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 REPLY 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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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Contrary to the City of Morgantown's assertion, whether civil actions present an adequate remedy for takings such that citizens are precluded from pursuing eminent domain proceedings against municipalities has yet to be authoritatively decided. Accordingly, this matter is appropriate for Rule 20 argument because not only does it concern an issue of first impression for this Court, it also presents a significant issue of fundamental public importance as 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.

ARGUMENT

The City of Morgantown (the "City") is simply wrong to assert that no taking occurred here. In support of its assertion, the City relies on caselaw holding that a taking requires authorized acts of the government, as well as the City's own interpretation of the project plans, which in the City's view, did not specifically describe a taking on Petitioner Roman Realty, LLC's ("Roman Realty") property. However, the City's interpretation of the plans relies on a select excerpt that fails to clearly define what is being depicted. A look at the overall plan, which clearly depicts the project area, reveals that a portion of Roman Realty's property was always within the project plans. *See* App. 232. Moreover, the City completely ignores the fact that regardless of the plans, the deposition testimony of the City's own engineer conclusively establishes that the taking was not only contemplated, but indeed, authorized and intended by the City.

The remainder of the City's arguments are premised on the proposition that no taking occurred. Accordingly, without the support of such proposition, the City's arguments regarding attorney's fees and potential jury composition collapse. Moreover, the City's statement regarding fairness and public policy is wholly misguided. The City essentially claims that consideration of

its own insurance arrangements trumps consideration of the private property rights of citizens, even though the private property rights of citizens have "long been recognized" as "basic civil rights, and . . . a government's failure to protect private property rights puts every other civil right in doubt." *W. Va. Dep't of Transp., Div. of Highways v. Pifer*, 242 W. Va. 431, 442, 836 S.E.2d 398, 409 (2019).[1] Upon review, this Court should find and hold that the City committed an illegal taking and that the Circuit Court erred below.

I. The actions of the City constitute a taking.

The City contends that "Petitioner cannot show that the alleged damage to Petitioner's Property resulted from the authorized acts of government officials" and that therefore any damage or impairment to the property cannot be a taking. In support of this contention, the City relies exclusively on the original written plans of the project and a letter to the City's contractor stating that the contractor would be responsible for any encroachments beyond the scope of those plans. But the City's argument is fatally flawed because it relies on mere excerpts of the project plans—plans which were neither accurate nor followed by the City during the course of construction. More importantly, the City's argument completely ignores the critical deposition testimony of its own engineer, Damien Davis. Furthermore, controlling authority and persuasive federal caselaw both support Roman Realty's conclusion that the underlying actions constituted a taking in violation of the Constitution.

[1] Indeed, the interior courtroom of the Supreme Court of Appeals of West Virginia prominently features the following Thomas Jefferson quote: "THE TRUE FOUNDATION OF REPUBLICAN GOVERNMENT IS THE EQUAL RIGHT OF EVERY CITIZEN IN HIS PERSON AND PROPERTY AND IN THEIR MANAGEMENT."

a. The record establishes that the underlying actions did result from authorized acts of government officials.

The City claims that the project plans do not contemplate the project entering any portion of Roman Realty's property, citing PL01 at App. 239 for support. *See* Response Br. 239. But PL01 simply depicts the initial planned location of the pipe. It does not depict the overall project boundaries, nor does it depict the subsequent changes made pursuant to change orders authorized by the City Engineer, including Change Order No. 2 and Change Order No. 3, *or* the actual work performed. The overall plan, which does depict project boundaries via a bold black line, contemplates that the project will occur within the boundaries of all parcels abutting the model alleyway, including Roman Realty's property. *See* App. 232. Moreover, the City's own engineer testified: "[W]e were excavating and clearing the whole area within our project limits to install the sanitary—or the storm and sanitary lines." APP. 251. And, as anticipated by the City engineer, this is exactly what happened to Roman Realty's property.

But alas, it is quite interesting that the City, which does not dispute that it refused to acquire the nine temporary construction easements affecting 32 individual parcels[2] as required in the project plans, is now asking this Court to believe that it followed the project plans and therefore did not use a portion of Roman Realty's property.

[2] The project plans 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. 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 access to two parcels*. 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 sloped to facilitate connection with public roads, including stormwater management."

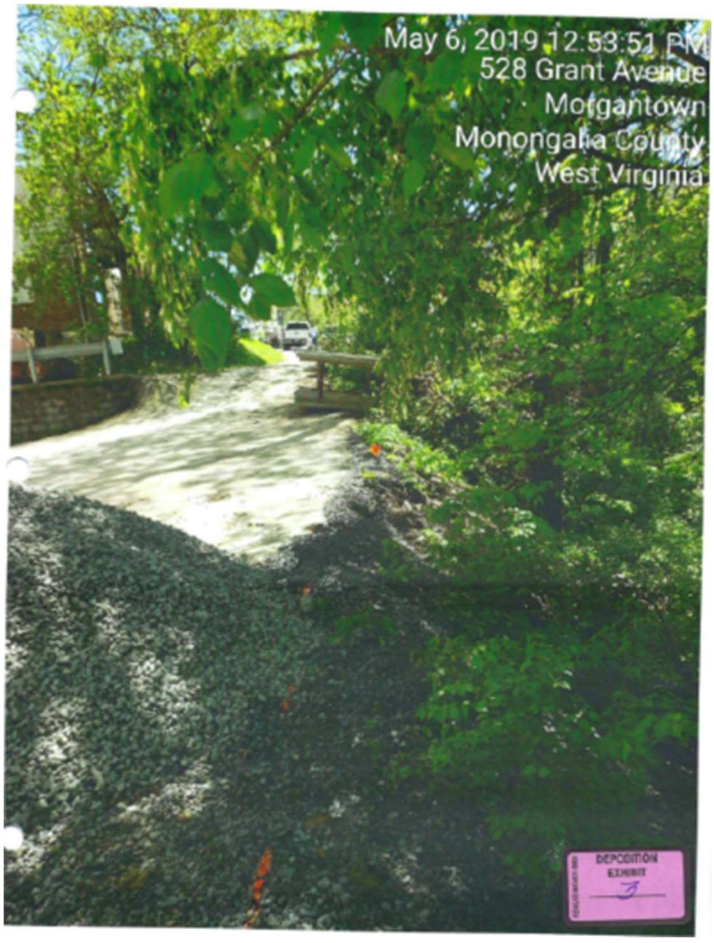
In any case, to the extent the written plans are ambiguous with regard to the City's intent to use Roman Realty's property, the deposition testimony of the City's engineer confirms that the City consciously and intentionally decided to conduct work on Roman Realty's property.

In deposition, the City's engineer testified in response to questioning regarding the ability of the City to place a retaining wall on its own property to provide support for the pipe instead of gradually sloping Roman Realty's property as follows: "*[M]yself* 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 (emphasis added). Moreover, the City's engineer testified regarding a proposed change order that would have revised the plan of the right-of-way between MHD04 and inlet D05, whereby rock would have been placed on the slope to retain the soil and prevent future slips. The City's engineer explained that the change order was not pursued because the City "didn't install rock along that hillside. *We graded, seeded, and mulched it*." *Id.* at 362 (emphasis added). Finally, the testimony of the City's engineer makes clear that the gradual slope of the Roman Realty's property was necessary to complete the project because "[t]he pipe could slip if the hillside slipped." *Id.* at 364.

The foregoing testimony shows that the City's contention regarding the allegedly unauthorized nature of the underlying actions is meritless. Regardless of the details of the written plans, the sworn testimony of the City's own engineer establishes that not only did he know about the encroachment onto Roman Realty's property, but he also affirmatively decided that "sloping it was the best and most cost-effective way to deal with" the lateral support of the pipe. App. 364. Accordingly, the City's claim that any impairment to Roman Realty's property "was certainly not intentional or the natural and probable consequences of the Project from the City's perspective" is

entirely without merit. Therefore, the underlying actions did in fact result from the authorized acts of government officials and therefore, are accurately characterized as a taking.

In order to protect the City's newly installed pipe from slipping, the City authorized the use of Roman Realty's property to provide the much-needed lateral support. Below, you will find two photographs of Roman Realty's property. Roman Realty's property was documented by the City's preconstruction photograph on May 6, 2019, on the left. The image on the right is dated September 19, 201, after the City removed and/or damaged trees; dumped dirt, debris, fill material; and completely regraded Roman Realty's property to laterally support its pipe.[3]



[3] The May 6, 2019 image can be found at APP 249. The September 20, 2019 image can be found at APP 252. *See also* APP 250.

There is no dispute that the slope of Roman Realty's property has changed as a result of work undertaken by the City as part of the project. When reviewing the before and after photographs, the lower court recognized, "Well, I notice the third picture, which is just the single picture, it obviously shows a difference in slope." App. 480. Counsel for the City argued, "If there was fill dirt placed on the plaintiff's property. If there was tree damage on the plaintiff's property. If this project resulted in increase in water. It was a mistake. It wasn't part of the plan. The City didn't desire to use that land." App. 472. This is wrong. The City *did* desire to use Roman Realty's property. The use of Roman Realty's property was done consciously and intentionally, for a specific purpose—to provide lateral support for its pipe. This was not a mistake. This was not a mere trespass. This was a taking.

b. The underlying actions were a taking pursuant to West Virginia law.

The City argues that damaging trees, dumping soil, sloping the property, and causing increased water flow onto the property do not amount to a taking, claiming Roman Realty failed to cite "any legal authority to demonstrate that these types of alleged damages amount to a 'taking.'" Response Br. 20. Not so. As Roman Realty cited in its Opening Brief, the standard by which a taking is analyzed in West Virginia is "anything done by a state or its delegated agent, as a municipality, which substantially interferes with the beneficial use of the 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." Syl. pt. 6, *Stover v. Milam*, 210 W. Va. 336, 557 S.E.2d 390 (2001).

This Court has held that takings include the loss of lateral support, even where the municipality does not directly assume control over the property as the City did here.[4] For example, in *French v. City of Bluefield*, this Court held the municipality was liable for damages to property owner's lateral support, noting "[i]t is no defense that the excavation was necessary for the purpose of grading the street. If the city desires greater rights than those possessed by private owners, it must acquire them by the exercise of eminent domain. It must either do this, or else *itself substitute other lateral support in place of the soil which it removed*." 104 W. Va. 219, 139 S.E. 644, 645 (1927). Under *French*, the City should have instituted eminent domain proceedings to assume control over Roman Realty's property when providing lateral support for the City's pipe, or it should have constructed a retaining wall (or some other lateral support) on its own property. The deposition testimony of the City's engineer confirms that although the City considered installing a retaining wall on its own property, it felt the "most cost-effective*"* option was to simply assume control over Roman Realty's property in violation of *French* and the Constitution. App. 364.

Here, there is no doubt that the City's dumping on and grading of Roman Realty's property deprived the owner of lawful dominion over its property. Undeniably, Roman Realty attempted to exercise its lawful dominion over the property by sending the City a letter dated September 12, 2019, informing the City's former City Manager that it had and was continuing to use Roman Realty's property without use of the proper right-of-way or easement procedures. *See* App. 022. The City convincingly demonstrated its lack of respect for Roman Realty's lawful dominion over Roman Realty's property by ignoring the letter and dumping on the property yet again, less than

[4] Indeed, given the fact that takings can even include instances where "no part of the tract is physically taken," it is odd that the City would argue that its assumption of dominion and control over Roman Realty's property is not a taking. *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").

two weeks after receiving the letter. *See id.* at 364. Accordingly, the result of the City's authorized actions was a taking.

c. Federal caselaw weighs heavily in Roman Realty's favor.

The City claims this case is directly analogous to *Thune v. United State*, 41 Fed. Cl. 49, 50 (1998), wherein the court held that a controlled burn undertaken by the government did not result in a taking where a shift in wind conditions after the fire was ignited resulted in the destruction of the plaintiff's property because the damage resulting from the shift in wind was not a direct, natural, and probable consequence of the project as designed. According to the City, the cases are analogous because any damage to Roman Realty's property "was the result of the alleged improper implementation of a project." Response Br. 22.

Yet again, the City's remarkable claim requires entirely ignoring the testimony of the City's own engineer, the facts of this case, and mere common sense. This is not a case where a plan is designed and then, during execution of the plan, an intervening force results in an outcome that was not intended by the government, as was the case in *Thune*. Unlike *Thune*, Roman Realty's property was not taken as a result of a natural phenomenon. The dirt and debris from the City's construction on the alley was not blown by the wind onto Roman Realty's property, nor did the wind blow down the walnut trees. To the contrary, here, the overall project plans include Roman Realty's property and the City considered the best method for providing lateral support and concluded "sloping [the hillside] was the best and most cost-effective way to deal with" supporting the hillside, thereby providing lateral support for the pipe. App. 232, 364. Thus, the taking of Roman Realty's property was the intended result of a conscious decision of a government official, not an intervening force as was the case in *Thune*.

Roman Realty cited *Thune* in its Opening Brief to establish the importance of intent when analyzing takings. The City agrees with this proposition—indeed, the City's own case illustration of *Thune* makes clear that federal takings analysis turns on intent. *See* Response Br. 22 ("The court first recognized that a taking results only from authorized acts of government and the plaintiff must show an *intent* on the part of the property [sic] to take the plaintiff's property or an intention to do an act the natural consequence of which was to take his property."). Here, there should be no question as to the City's intent given the sworn testimony of the City's engineer, which makes clear that the City *intended* to forego building a retaining wall for lateral support on its own property because it *intended* to exert unlawful dominion over Roman Realty's property by dumping and grading, thereby providing the lateral support that was required in a more "cost-effective" (at least from the City's perspective) manner. App. 364. Indeed, although the Circuit Court did not make any explicit findings regarding intent in its order, it clearly observed the intentional nature of the City's actions by equating its actions to the behavior of "[b]ullies." App. 498. The Circuit Court also recognized that a taking had occurred, explaining: "And I think the issue might be, is this a damage case, or is this a taking case. Is it a taking? I mean, obviously, if they could use the property right up—you know, if they can't use an inch of the property, I would think that might be a taking. **You took an inch.**" App. 496 (emphasis added).

Accordingly, the intent of the City and the authorized nature of the underlying actions confirm that a taking, not a tort, occurred here. Therefore, this Court should reverse the decision of the Circuit Court and hold that Roman Realty's petition for writ of mandamus is granted in the light of the distinction in remedies between takings and torts analyzed below.

II. Civil remedies do not adequately redress the City's taking of Roman Realty's property.

The City's arguments regarding the adequacy of remedy through civil actions cannot withstand scrutiny. For starters, the underpinnings of each argument rely on the incorrect assumption that any damage to Roman Realty's property was merely the result of negligence and not an intentional taking. As established, the City committed a taking here, and accordingly, an adequate remedy for Roman Realty requires a remedy that contemplates an award of attorney's fees and the value of the land taken, as well as a procedure that ensures resolution by a jury of twelve freeholders.

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

To begin with, the City observes that plaintiffs "generally ha[ve] no right to recover attorney fees and costs in a tort claim." Response Br. 23. From there, however, the City claims that because attorney's fees are not automatically available in mandamus actions, Roman Realty's argument regarding the same fails. The City correctly observes that "[a]ttorney's fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command" but provides absolutely no reason why Roman Realty should not be afforded an opportunity to make such a showing beyond insisting that no taking occurred here. *Id.* at 24 (quoting Syl. Pt. 1, *State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Envt'l Prot.*, 193 W. Va. 650, 458 S.E.2d 88 (1995)).

In truth, the standard outlined in *W. Va. Highlands Conservancy* is easily met in this case. *See W. Va. Dep't of Trans., Div. of Highways v. Newton*, 238 W. Va. 615, 625, 797 S.E.2d 592,

602 (2017) (upholding an award of attorney's fees where the Division of Highways failed to discharge its nondiscretionary duty to initiate condemnation proceedings against the mineral interest owner before extracting the minerals). But even if it were a question, Roman Realty's injury requires the opportunity to attempt to meet the standard. As demonstrated, the City acted intentionally when it decided to use Roman Realty's property as its own. Accordingly, Roman Realty has to have the opportunity to demonstrate that such action was a violation of nondiscretionary duty.

The City's suggestion that civil action presents a sufficient remedy because attorney's fees can be awarded to a plaintiff in a tort action under certain circumstances is a classic red herring. Those certain circumstances are an "exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, [and] allow the assessment of fess against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Nelson v. W. Va. Public Employees Insurance Bd.*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1983). Although the City arguably has acted vexatiously and oppressively in this case, that is not the standard by which its actions should be judged. As Roman Realty established at length in its Opening Brief, citizens should not, and do not, have to pay attorneys to enforce the nondiscretionary duties of government officials. Whether done in bad faith or not, failing to observe nondiscretionary governmental duties puts citizens basic rights in jeopardy, which is why the deterring power of attorney's fees is so important. *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."); *City of Riverside v. Rivera*, 477 U.S. 561, 574–75 (1986) (United States Supreme Court specifically observing the important role an award of attorney's fees plays in "the

deterrence of civil rights violations in the future"). The City's attempt to mix the standards by which its actions should be judged with regard to attorney's fees is yet another example of the City's painstaking attempt to frame the underlying actions as mere negligence and to ultimately avoid being held accountable for ignoring its nondiscretionary duties.

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

The City's argument regarding adequacy of compensatory damages similarly confuses the standards by which such remedies are awarded. The City relies on the following passage to argue that compensatory damages in tort are the same as compensation contemplated by mandamus:

> 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). As Roman Realty explained in its Opening Brief, 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. *See 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, and that the value of the land taken and the damage to the residue are necessarily matters of opinion.") (internal quotation marks omitted).

A taking need not be permanent and irrevocable. *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 318–19, 107 S. Ct. 2378, 2388, 96 L. Ed. 2d 250 (1987) ("[I]f the government destroys a chicken farm by building a road through it or flying planes over it, removing the road or terminating the flights would not palliate the physical damage that had already occurred. These examples are consistent with the rule that even minimal physical occupations constitute takings which give rise to a duty to compensate."). *See also Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In fact, in *Loretto*, the United States Supreme Court explained that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . . Property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S. Ct. 3164, 3176, 73 L. Ed. 2d 868 (1982). "The government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id*. (citing *Andrus v. Allard*, 444 U.S. 51, 65–66, 100 S.Ct. 318, 326–327, 62 L.Ed.2d 210 (1979)).

Additionally, the City's attempt to rely on Roman Realty's suit against Green River to establish the adequacy of the remedy falls flat.[5] To the extent the allegations of Roman Realty's

[5] Further, the City's reliance on Roman Realty's monetary settlement demands to determine the adequacy of tort remedy is entirely inappropriate, and at the very least, irrelevant. *See* Response Br. 18. Regardless, the City's apparent perceived disparity between the compensatory damages it thinks are appropriate and the demand of Roman Realty simply establishes that from the outset, Roman Realty has considered the character of its injury to be different and more severe than that of a simple tort. And the fact that Roman Realty's demand included its retention of the property establishes nothing because (a) that demand is not in the appendix, the City merely cites to its own renewed motion for summary judgment wherein such demand is discussed but not attached to the memorandum and (b) that aspect of the demand (i.e., providing a demand that included Roman Realty keeping the property) was in fact encouraged by the City's counsel.

petition for the writ of mandamus mirror those allegations in Roman Realty's complaint against Green River, the similarity is irrelevant. First, the complaint and the petition are each premised on very similar sets of facts, so similarities between the allegations should be wholly unsurprising. But more importantly, Roman Realty only filed a civil action against Green River because the statute of limitations on such action was quickly approaching due to the protracted litigation in this case. *See* App. 446–47, 490–90. Preserving Roman Realty's right to any recovery while this case is pending was arguably necessary pursuant to counsel's professional ethics requirements and has no bearing on Roman Realty's right to eminent domain proceedings. Indeed, the fact that Roman Realty pursued recovery from the City from the beginning, and only filed against Green River as a last resort, illustrates that from Roman Realty's perspective, a writ of mandamus has always been its only avenue to proper recovery. 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). Thus, the Green River complaint has no bearing on whether mandamus may be pursued against the City.

c. A jury of twelve freeholders is a procedural protection that is unique to eminent domain proceedings and Roman Realty did not waive argument pursuant to the same.

Finally, Roman Realty did not waive argument that the jury composition of civil actions is inadequate. Roman Realty adequately preserved its objection based on adequacy of the remedy when it responded to the City's motions for summary judgment. *See* App. 267 (arguing that the City's motion for summary judgment should not be granted because "civil actions for negligence and trespass do not provide adequate remedies where real property is taken without just compensation"). Moreover, the point regarding twelve freeholders was specifically raised below in response to Green River's *Motion to Transfer and Consolidate*, *see* App. 391, which was briefed for the Circuit Court and later acknowledged by the Circuit Court in the hearing below. *See* App.

465 ("Now we have a renewed motion by the City – motion for summary judgment, and a motion to transfer and consolidate this case with [the Green River case]."). In fact, counsel for the City specifically requested to schedule the hearing on its renewed motion for the same time as the hearing on the motion to transfer and consolidate.

The City's substantive response to Roman Realty's twelve freeholder point is equally unpersuasive—the City suggests that jury composition has no bearing on remedy adequacy because Roman Realty "could request a jury of twelve (12) persons if it so desired." Response Br. 25 (citing W. Va. R. Civ. P. 47(b)). This misses the mark for two reasons. First, Rule 47(b) provides that "[u]nless the court directs that a jury shall consist of a greater number, a jury *shall* consist of six persons." This is a far cry from an entitlement to a jury of twelve freeholders. Second, the City doesn't even attempt to grapple with the fact that the twelve-person jury must be made up of *freeholders*, which is important because the requirement ensures that the jurors 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 . . . .").

Therefore, this Court should reverse the decision of the Circuit Court and hold that Roman Realty's petition for writ of mandamus can proceed because any remedies available in civil actions are wholly insufficient to redress the illegal taking committed by the City in this case – to provide just compensation.

III. The interests of public policy, fairness, and justice weigh heavily in Roman Realty's favor.

In its Opening Brief, Roman Realty described the importance of holding in its favor because of the importance of securing private property rights and ensuring that attorney's fees are available when private property is illegally taken. Without such deterrence, 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."). Indeed, the Circuit Court's understanding the fairness implications in this case led it to apologize to the owners of Roman Realty when issuing its ruling at the hearing below. *See* App. 502 ("Ms. Pavone, I'm sorry, and, Mr. Glitz, I'm sorry I have to rule this way because I know the burden that you have financing the litigation. I've been there. I was a plaintiffs' lawyer my entire career, so I know the effect.").

The City mustered only two responses to these points: (1) that a "deluge of similar suits" is likely to follow if this Court rules in Roman Realty's favor, and (2) that the potential for inverse condemnation proceedings "has caused significant prejudice to the City by raising questions regarding insurance coverage that would not otherwise exist." Response Br. 26. Neither point is compelling.

First, the City's insurance coverage questions absolutely pale in comparison to the sanctity of private property rights, especially when such rights are invaded by a branch of government. *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."). Ultimately, if the City does not have insurance for takings, then it should be especially cautious about committing them, rather than, as here, securing only a fraction of the easements that were expressly contemplated by the project plans.

Second, it is unlikely that a deluge of similar suits will follow because it is unlikely that other municipalities have behaved as egregiously as the City has here. Nonetheless, to the extent other municipalities throughout the state have *intentionally* claimed dominion over citizens' private property, assuming that such citizens will not be able to remedy the taking unless they pay for litigation, a deluge of similar suits *should* follow. That is precisely the justice and fairness that the United States Supreme Court had in mind when it held "[r]egardless 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." *City of Riverside*, 477 U.S. at 574–75. Additionally, in making its point, the City once again ignores the critical role that intent plays when distinguishing takings and negligence-based torts because the City claims that a ruling in Roman Realty's favor would allow a "property owner that has suffered some miniscule amount of property damage as a result of the work of a municipality could file an action as a writ of mandamus seeking condemnation proceedings and, even if only awarded or [sic] modest or even miniscule amount, would claim for all his attorney's fees." Response Br. 26. This is not the case. Under Roman Realty's reasoning, property owners are only entitled to attorney's fees when the facts demonstrate a taking as opposed to mere negligence. If Green River had simply negligently crashed its vehicle onto Roman Realty's property (causing even more than the miniscule amount

of damage contemplated by the City in its response), then Roman Realty would not be seeking attorney's fees from the City. But as it stands, the City consciously and intentionally deprived Roman Realty of lawful dominion over its own property. The City then refused to initiate condemnation proceedings and subsequently subjected Roman Realty to time-consuming and costly litigation. These are the facts that set this case apart from the "deluge of other suits" contemplated by the City and the reasons why this Court should reverse the decision of the Circuit Court below and allow Roman Realty's petition for the writ of mandamus to proceed.

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 19th day of December 2022.

PETITIONER

ROMAN REALTY, LLC,
a West Virginia limited liability company,

By Counsel,

/s/ Kayla A. Cook

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-587

ROMAN REALTY, LLC

Plaintiff Below/Petitioner,

vs.

THE CITY OF MORGANTOWN,

Defendant Below/Respondent.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2022, I electronically filed **Petitioner's Reply 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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