation" when the Town lost its direct-condemnation action. Judge Collins also accepted the Town's misinterpretation of *Wilkie*. And the court's refusal to dismiss the 2019 case meant that it accepted the fake controversy created by the Town's confusion of inverse condemnation and *Wilkie*.

The Court of Appeals' rejection of the trial court's treatment of *Wilkie* and inverse condemnation was correct and should be affirmed.

C. The Court of Appeals Correctly Held that Res Judicata Precludes Relitigation of Title and the Town's Claims Alleging that Inverse Condemnation Is Ms. Rubin's Sole Remedy.

Ms. Rubin sought dismissal of the 2019 action on two alternative grounds. Either the original Judgment was res judicata for the 2019 action, or the ongoing nature of the 2015 action meant that the 2019 case was abated under the prior-action-pending doctrine. The trial court apparently

determined that the 2015 action was a zombie: too dead for prior action pending, and too alive for res judicata. That's impossible.

Fortunately, the Court of Appeals mostly agreed with Ms. Rubin on this point, ruling that res judicata precludes the Town from relitigating: (1) whether the Town has a claim to an easement on Ms. Rubin's property, (2) whether an inverse-condemnation action is the sole remedy available to Ms. Rubin, (3) whether Ms. Rubin's remedies are limited to compensation, and (4) whether mandatory injunctive relief is available to Ms. Rubin. *See Rubin III*, 277 N.C. App. at 365-66, 858 S.E.2d at 371-72.

The Court of Appeals recognized that all the requirements for a finding of res judicata are present in this case: "The parties are the same. The subject matter, namely, a sewer easement across Ms. Rubin's land to serve [the private development], is the same. And the issues—whether the Town can compel Ms. Rubin to surrender title to such an easement in exchange for compensation—are the same." *Id.* at 655, 858 S.E.2d at 371. The Town makes no direct attempt to rebut this straightforward finding of res judicata.

In fact, the Town's Brief inadvertently concedes that res judicata applies:

> [T]he Town's [declaratory judgment] action is to have the court declare that the sewer easement and line exist on Rubin's property pursuant to the Town's power of eminent domain and based on the effect of Judge O'Neal's Judgment, and Rubin has a right to just compensation for the easement taken, if she so chooses.

(Town's Consolidated New Br. at 26). That is exactly the question that the 2016 Judgment already decided in the negative.

The Town has no good answer to the Court of Appeals' res judicata analysis, so it relegates its response to a footnote: "Interestingly, the Court of Appeals erred in holding that the trial court's finding that the sewer line is an inverse taking is barred by res judicata—nothing in the O'Neal Judgment supports such a finding." (*Id.* at 37 n.4).

The Town was simply looking for a do-over when it filed the 2019 lawsuit. The Court of Appeals saw it for what it was.

II. THE TOWN CONTINUES TO UNCONSTITUTIONALLY OCCUPY MS. RUBIN'S PROPERTY.

Ms. Rubin should not be required to bring a separate trespass action to eject the Town from her property. The Town's invasion of her property was unconstitutional, and our constitutions' protections are supposed to be self-executing. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); (*see also* Rubin's New Br. at 13-33).

This Court may nevertheless decide that the Court of Appeals rightly found "trespass" to be the correct label for the Town's continued occupation of Ms. Rubin's land. There would not appear to be anything inconsistent about such a ruling, provided that Ms. Rubin is still afforded the remedy of requiring the Town to leave.

Nor was the Court of Appeals wrong to suggest that Ms. Rubin may *opt* to bring a trespass claim, if she wishes. But it would be wasteful under these circumstances to require that a *third* action be filed, to the extent that was the panel's recommendation. There are already two lawsuits pending between these parties, and this dispute is nearing its tenth year. Ms. Rubin deserves finality.

For its part, though, the Town insists that it cannot be liable for trespass at all. (Town's Consolidated New Br. at 49, 59, 67, 68, 69). Should the law of trespass be deemed to play a role here, the Town is wrong on this count as well.

A. The Town Is Liable to Ms. Rubin for Both Trespass and Continued Trespass.

This Court long ago established that a government body occupying private property outside of its eminent domain powers "may be treated as a trespasser and sued in ejectment." *McDowell v. City of Asheville*, 112 N.C. 747, 17 S.E. 537 (1893). The Court of Appeals correctly affirmed this principle and held that the Town was—and is—a trespasser on Mr. Rubin's property. *See Rubin II,* 277 N.C. App. at 348, 858 S.E.2d at 401 (citing *McDowell*, 112 N.C. at 750, 17 S.E. at 538).

The Town insists, however, that it cannot be a trespasser because it was acting within its eminent domain power, and that it can keep property it took for a private purpose. The Town's argument on this point is a patchwork

compilation of ordinary condemnation law, inverse taking concepts, and the 2016 Judgment's declaration that the Town's original claim to Ms. Rubin's land was "null and void." (*See* Town's Consolidated New Br. at 50-51 ("[A]n inverse taking is what resulted from the Town's physical invasion coupled with Judge O'Neal's Judgment dismissing the original condemnation complaint as null and void but not ordering it removed.")). In other words, the Town is again trying to escape its trespasser status so it can continue occupying Ms. Rubin's property by crafting some sort of "freedom-destroying cocktail." *Navarette v. California*, 572 U.S. 393, 413, 134 S. Ct. 1683, 1697 (2014) (Scalia, J. dissenting).

For example, the Town says the court's opinion in *Rubin II* is "inconsistent and incorrect" because the court "properly held that the Town properly installed the sewer line pursuant to Chapter 136." (Town's Consolidated New Br. at 54). It could not have been a trespasser, the Town reasons, because "[a]fter all, the first element of a trespass claim is 'an unauthorized and therefore unlawful entry' onto the land of another." (*Id.*; *see also id.* at 67 (claiming that the Town's "physical invasion was authorized and legal at the time it occurred, and has not been adjudicated unauthorized or illegal by a trial court, and therefore cannot be a trespass")).

None of that is sensical.

The Court of Appeals never held that the Town "properly installed" the sewer line. The panel merely noted that the Town utilized quick-take procedures to commence its unconstitutional invasion of Ms. Rubin's property. *Rubin II,* 277 N.C. App. at 339-40, 858 S.E.2d at 396. Shortly thereafter, the court explicitly rejected the Town's theory on the grounds that it "is irreconcilable with *Thornton*'s prohibition against the enlargement of the government's condemnation powers 'by precipitate entry and construction.'" *See id.* at 341, 858 S.E.2d at 397 (quoting *Thornton*, 271 N.C. at 237, 156 S.E.2d at 256). Moreover, the Town's argument that the first element of a trespass claim cannot be satisfied was rejected decades ago. *See Ivester v. Winston–Salem,* 215 N.C. 1, 1 S.E.2d 88, 91-92 (1939) (explaining that causes of action exist for all consequential and successive damages for a recurring injury resulting from a condition wrongfully created and maintained, such as a recurrent nuisance or trespass).

The Town then supposes that it is immune from a trespass claim because the condemnation statutes make the Town just like the State. (*See* Town's Consolidated New Br. at 56-59 ("The Town exercised the power of eminent domain pursuant to Chapter 136 of the General Statutes, and therefore, was acting like the State with the power and authority of Chapter 136 in its exercise of the power of eminent domain.")). But it cannot be right for the Town to claim it is the State, and not a municipality, just because it has permission

to use a condemnation statute originally designed for the Department of Transportation. Whether an entity is "The State" is not implicitly determined by statute. This one is easy: the Town of Apex is not the State of North Carolina.

Regardless, because eminent domain law prohibits the invasion of property for a private purpose, the Town was *not* acting within its eminent domain power. The law is clear that without a public use, the government is powerless to condemn in the first place. *Ferrell v. Dep't of Transp.*, 104 N.C. App. 42, 46, 407 S.E.2d 601, 604 (1991) (holding that "public use is a prerequisite to the exercise of the power of eminent domain"), *aff'd*, 334 N.C. 650, 435 S.E.2d 309 (1993). *Ferrell* stands in direct contrast to the Town's argument in this case that its quick-take power usurps the state and federal constitutions' public-purpose requirement.

The Town alternatively argues that its status as a city precludes a trespass claim. (Town's Consolidated New Br. at 55). The Court of Appeals correctly rejected this argument for two reasons. First, the limited governmental immunity that municipalities enjoy does not extend to proprietary functions. *See Rubin II*, 277 N.C. App. at 351-52, 858 S.E.2d at 403 (citing *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012)). Second, the government cannot use immunity to trample the people's constitutional rights,

due to this Court's "landmark decision in *Corum* . . . which carved out an express exception to sovereign immunity for constitutional injuries." *See id.* at 351-52, 858 S.E.2d at 403 (further explaining that, "[u]nder *Corum*, in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution"). The Court of Appeals correctly rejected the Town's theory that it can violate constitutional rights with impunity.

The Town's position also suffers from a fatal internal contradiction. In an effort to turn its unconstitutional construction into a permissible inverse taking, the Town argues that it is "as if" its direct-condemnation action never happened. (*See, e.g.*, Town's Consolidated New Br. at 51). Yet the Town does an about-face when it comes to trespass, claiming immunity on the grounds that no trespass claim lies against a condemnor exercising its power of eminent domain. (*See, e.g.*, *id.* at 71-72 ("The Town's use of its legislatively granted eminent domain power under Chapter 136 insulates it from a mandatory injunctive claim to be brought by Rubin under the facts of this case.")). Either the Town exercised its eminent domain authority or it didn't. The Town can't have it both ways.

Finally, the Town claims that res judicata would bar any future trespass claim brought by Ms. Rubin. (*Id.* at 67). But the Town never explains how that same logic would not have also barred *the Town's* second case. Regardless,

the Town's argument was correctly rejected on the grounds that injunctive relief was not a compulsory counterclaim at the time Ms. Rubin filed her answer. *Rubin II*, 277 N.C. App. at 354, 858 S.E.2d at 405 (citing *Murillo v. Daly,* 169 N.C. App. 223, 227, 609 S.E.2d 478, 481 (2005)).

Moreover, the court below correctly noted that a claim for continuing trespass, by definition, is not barred by res judicata because each day the trespass continues a new wrong is committed. *See id.* at 355, 858 S.E.2d at 405 (citing *Bishop v. Reinhold*, 66 N.C. App. 379, 382, 311 S.E.2d 298, 300 (1984), and *John L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 140 N.C. 437, 442, 53 S.E. 134, 136 (1906)).

The Town cannot escape liability for its trespass merely based on its own say-so.

CONCLUSION

For these reasons and those set forth in Ms. Rubin's opening brief, the Court of Appeals opinions should be affirmed in part and 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 8th day of March, 2024.

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

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This the 8th day of March, 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

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Appendix Pages

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Excerpts from 2015 Rule 11(c) Supplement ..... App. 3-7

West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 9. Condemnation (Refs & Annos)

N.C.G.S.A. § 136-111

§ 136-111. Remedy where no declaration of taking filed; recording memorandum of action

Currentness

Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court setting forth the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have estates or interests in the said real estate and if any such persons are under a legal disability, it must be so stated, together with a statement as to any encumbrances on said real estate; said complaint shall further allege with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken. Upon the filing of said complaint summons shall issue and together with a copy of said complaint be served on the Department of Transportation as provided by G.S. 1A-1, Rule 4(j)(4). The allegations of said complaint shall be deemed denied; however, the Department of Transportation within 60 days of service of summons and complaint may file answer thereto, and if said taking is admitted by the Department of Transportation, it shall, at the time of filing answer, deposit with the court the estimated amount of compensation for said taking and notice of said deposit shall be given to said owner. Said owner may apply for disbursement of said deposit and disbursement shall be made in accordance with the applicable provisions of G.S. 136-105 of this Chapter. If a taking is admitted, the Department of Transportation shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the land taken. The procedure hereinbefore set out shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.

The plaintiff at the time of filing of the complaint shall record a memorandum of action with the register of deeds in all counties in which the land involved therein is located, said memorandum to be recorded among the land records of said county. The memorandum of action shall contain

(1) The names of those persons who the plaintiff is informed and believes may have or claim to have an interest in said lands and who are parties to said action;

(2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;

(3) A statement of the estate or interest in said land allegedly taken for public use; and

(4) The date on which plaintiff alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action.

Credits

Added by Laws 1959, c. 1025, § 2. Amended by Laws 1961, c. 1084, § 6; Laws 1963, c. 1156, § 8; Laws 1965, c. 514, §§ 1, 1½; Laws 1971, c. 1195; Laws 1973, c. 507, § 5; Laws 1977, c. 464, §§ 7.1, 29; Laws 1985, c. 182, § 1.

N.C.G.S.A. § 136-111, NC ST § 136-111

The statutes and Constitution are current through the end of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

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WAKE COUNTY, C.S.C.
BY

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE	SUPERIOR COURT DIVISION 15 CVS 5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN Defendants.	AFFIDAVIT OF DONALD ASHLEY d'AMBROSI

I, Donald Ashley d'Ambrosi being first duly sworn do hereby depose and say that all things stated herein are stated of my own personal knowledge and are true and accurate, and all things stated herein based upon information and belief are believed to be true.

1. My name is Donald Ashley d'Ambrosi. I have a Bachelor of Landscape Architecture from NC State University.

2. I am a consultant with d'Ambrosi Land Consulting Services, LLC, and regularly practice in the field of land planning and entitlements, site and subdivision design.

3. I have been previously qualified as an expert witness in State Court.

4. I am familiar with the location and property of Beverly Rubin which is the subject of this action. I was retained by Ms. Rubin and David Aspnes and Cynthia Ball to represent them in negotiations with the company who owned the property fronting Olive Chapel Road and adjacent to the Rubin and Aspnes/Ball property ("Acradia East"). The company had applied for rezoning to increase the number of units that could be built on the property.

5. I have visited Ms. Rubin's Property and know generally the location of the driveway, swimming pool and other improvements.

6. In the development of property for residential uses, the owner can install septic systems or if available, use a municipality's sewer lines. For example, the Rubin property has a septic system. It is common for houses in this part of Wake County to be on septic systems.

7. It is my understanding that at the time the rezoning application was filed there was an existing sewer line proximate to the rear of Ms. Rubin's property and the Aspnes/Ball property.

8. During the rezoning application process with the Town of Apex, I was informed and understood that if the developer wished to connect to the sewer system already in place to the rear of the Aspnes/Ball property, it would need to obtain a sewer easement across the Aspnes/Ball property.

9. Upon approval of the governing municipality, private companies that create single family lots have the option of tying into the existing sewer line if their property is adjacent to a sewer line or they can obtain easements to an existing sewer line if they elect not to use septic systems.

10. In the event a sewer easement could not have been obtained across the Aspnes/Ball property then the company had a second option to obtain sewer service.

11. The parcel to the west of the Rubin tract extended to the existing sewer line ("Arcadia West"). There was common ownership of the parcels to the east and west of the Rubin property.

12. A pump station could have been built on the Arcadia East site that did not have direct access to a sewer line to pump effluent from its site along the right of way line of Olive Chapel Road to the Arcadia West site that did have access to the sewer line.

13. Sewer lines are often in the right of way of roads maintained by the State or by a Town and pump stations are a device to channel the effluent through the lines in the right of way.

14. Instead of the two options mentioned that would cause no harm to Ms. Rubin, the private companies who own the land on either side of Ms. Rubin's property connected a sewer line under Ms. Rubin's property near her house in order to be able to avoid the use of a pump station or obtain the easement from Aspnes and Ball.

15. The decision to not use a pump station is a cost saving measure to the companies since it would be cheaper to install a sewer line across Ms. Rubin's property instead of installing a pump station near the right-of-way of Olive Chapel Road and running a sewer line in the right-of-way.

16. As a result of the sewer easement across Ms. Rubin's property it has limited the use of her property for any expansion.

17. From a land planning standpoint, the location of the sewer easement across the middle of Ms. Rubin's property cutting the front half from the rear half will create significant development challenges should Ms. Rubin or a subsequent owner choose to subdivide her property in the future.

Further the Affiant sayeth not this the 29 day of July, 2016.

Donald Ashley d'Ambrosi

STATE OF North Carolina

COUNTY OF WAKE

Sworn to and subscribed before me this day by Donald Ashley d'Ambrosi.

Date: 7/29/2016

(Official Signature of Notary

Kenneth C Haywood
(Notary's Printed or typed name)

(Official Seal) KENNETH C. HAYWOOD NOTARY PUBLIC WAKE COUNTY, NC

My Commission Expires: 11-27-2016

Royal Oaks
HOMES THAT MOVE YOU

Robert Bailey
1210 Trinity Rd. Suite 102
Raleigh, NC 27607

7/28/2016

Steven Adams
Town of Apex
Real Estate & Public Utilities
PO Box 250
Apex, NC 27502

Mr. Adams,

As of 7/27/16, Royal Oaks Homes has pre-sold four homes in Riley's Pond Subdivision. The lots we have sold are listed below with their contractual closing dates.

Lot 42 – August 2016 Closing
Lot 34 – September 2016 Closing
Lot 41 – October 2016 Closing
Lot 25 – January 2017 Closing

Feel free to contact me with any additional questions.

Sincerely,

Robert Bailey
Land Development Manager
Royal Oaks Homes

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