IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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ROMAN REALTY, LLC, a West Virginia limited liability company, *Plaintiff Below/Petitioner*, v. THE CITY OF MORGANTOWN, WEST VIRGINIA, a West Virginia municipal corporation, *Defendant Below/Respondent*.	CASE NO. 22-0587

PETITIONER'S BRIEF

Appeal Arising from Order Entered on
June 14, 2022, in Civil Action No. 20-C-109 in
the Circuit Court of Monongalia County, West Virginia

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The Circuit Court erred in denying Petitioner Roman Realty's ("Roman Realty") Petition for Writ of Mandamus because a civil tort recovery is not an adequate remedy when private property is taken without just compensation in violation of the State Constitution. The Circuit Court's holding would effectively preclude municipalities from ever being compelled to institute eminent domain proceedings.

IV. Statement of the Case

This appeal is necessary because the Circuit Court's denial of Roman Realty's Petition for Writ of Mandamus has denied Roman Realty access to the only remedy that can adequately address the willful taking of its property. Moreover, the Circuit Court's holding would hinder all citizens' ability to protect their constitutional rights by effectively denying them from ever compelling municipalities to enter eminent domain proceedings, even in the event of a clear taking.

"A writ of mandamus will not issue unless three elements coexist— (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another *adequate* remedy." *Shaffer v. W. Va. DOT, Div. of Highways*, 208 W. Va. 673, 674, 542 S.E.2d 835, 837 (2000) (emphasis added). Analyzing the facts set forth below, the Circuit Court erred when it denied Roman Realty's Petition for Writ of Mandamus, holding the potential for a civil tort recovery against Respondent, the City of Morgantown, West Virginia (the "City") resulted in Roman Realty's failure to show the absence of another adequate remedy.

On appeal, Roman Realty submits that a civil action is insufficient to *adequately* remedy a taking because (i) just compensation for the value of the property taken and damages to the residue

are not available in a civil tort case, whereas both are available in eminent domain proceedings; (ii) unlike civil actions, attorney's fees are available to prevailing parties in mandamus proceedings involving public officials; and (iii) the West Virginia Constitution grants the distinct procedural protection of a jury of twelve freeholders to parties in eminent domain proceedings.

Roman Realty is the owner of those certain tracts of real property identified as Tax Map 15, Parcel 244 and Tax Map 15, Parcel 245, located in the Fourth Ward of the City of Morgantown of Monongalia County, West Virginia (the "Property"). In 2008, the City was approved by the West Virginia Development Office (the "WVDO") to create The Sunnyside Up Tax Increment Financing District ("Sunnyside TIF District"), to allow for the improvement of waterlines, storm water management culverts and facilities, sanitary sewer lines, road improvements, streetscape systems, traffic control, pedestrian ways and systems, utility relocations, lighting and related infrastructure, land and right-of-way acquisitions, demolition and site preparation, over three phases.

The City received approval from the WVDO in 2017 to begin Phase 3 of the TIF project plan, which included improvements to streetscapes, roadway and alleyway improvements, relocation of utilities, intersection upgrades, and the University/Neighborhood Gateway (hereinafter, "Phase 3"). As part of Phase 3, the City installed a new drainage system in the alleyway between Beverly Avenue and Grant Avenue ("Alley D"). Alley D was sometimes referred by the City as "Model Alley." The Property has a physical address of 512 and 516 Grant Avenue, Morgantown, West Virginia 26505, respectively, and sits below Alley D.

The *Construction Plans for Sunnyside TIF District Phase 3- Model Alley Improvements, Monongalia County, West Virginia January 3, 2019* ("Project Plan"), *see* App. 232, indicate that

work to be performed on Alley D will extend onto the Property (as shown on Page PL-01 and PL-04 of the Project Plan).

The Project Manual[1], *see* App. 244, indicates that the site identified in the Project plan "includes rights-of-way, easements, and other land furnished by [the City]." App. 246. The Project Manual also indicates that additional easements, including temporary construction easements ("TCE"), are to be obtained as needed during the course of construction. An easement or access right is a right that is granted and allows a party to cross or otherwise use someone's land for a specified purpose. A TCE is a type of easement that grants a right to use property belonging to another for a limited period of time for construction purposes.

The Project Plan specifically denoted that at the outset of construction, at least nine TCEs affecting 32 individual parcels were required for the work to be performed on the Model Alley. App. 239–43. Additional TCEs are to be obtained as required during construction of Phase 3, including when "the confines of clearing [or grubbing] extend beyond the limits of the Permanent Rights-of-Way or temporary construction easements." App. 247. Change orders produced by the City during discovery indicate that work to be performed required additional TCEs to be obtained, yet none were obtained. During discovery, the City was only able to produce two temporary construction easements and three access rights granted by property owners. Of those, *only two TCEs were applicable for the entire Phase 3 work to be performed on the Model Alley and granted*

[1] The Project Manual was prepared by Herbert, Rowland & Grubic, Inc. ("HRG") for the City and includes the procurement and construction requirements for the TIF District. The Project Manual and Project Plan are both dated January 3, 2019.

access to two parcels.[2] Thus, nearly all of the work performed by the City in relation to Phase 3 was done without the proper easements or access rights.

The City's engineering company, HRG, by letter dated May 6, 2019, noted that "on several occasions HRG's Resident Project Representative (RPR) has documented the Contractor exceeding the right-of-way…." App. 248. The letter further indicated that "Any additional lands required for temporary construction facilities, construction equipment, or storage of materials and equipment, and any access needed for such additional lands, are to be obtained and paid for by the Contractor." The City failed to obtain the required land and TCEs that it knew were required prior to beginning construction on Phase 3, and knowingly allowed its Contractor to proceed with construction without any effort to acquire additional property and easements needed along the way.

During construction of Phase 3 and the installation of a new drainage system along Alley D, it was discovered that certain inlets and manholes were not in the locations originally designated on the construction plans. This is documented on numerous daily construction logs submitted by the City during the course of discovery. As a result of the incorrect inlet/manhole locations, the City was forced to relocate the installation of the new pipe closer to/on Roman Realty's property. Still, the City did not contact Roman Realty to acquire the right to use a portion of the Property. Instead, the City took it upon itself to take the property owned by Roman Realty. In doing so, several trees were removed, others were damaged, and approximately 1,000 square feet of the

[2] The two TCEs, relating to three out of 32 affected parcels were obtained by the City for work performed during Phase 3 on the Model Alley. The first was granted by Charles Kisner and applied to Tax Map 20, Parcel 24; and the second was granted by Joseph F. Scmiddle IV and applied to Tax Map 20, Parcel 9 and 13. These TCEs were titled "Temporary Construction & Grading Easement" and indicated that the "easement area may be slopped to facilitate connection with public roads, including stormwater management."

Property was used as a dumping site for dirt and debris, which was later improperly graded by the City in an attempt to provide lateral support for the City's new pipe — the support which could have only otherwise been provided by the construction of a retaining wall. Due to the improper dumping and excavation, erosion of the Property's newly created slope caused surface water to flow directly towards the residences located on the lower portion of Roman Realty's property, resulting in water damage to the interior of the homes. Because the dirt and debris that the City dumped on to Roman Realty's property was not properly compacted, it is continuing to slip and encroach further onto the Property.

As evidenced by the pre-construction photographs taken by the City in May of 2019, the rear of the Property was once steep, secluded, non-traversable, and heavily wooded with several mature walnut trees. *See* App. 249. By contrast, the post-construction photographs taken by the City a mere four months later, demonstrate how much the Property has been changed, as it is now gradually slopped, easily traversable, and several trees—including those mature walnut trees—have been damaged or removed entirely. *See* App. 250.

Not only did the City use Roman Realty's property for a public purpose, in doing so, the City damaged and permanently changed the characteristics of the land. This is an illegal taking. The City's engineer, Damien Davis, testified in his deposition that the City gradually sloped the Property to provide lateral support for the new pipe, in lieu of a retaining wall[3]. App. 363, at Page 136, Lines 10 through 23. The City's Engineer also testified that the Property was gradually slopped to prevent erosion, which in turn ensures the continued lateral support for an underground

[3] When the City Engineer was asked, "Instead of building out the hillside as gradually as it was, you could have put a retaining wall in, correct?" He replied, "Yeah, I don't see the – myself and HRG, as our project representative, did not feel that a retaining wall was necessary to support this hillside. *That sloping it was the best and most cost-effective way to deal with the slope*." App 364, at Page 137, lines 14 through 24 and Page 138, Line 1. (emphasis added).

pipe installed by the City because the "pipe could slip if the hillside slipped." App. 364. Moreover, the City does not dispute that Roman Realty's property was damaged during the construction of Phase 3, arguing, "Here, there is no dispute that the alleged damages occurred during a project designed to be completed on the City's alleyway" in its Motion to Dismiss. App. 029.

On September 12, 2019, Roman Realty sent a letter to Paul Brake, former City Manager for the City of Morgantown, informing him of Roman Realty's intent to file an inverse condemnation action against the City and explaining that the City had and was continuing to use the Property without having secured the land through normal right-of-way or easement acquisition procedures, and had taken private property for public use without just compensation. App. 022. Ignoring the letter, on or around September 25, 2019, the City dumped more fill material onto the Property and installed a filter sock in an attempt to redirect the surface water. App. 364.

On April 13, 2020, Roman Realty filed its *Petition for Writ of Mandamus to Compel Eminent Domain Proceedings* against the City given the City's taking of the Property. App. 010. After extensive discovery, Roman Realty and the City filed cross-motions for summary judgment.

The City argued almost exclusively under the three elements required for mandamus identified by *Shaffer*, claiming that because Roman Realty could pursue civil negligence and trespass claims against the City, another adequate remedy existed.[4] Roman Realty responded by arguing that civil remedies are inadequate because they merely offer compensatory damages,

[4] In the City's view, the fact that Roman Realty later filed a civil action against the general contractor who conducted the work demonstrated that there is another adequate remedy available. However, as Roman Realty argued in the briefing and at the hearing below, Roman Realty only filed a civil action against the contractor to secure its right to an *alternative* remedy because the statute of limitations on such action was quickly approaching due to the protracted litigation in this case, and it has no bearing on the *adequacy* of such civil action remedy. *See* App. 446–47, 490–90. Moreover, this Court has previously expressly allowed parallel tort and eminent domain proceedings. *See State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W. Va. 306, 313–14, 175 S.E.2d 428, 432 (1970).

rather than the value of the land and the damages to its residue as is the case in eminent domain. App. 267 and App. 302. Roman Realty argued further that civil remedies are inadequate because they present no opportunity to recover attorney's fees whereas costs and attorney's fees may be awarded in mandamus proceedings involving public officials. App. 267 and App. 302. Finally, Roman Realty argued that civil suits at common law offer a right to a trial by *only six* jurors, while under Article III, Section 9, there is a constitutional requirement that compensation for private property taken or damaged for public use be ascertained by an impartial jury of *twelve freeholders*. App. 391.

Nonetheless, the Circuit Court concluded "that Roman Realty's Petition for Writ of Mandamus must be denied as it fails to show the absence of another adequate remedy" and Granted Summary Judgment in favor of the City. App. 518–19.

Roman Realty filed its notice of the instant appeal on July 13, 2022.

V. Summary of the Argument

Article III section 9 of the West Virginia Constitution provides:

> Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

W. Va. Const. art. III, § 9. The Circuit Court erred in denying Roman Realty's Petition for Writ of Mandamus because the distinct remedies available in eminent domain proceedings render

the remedies available in civil suits inadequate to redress the City's taking of private property for public use.

The valuation of damages is different in civil suits than in eminent domain proceedings. The remedy for a non-malicious trespass is compensatory damages. *See Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S.E. 226, 233 (1924). Likewise, the general remedy in negligence actions is compensatory damages. *See Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 550, 694 S.E.2d 815, 883 (2010). But where a property owner loses lawful dominion and control over their own property to a delegated agent of the state such as a municipality, it constitutes a taking, the remedy for which is just compensation based on the value of the land taken. *See* W. VA. CONST. art. III § 9; *W. Va. Dep't of Transp., Div. of Highways v. Pifer*, 242 W. Va. 431, 442, 836 S.E.2d 398, 409 (2019); *W. Va. Dep't of Trans., Div. of Highways v. Western Pocahontas Properties, L.P.*, 236 W. Va. 50, 61, 777 S.E.2d 619, 630 (2015) ("Suffice it to say that one whose real estate is taken is entitled to just compensation for the value of the land taken at the time of taking, *and* to damages to the residue . . . .") (internal quotation marks omitted) (emphasis added). Accordingly, the Circuit Court was simply wrong when it concluded a civil remedy "is precisely the same remedy [that] Roman is seeking through its writ of mandamus – *either* an award of damages to the residual to the property, *or* the value of the property." App. 518 (emphasis added). *Western Pocahontas Properties* clearly establishes that petitioners in eminent domain proceedings are entitled to *both,* not either or.

Moreover, this Court has established that "[c]osts and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties." Syl. pt. 1, *State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Envtl. Prot.*, 193 W.

Va. 650, 458 S.E.2d 88 (1995). No such award is available in mere trespass and negligence actions. Therefore, such civil actions are facially inadequate to redress an injury — such as the taking that occurred here — that results from government officials failing to perform their legally prescribed nondiscretionary duties.

Finally, in suits at common law the parties have a right to a trial by only six jurors, while under Article III, Section 9, there is a constitutional requirement that compensation for private property taken or damaged for public use be ascertained by an impartial jury of twelve freeholders. This constitutional procedural protection "secures a very substantial right and imposes a duty, not only upon the Legislature, but upon the courts, that the compensation for property taken or damaged, when demanded, shall be ascertained by a jury of freeholders." *Thorne v. City of Clarksburg*, 88 W. Va. 251, 106 S.E. 644, 646–47 (1921). This distinction between civil tort actions and eminent domain proceedings presents yet another reason why civil suits cannot adequately remedy an illegal taking.

In addition to the foregoing, the City's arguments and the Circuit Court's holding would have the effect of precluding municipalities from ever being compelled to initiate eminent domain proceedings via writ of mandamus. As the City pointed out ad nauseam below, municipalities are not immune from civil tort and negligence actions. Therefore, if, as the City argued and the Circuit Court held, the presence of a civil cause of action means that a writ of mandamus cannot lie under *Shaffer*, then municipalities could *never* be compelled to initiate eminent domain proceedings because every taking can be recharacterized as a tort. But the case at hand illustrates the distinction between takings and torts and the importance thereof. As an example, had the City damaged the Property by negligently crashing a dump truck into it, it could give rise to a civil cause of action for negligence. But that is not what happened in this case. Instead, during the course of a

construction project for public use, the City took Roman Realty's property without paying just compensation. The City willfully disregarded its non-discretionary duty when it failed to secure the necessary rights of way for the construction project, and when it refused to institute eminent domain proceedings to pay the just compensation for the land it took. The City proceeded to use Roman Realty's property as if it were its own. The City removed trees from Petitioner's property, the City used Petitioner's property as a dump site, and the City altered the grade of Petitioner's property in order to provide the lateral support needed for its newly installed pipe. This a classic taking, which entitles Roman Realty to the above-described remedies. *See* Syl. pt. 6, *Stover v. Milam*, 210 W. Va. 336, 557 S.E.2d 390 (2001) ("Wherefore any thing done by a state or its delegated agent, *as a municipality*, which substantially interferes with the beneficial use of land, depriving the owner of lawful dominion over it or any part of it, and not within the general police power of the state, is the taking or damaging of private property without compensation inhibited by the Constitution.") (emphasis added).[5] As explained herein, the remedies available under eminent domain not only ensure that Roman Realty is made whole for its injuries, but they also deter municipalities from abusing their power of eminent domain.

[5] The Circuit Court did not directly rule on whether or not a taking occurred here, however, when questioning the City at the hearing on its renewed motion for summary judgment, the Circuit Court observed "if [Roman Realty] can't use an inch of the property, I would think that might be a taking. You took an inch." App. 496. The Circuit Court overestimated the role continued use of the Property plays in takings determinations as discontinued use is merely sufficient, but not necessary, to establish a taking. Nonetheless, the takings analysis is clear here; *Stover* states that depriving the owner of lawful dominion over any part of his land is a taking. That is precisely what occurred here when the City changed the character of the Property and damaged the trees thereon by using it as the City's dumping ground. *See* App. 264 (the City's engineer testifying that the Property was gradually sloped to prevent erosion, which in turn ensures continued lateral support for the underground pipe installed by the City); App. 361 (owner of Roman Realty testifying that although the City's engineer said the owner "could still use the property that had been taken," he could not "excavate all the material [the City] placed there" without building a retaining wall).

In summary, the Circuit Court's order acknowledges the power of a municipality to commit a taking while simultaneously debilitating citizens' ability to place appropriate checks on that power by denying Roman Realty the only remedy that can adequately address the willful taking of its property. Moreover, the Circuit Court's holding would hinder all citizens' ability to protect their constitutional rights by effectively denying them from ever compelling municipalities to enter eminent domain proceedings, even in the event of a clear taking.

VI. Statement Regarding Oral Argument and Decision

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: 1) all parties have not waived oral argument; 2) this appeal is not frivolous; and 3) the dispositive issues have not been authoritatively decided. W. Va. R. App. P. 18(a).

This matter is appropriate for a Rule 20 argument because the matter concerns an issue of first impression for this Court, to wit, whether a civil tort recovery presents an adequate remedy for a taking such that a Writ of Mandamus compelling eminent domain proceedings for the taking must be denied. Moreover, the matter presents an issue of fundamental public importance because the decision of the Circuit Court below would hinder the ability of citizens to enforce their constitutional right to receive just compensation for takings against municipalities. *See* W. Va. R. App. P. 20(a).

VII. Argument

1. THE CIRCUIT COURT ERRED IN DENYING ROMAN REALTY'S PETITION FOR WRIT OF MANDAMUS BECAUSE A CIVIL TORT RECOVERY IS NOT AN ADEQUATE REMEDY WHEN PRIVATE PROPERTY IS TAKEN WITHOUT JUST COMPENSATION.

The City argued at length that the potential for a civil action maintained against the City precluded Roman Realty's Petition for Writ of Mandamus under *Shaffer*, and the Circuit Court

ultimately agreed. The City incorrectly relied on the following quoted passage from *State ex rel. Firestone Tire & Rubber Co. v. Ritchie* in support:

> The difficulty encountered when the State is involved with regard to private property under the provisions of Article III, Section 9 of the Constitution is not present where a private corporation or municipal corporation having the right of eminent domain is involved or an independent contractor doing work for the State in a *tortious manner* is involved because the provisions in the Constitution are self-executing in such cases where the parties have the right of eminent domain and in *these instances* common law or equitable actions will lie.

153 W. Va. 132, 140–41, 168 S.E.2d 287, 291–92 (1969) (emphasis added). The italicized text demonstrates that the City is relying on inapposite authority because while it establishes that a civil action will lie in instances where the municipality has acted *tortiously*, it says *nothing* with respect to instances where municipalities have in fact taken private property. The City's argument boils down to this: The State is immune from tort action and therefore, tort damages must be recouped from the State through eminent domain; but because municipalities are not immune from tort action, any remedy for a municipal taking must be pursued through tort action. But this cannot be an accurate statement of law because it disregards any distinction between takings and torts. Furthermore, municipalities — including the City of Morgantown — have historically been subject to writs of mandamus compelling eminent domain proceedings. *See Flowers v. City of Morgantown*, 166 W. Va. 92, 272 S.E.2d 663 (1980) (reversing the circuit court and holding that condemnation proceedings could be instituted *against the City of Morgantown* where the City constructed an indoor parking facility that blocked appellants' "special property rights in light, air and view"); Syl. pt. 6, *Stover v. Milam*, 210 W. Va. 336, 557 S.E.2d 390 (2001) ("Wherefore anything done by a state or its delegated agent, *as a municipality*, which substantially interferes with the beneficial use of land, depriving the owner of lawful dominion over it or any part of it,

and not within the general police power of the state, is the taking or damaging of private property without compensation inhibited by the Constitution.") (emphasis added). Indeed, the language of Article III itself distinguishes between takings and damages. *See* W. Va. Const. art. III § 9 ("Private property shall not be *taken or damaged* for public use . . . and when private property shall *be taken, or damaged* for public use, . . . the compensation to the owner shall be ascertained in such manner as may be prescribed by general law.") (emphasis added).[6]

Shaffer allows mandamus only in the "absence of another *adequate* remedy." *Shaffer v. W. Va. DOT, Div. of Highways*, 208 W. Va. 673, 674, 542 S.E.2d 835, 837 (2000) (emphasis added). The adequacy of the remedy must be a meaningful aspect of the elements described in *Shaffer*. The taking suffered by Roman Realty is an injury that is distinct from an injury resulting from tort, and therefore Roman Realty requires a distinct remedy for adequate redress. Because a civil action does not offer the same valuation of damages that would occur in eminent domain proceedings, does not offer any possibility of recovering attorney's fees, and does not grant the

[6] Federal courts wrestling with the distinction between torts and taking have adopted a standard based on the probability of the outcome—damages that are remotely connected to the actions of the government sound in tort, whereas damages to property that "are the natural consequence of acts of the" government constitute a taking. *See, e.g.*, *Barnes v. United States*, 210 Ct. Cl. 467, 479, 538 F.2d 865, 873 (Ct. Cl. 1976); *Thune v. United States*, 41 Fed. Cl. 49, 52 (Ct. Cl. 1998) ("Thus, the probability and foreseeability of the damage is a primary determinative element in whether a taking or a tort occurred." (internal quotation marks omitted)); *see also* Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 UCLA J. Env't L & Pol'y 359 (2002) ("As the law currently stands, a Fifth Amendment taking must result from a natural and probable consequence of the government's action."). The *Barnes* court analyzed whether flooding resulting from the government's construction and operation of the Fort Randall Dam constituted a taking. Beginning in 1969, the government's operation of the Fort Randall Dam resulted in sustained flooding on plaintiff's property. By 1973, the government's data indicated that continued operation would continue to result in the flooding of plaintiff's property. Thus, the *Barnes* court concluded floodings occurring after 1973 where a taking because at that point "it could be said with relative certainty that the flooding would be permanent." *Id.* Here, the damages to the Property as well as Roman Realty's loss of dominion and control over it, are well beyond the natural and probable consequences of the City's action, they are the direct result of the City dumping fill dirt the Property. As noted at the outset, the City's argument might have landed if the injury to the Property was the result of a negligently driven dump truck. But where the injury is the result of willful action in the face of notice provided to the City by both Roman Realty and HRG, *see* App. 248, 281, the injury must constitute a taking.

injured party the necessary and constitutionally granted procedural protection of ensuring a jury of twelve freeholders, a civil action cannot adequately remedy the taking committed by the City in this case.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

A. Compensatory damages in tort actions do not ensure that property owners receive just compensation for the value of their taken property.

This Court offered a comprehensive discussion of the "general guidelines for condemnation proceedings," including examination of the "elusive question" of "what constitutes just compensation," in *W. Va. Dep't of Trans., Div. of Highways v. Western Pocahontas Properties, L.P.* 236 W. Va. 50, 61, 777 S.E.2d 619, 630 (2015). Therein, this Court explained:

> Both the United States and West Virginia Constitutions require the State to provide just compensation to the owner of an interest in real estate taken through the State's exercise of the power of eminent domain. . . . Suffice it to say that one whose real estate is taken is entitled to just compensation for the "value of the land taken at the time of taking, and to damages to the residue," and that the value of the land taken and the damage to the residue are necessarily matters of opinion.

Id. (quoting *Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 442, 83 S.E. 1031, 1038 (1914)) (other internal quotation marks omitted). Accordingly, "[w]here the State condemns only a portion of a tract of real estate and leaves a smaller tract as residue, there may be damages to the residue." *Id.* Thus, this Court observed the "difference in the fair market value of the residue immediately before and immediately after the taking is the proper measure of just compensation." *Id.* (citing Syl. Pt. 3, *W.Va. Dep't of Highways v. Bartlett,* 156 W.Va. 431, 194 S.E.2d 383 (1973) ("The approved and general rule for the measure of damages in an eminent domain proceeding where parts of the land are taken is the fair market value for the land at the

time it was taken, plus the difference in the fair market value of the residue immediately before and immediately after the taking less all benefits which may accrue to the residue from the construction of the improvement for which the land was taken.")).

Conversely, the law on compensatory damages available in civil suits holds:

> When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

Brooks v. City of Huntington, 234 W. Va. 607, 611, 768 S.E.2d 97, 101 (2014). This damages evaluation is fundamentally different than the just compensation evaluation described in *Western Pocahontas Properties*. In civil suits, compensatory damages are all that is available unless the injury cannot be repaired, or the cost of repair exceeds the property's market value. By contrast, petitioners in eminent domain proceedings are entitled to the value of the property at the time it was taken, plus the damages to the residue, all without regard to the cost of the repair. Accordingly, the Circuit Court committed plain error when it concluded "*either* an award of damages to the residual to the property, *or* the value of the property" "is precisely the same remedy Roman is seeking through its writ of mandamus." App. 518. Not so. Roman Realty is seeking *both* an award of damages to the residue of the Property not taken *and* the value of the Property taken, as it is entitled to do in eminent proceedings consistent with the West Virginia Constitution. *See Western Pocahontas Properties, L.P.*, 236 W. Va. at 61, 777 S.E.2d at 630. This difference in remedies alone is enough to conclude that a civil remedy is an inadequate remedy for the City's taking of the Property. Thus, the Circuit Court erred in finding the presence of another adequate

remedy and denying Roman Realty's Motion for Summary Judgment based the availability of mere civil tort remedies.

B. Attorney's fees are a key component of the remedies available in eminent domain proceedings and are unavailable in civil tort suits.

In its order, the Circuit Court acknowledged that Roman Realty "argued at length that it must be awarded a writ of mandamus as the only adequate relief comes from an eminent domain proceeding to determine the value of the property allegedly taken *and an award of attorneys' fees*." App. 518. The Circuit Court then erred by failing to provide any analysis whatsoever regarding attorney's fees in support of its conclusion that mere compensatory damages provide "precisely the same remedy [that] Roman is seeking through its writ of mandamus." *Id.*

"As a general rule award of costs and attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule." *Nelson v. W. Va. Public Employees Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982) (citing *Burdette v. Campbell*, 126 W. Va. 591, 30 S.E.2d 713 (1944)). "However, it is settled that in mandamus proceedings where a public officer willfully fails to obey the law, costs will be awarded." *Id.* This Court has explained that "[c]osts and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties." Syl. pt. 1, *State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Envtl. Prot.*, 193 W. Va. 650, 458 S.E.2d 88 (1995). This is a critical aspect of the remedy available in a mandamus proceeding, and the substance of the quote from *Highlands Conservancy* explains why. There is no justice in requiring citizens to protect their fundamental constitutional rights by resorting to lawsuits that force government officials to perform their legally prescribed nondiscretionary duties. *See Id.* at 655 n.5, 93 n.5 ("If the citizen does not have the resources, his day in court is denied him; the legislative policy which he seeks

to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.") (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986)).

As this Court has observed, when citizens must resort to lawsuits "to cure willful disregard of law, the government ought to bear the reasonable expense incurred by the citizen in maintaining the action. No individual citizen ought to bear the legal expense incurred in requiring the government to do its job." *Nelson*, 171 W. Va. at 451, 300 S.E.2d at 92. Accordingly, in the face of such clear holdings from the West Virginia Supreme Court, any remedy that would purport to make Roman Realty whole after the Property was taken by the City is facially inadequate unless such remedy contemplates an award of attorneys' fees because of the City's persistent and willful disregard of Roman Realty's rights in this case. The City ignored its duty to procure the portion of Roman Realty's property through eminent domain or TCEs for the Property and ignored notice of encroachment and damage to the Property from Roman Realty. *See* App. 281.

Holding otherwise would effectively insulate municipalities from their unconstitutional actions. According to the City's theory of the case, and by extension the Circuit Court's holding, any taking committed by a municipality must be remedied through civil tort action because a taking will always constitute trespass, a cause of action to which municipalities are not immune. And as a result, private landowners would have to undertake a cost benefit analysis before filing suit to enforce their constitutional right not to have their land taken for public use without just compensation. If such landowners are limited to the mere compensatory damages available in civil actions and are precluded from seeking attorneys' fees, then it is very likely that countless takings could occur without any form of just compensation. Such an outcome would severely undermine private property rights—one of the most basic civil rights in our society. *See W. Va. Dep't of Transp., Div. of Highways v. Pifer*, 242 W. Va. 431, 442, 836 S.E.2d 398, 409 (2019) ("It

has long been recognized that property rights are basic civil rights, and that a government's failure to protect private property rights puts every other civil right in doubt.") (internal quotation marks omitted); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (the United States Supreme Court observing that it has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."). In fact, the United States Supreme Court has specifically observed the important role an award of attorney's fees plays in "the deterrence of civil rights violations in the future." *City of Riverside*, 477 U.S. at 574–75 ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in the nominal or relatively small damages awards."). Thus, landowners should not be, and pursuant to the law, need not be, forced into tallying potential compensatory damages recovery against the cost, via attorney's fees, of safeguarding their constitutionally established property rights.

Indeed, the facts underlying this case highlight the urgency of the issue. The City's project plan specifically denotes that at the outset of construction, at least nine temporary construction easements affecting 32 individual parcels would be required to perform the project. During discovery, the City was only able to produce *two* of the temporary construction easements that were called for by the plan. This open lack of respect for the rights of private property owners is indicative of the need for the law to provide viable avenues of enforcement of the constitutional rights of property owners. Without ensuring that attorney's fees are available when private property is illegally taken, municipalities will feel increasingly emboldened to trample on citizens' property rights because the cost of safeguarding their rights will deter many citizens from actually doing so. *See Kerr v. Quinn*, 692, F.2d 875, 877 (2nd Cir. 1982) ("The function of an award of

attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel."). Despite the Circuit Court's lack of analysis regarding attorney's fees in the order, at the renewed motion for summary judgment hearing it acknowledged the importance of the proposition by observing the following:

> But you know what I have a problem with, Mr. Jacks, is, you're forcing -- the City went in there and they just did this. And now you're forcing the plaintiffs, just ordinary -- they have a business. But they're just normal people. And you're saying, you know, go hire a lawyer and pay them, which maybe they can't afford, and maybe we'll give you something at the end, either a settlement or maybe, you know, if we go and fight long enough with the Court, you'll win. You know you're placing a heavy burden on the property owner to remedy this matter.

App. 492. In fact, the Circuit Court noted that in its view, the City's behavior resembled that of "[b]ullies." App. 498.

This deterrence is precisely what the City seeks to avoid in this case. In fact, if the Circuit Court's order is upheld, the practical effect will be to shield all municipalities from eminent domain proceedings, thereby shielding them from the important deterrence of attorney's fees, and risking countless future takings without just compensation.

In sum, because attorneys' fees are generally not available in a civil action for compensatory damages, a civil action remedy fails to adequately redress the injury suffered by Roman Realty. Thus, the Circuit Court erred by entirely disregarding the importance of attorney's fees in mandamus proceedings when it concluded compensatory damages offer the same remedy that Roman Realty seeks through mandamus.

C. Resorting to civil action would preclude Roman Realty from procedural protection to which it is constitutionally entitled, namely an impartial jury of twelve freeholders.

In suits at common law the parties have a right to a trial by only six jurors. By contrast, the West Virginia Constitution requires that compensation for private property taken or damaged for public use be ascertained by an impartial jury of twelve freeholders. W. VA. CONST. art. III, § 9 ("*Provided*, That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."). In fact, this Court has long held that a landowner's right to a jury of twelve freeholders is so important and constitutionally protected, that it is self-executing. *Thorne v. City of Clarksburg*, 88 W. Va. 251, 106 S.E. 644, 646–47 (1921). "It secures a very substantial right and imposes a duty, not only upon the Legislature, but upon the courts, that the compensation for property taken or damaged, when demanded, shall be ascertained by a jury of freeholders." *Id*. This right has been further codified by the state Code's eminent domain procedure. Upon the initiation of eminent domain proceedings "five disinterested freeholders shall be appointed commissioners to ascertain what will be a just compensation and any damages to the persons entitled thereto, for the property, or interest or right therein, proposed to be taken." W. Va. Code § 54-2-5. After the five freeholder commissioners submit their just compensation report, "either party may file exceptions thereto, and demand that the question of the compensation, and any damages to be paid, be ascertained by a jury, in which case a jury of twelve freeholder shall be selected and impaneled for the purpose." W. Va. Code § 54-2-10.

Thus, a civil suit would afford Roman Realty a jury of six individuals, while eminent domain proceedings ensure that Roman Realty's dispute with the City would be resolved by a jury of twelve freeholders. The fact that the twelve jurors must be freeholders is important because it ensures that they are in a better position to understand the sanctity and importance of real property rights. *See* W. Va. Code § 8-1-2(b) ("'Freeholder' shall mean any person . . . owning a 'freehold interest in real property'; 'Freehold interest in real property' shall mean any fee, life, mineral, coal,

or oil or gas interest in real property . . . ."). This constitutional procedural protection is yet another right of Roman Realty's that would be entirely unavailable if it were forced to pursue redress via civil action, and thus, presents yet another reason why civil action remedies are *inadequate* to redress the City's taking of the Property. Accordingly, the Circuit Court erred when it denied Roman Realty's Petition for Writ of Mandamus based on the availability of civil tort actions.

CONCLUSION

For the foregoing reasons as discussed herein, the Circuit Court erred in granting summary judgment in favor of the City and denying Roman Realty's Petition for Writ of Mandamus.

WHEREFORE Petitioners respectfully request that this Honorable Court reverse that Order entered June 14, 2022, by the Circuit Court of Monongalia County, West Virginia and grant Roman Realty's Petition for Writ of Mandamus.

DATED the 14th day of October 2022.

PETITIONER

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-587

ROMAN REALTY, LLC

Plaintiff Below/Petitioner,

vs.

Appeal from the Circuit Court of Monongalia County, West Virginia; Civil Action No. 20-C-109

THE CITY OF MORGANTOWN,

Defendant Below/Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2022, I electronically filed the **Petitioner's Brief** with the Clerk of Court using the *File & ServeXpress* system, which will send notification of such filing to the following:

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