NO. COA _____ **N[TH] DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

HISTORICAL MUSEUM, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**From The County**
CITY; JOE SMITH, as Mayor of City and	)	
individually; BOB JONES, Councilman for	)	
City and individually; DICK DOE,	)	
as Former Councilman for City and	)	
individually; SAM LONG, as Former	)	
Councilman for City and individually;	)	
FRED FORD, Councilman for City	)	
and individually; and LARRY DODGE,	)	
Councilman for City and individually,	)	
	)	
Defendants.	)	

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PLAINTIFF-APPELLANT'S BRIEF

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INDEX

INDEX (CONT'D)

INDEX (CONT'D)

INDEX (CONT'D)

TABLE OF CASES AND AUTHORITIES

Cases:

TABLE OF CASES AND AUTHORITIES (CONT'D)

TABLE OF CASES AND AUTHORITIES (CONT'D)

TABLE OF CASES AND AUTHORITIES (CONT'D)

TABLE OF CASES AND AUTHORITIES (CONT'D)

Statutes:

Rules:

Other:

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Councilman for City and individually,	)	
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Defendants.	)	

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PLAINTIFF-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. The parties entered into a Contract in which the Museum agreed to let the City enter its property and destroy a building in exchange for letting the Museum continue operating on the same site. After the Museum performed, the City refused to let the Museum continue its operations there. Did the City breach the Contract?

II. The City destroyed the Museum Building and then moved another structure there, depriving the Museum of continued use of the site. The

City has not compensated the Museum for either destroying its building or taking its property. Is this deprivation of property rights a taking without compensation?

III. The City suggests that the Defendants acted outside their authority, despite representations to the Museum to the contrary, in making numerous material misrepresentations to the Museum to induce it to enter into the Contract. The Defendants knew their representations were false when made and intended them to induce the Museum to rely upon them in letting the City enter the Property and destroy the Museum Building, and the Museum did so to its detriment. Did the Defendants perpetrate a fraud on the Museum when they made false representations intending for the Museum to rely upon them, when the Museum did so to its detriment?

STATEMENT OF THE CASE

The Historical Museum, Inc., the Plaintiff below and the Appellant here (the "Museum"), filed this action on 29 October 2007 against the City and its mayor and present and former councilmen (collectively the "Defendants" or the "City"), alleging breach of contract, taking without compensation, and fraud, based on the City's breach of an agreement that the Museum had fully performed, which entailed letting the City enter its property (the "Property") and destroy its building. There is no dispute that this occurred; accordingly, if and to the extent that the City contends that the contract (the "Contract") was unenforceable, the City's actions constituted a taking without compensation. Either way, the Defendants' fraudulent

misrepresentations—made with full knowledge of their falsity—induced the Museum to let the City enter its Property and destroy the Museum Building.

The City filed its Motion for Summary Judgment on 1 January 2008. (R pp 25-30.) The Museum responded on 1 February 2008. (R pp 87-89.) The City filed its Brief on 14 February 2008. (R pp 155-79.) The trial court granted summary judgment for the Defendants (the "Order") on 1 March 2008, by summary order unsupported by the record and lacking findings of fact, conclusions of law, or any rationale. (R pp 187-88.) The Notice of Appeal was filed on 1 April 2008. (R p 190.)

STATEMENT OF GROUND FOR APPELLATE REVIEW

The Order is a final judgment, and appeal therefore lies to the court of appeals, pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

The Museum let the City enter its Property and destroy a valuable building with the understanding that in exchange, it would be permitted to continue operating on the same site; however, after the Museum fully performed under the Contract, the City reneged on its obligations, imposing numerous limitations, restrictions, and contingencies that constituted a material change in the rights, duties, and obligations

agreed to under the Contract. Accordingly, either the City breached the Contract, or its entering the Property and destroying the Museum Building constituted taking without compensation. The Defendants were fully aware of the limitations, restrictions, and conditions the City was intending to impose after the Museum performed under the Contract, so their intentional deception worked a fraud on the Museum.

A. The Museum Owned A Museum Building And A 99-Year Lease.

The Museum had a 99-year lease (the "Lease") on the Property on which it owned a building (the "Museum Building") that housed the Silver Bullet, a historical wooden train engine (the "Engine"). (R pp 66-73; Marks Dep., 20 Dec. 2007, 30:10-18.)

The Museum maintained the Museum Building, valued at over $25,000 (Spencer Dep., 20 Dec. 2007, 55:6-9, 83:13-14), and enhanced and beautified the Property with a flagpole and ornamental landscaping.

B. The Museum Let The City Tear Down Its Building In Exchange For Being Permitted To Continue Operations In The Depot On The Same Site.

Under the Contract, the Museum allowed the City to tear down the Museum Building and move an old N&S depot (the "Depot") onto the Property. Because the

Museum Building would be destroyed, the Defendants additionally agreed to remove and restore the Engine during the Depot relocation. (R pp 74-75, 102-03.)

The City expressly represented that the Museum would be allowed to continue operating on the same site—in the Depot rather than the Museum Building—as a historical museum as it had for 26 years, affirming that unequivocal representation in writing not only to the Museum but to others as well. (R pp 104-11; Marks Dep. 34:15-25; Spencer Dep. 37:5-21, 38:2-41:22, 52:9-53:11, 55:10-17, 62:12-18, 69:7-14.) Under the Contract, the Museum would be permitted—and required—to house its historical treasures in the Depot. (R pp 104-05.)

C. The City Breached The Contract.

The City mischaracterizes testimony by an 80-year-old with difficulty hearing by carefully selecting a few passages from his lengthy deposition to extract them from their overall context. (*See* R pp 161-64; Spencer Dep. 8:7-8, 88:5-15.) In proper context, Mr. Spencer's testimony makes clear that the City made numerous promises that it did not keep. The Museum understood the terms of the deal in simple terms:

> The city promised that the museum could go back into the station. And on that promise we went ahead and let them use our name to raise money, put in the contracts, put in the contracts with the state and federal governments, and with other entities. . . . Based on the promise and so forth that we were going back in there, we cooperated and agreed to do certain things.

> We also let them take our lease, which we had, which we knew we wouldn't need once we went back into the station . . . because they promised us that we could go back in. This relates to that destruction of our building[.]

(Spencer Dep. 76:13-77:5.)

Only *after* having let the City tear down the Museum Building and move the Depot onto the site did the Museum learn that it could not occupy the Museum Building without meeting numerous significant, onerous, additional conditions, including conveying its artifacts to the City and permitting it to run the Museum. (R pp 159, 161, 184-85; Spencer Dep. 96:14-23; Spencer Aff., 4 Feb. 2008, R pp 90-100, ¶¶ 1(C), (D), (E).)[1] Such conditions were never part of the Contract and contradicted the Defendants' representations during Contract discussions and ratification. In other words, the City refused to honor its obligations (letting the Museum occupy the Depot on the former Museum Building site) following full performance by the Museum (letting the City tear down the Museum Building and move the Depot onto the site).

The Museum relied on the City's promises: It would never have permitted the Museum Building to be destroyed or the Depot placed on its Property, given up its 99-year Lease, let the Engine be moved, or let the City use its name for fundraising had the City divulged its intended restrictions and limitations. (Spencer Dep. 93:18-

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[1]The Museum can only speculate that this change in position might be related to the City's efforts to build its own transportation museum. (*See* Marks Dep. 45:1-25.)

94:10, 96:24-97:10, 99:9-100:6; Spencer Aff. ¶ 2(E).) Common sense is consistent with the Museum's plain-English summary:

> If they had told us up front the museum is not going back in there, there's no way we would approve them taking our building, moving our Engine and our—We could have had that Engine and caboose moved to another site. We could have built another building with all the rent that we were paying after we came out of the museum—out of the station. We lost a lot of money relying on their promise that we were going back in there.

(Spencer Dep. 78:10-18.)

The City does not dispute the Lease's existence, that it destroyed the Museum Building (Marks Dep. 26:2-3) and occupied the Property (Marks Dep. 26:4-17), or that the Museum was not compensated for the destruction and removal of the Museum Building and Engine or for the City's occupying the Property during the 99-year lease (Spencer Dep. 100:22-101:5).

The City either acted pursuant to the Contract, as the Museum contends, or effected a taking without compensation. Any dispute regarding these facts is a genuine issue of material fact rendering summary judgment inappropriate; accordingly, the Order should be reversed on that basis alone.

ARGUMENT

The Museum assigns two points of error: granting summary judgment (R pp 187-88) and failing to rule on the Museum's motion to amend its complaint. The latter can be succinctly addressed by pointing out that that motion was filed on 5 October 2007 but never addressed. (R pp 78-80.) That failure constituted error correctable by remand. The summary judgment Order, which contains absolutely no findings or conclusions, may be efficiently identified in its entirety as containing the error underlying all arguments below. (R pp 187-88.)

I. STANDARD OF REVIEW.

The standard to review a summary judgment is whether any genuine issue of material fact exists and whether the movant is entitled to judgment as a matter of law. *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 705, 707-08, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004); *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001); *Gosai v. Abeers Realty & Dev. Mktg.*, 166 N.C. App. 625, 628, 605 S.E.2d 5, 8 (2004); *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992); N.C. R. Civ. P. 56(c).

Here, the lack of analysis or rationale in the Order, and the undisputed facts discussed above, confirm that there is at least an issue regarding whether the City performed its contractual obligations. The undisputed facts (including the existence of the Museum's 99-year Lease, the City's destruction of the Museum Building and placement of the Depot on the site, and the City's refusal either to (a) let the Museum continue operations on the site pursuant to the Contract, or (b) compensate the Museum for taking its building and property rights) and North Carolina law confirm that the City is *not* entitled to judgment as a matter of law. Accordingly, the Order was erroneous and should be reversed so that the Museum can be compensated for the taking of its Property without compensation, in contravention of the Contract and based on the Defendants' fraudulent misrepresentations.

II. THE CITY BREACHED THE CONTRACT, RENEGING ON ITS PROMISES AFTER THE MUSEUM FULLY PERFORMED.

Under the Contract, the Museum agreed to let the City enter its Property and destroy its building in exchange for the City's letting the Museum continue operating on the site. After the Museum performed, the City refused to let the Museum continue its operations there. The first question presented is whether the City breached the Contract. The Museum answers yes. Assignment of Error No. 1, R p. 187-88.

Remember that any doubt or dispute as to the Contract's existence is a genuine issue of material fact precluding summary judgment.

A. The Contract Was Valid And Enforceable.

1. The City Council Ratified, and Acted Consistently with, the Contract.

A contract can be verbal or written. The Contract here was both. The Contract let the City enter the leased Property, destroy the Museum Building, and move the Depot onto the site, in exchange for which it was required merely to let the Museum continue operations on that site in the Depot. The Museum fulfilled its part of the Contract, but the City refused to do the same, only later—*after* having entered the Property and destroyed the Museum Building—denying the Contract, claiming that the Defendants had acted outside their authority in entering into it on the City's behalf.

The City misconstrues North Carolina law, which expressly permits municipal contracts to be *either* written *or* oral: Oral contracts simply must be ratified. N.C. Gen. Stat. § 160A-16 ("All contracts made by or on behalf of a city shall be in writing . . . *unless . . . expressly ratified by the council*." (emphasis added)).

The City argues that its council never authorized or approved the Contract. (RA 164-65.) Using several negative pregnants, the City insists that "there simply

has never been a *written* agreement between the plaintiff and the City," that there was "no valid *written* contract," and that "[i]n no *document*" was the Contract ratified, suggesting that city contracts must be written to be enforceable. N.C. Gen. Stat. § 160A-16. (RA 162, 164, 165, 168-170 (emphasis added).) However, the Contract *was* ratified, and confirmed in writing. (See RA 104-05 (City Council Mins. & Mayor's Resol'n, 11 Aug. 2001 (regarding Museum's unconditional Depot occupation)); RA 106-11 (Applic'n, 20 Aug. 2001 (confirming unequivocal Museum relocation to Depot)); Spencer Aff. ¶¶ 11, 12.)

Contracts "may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract." N.C. Gen. Stat. § 25-2A-204. Here, both parties' conduct clearly recognized the Contract: The Museum let the City enter its Property, tear down its Museum Building, and move the Depot onto the site; the City ratified the Contract, agreeing that the Museum would return to the site in the Depot—and referenced this agreement in fundraising solicitations. (See RA 104-11.)

The City's authorities addressing procedural protocol are inapposite. (See RA 170 (citing *Jefferson Stand. Life Ins. Co. v. Guildford County*, 225 N.C. 293, 301-02, 34 S.E.2d 430, 435 (1945) (county board must act in corporate capacity at properly convened meeting); *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28, 29-30 (1928) (board members acting in individual capacity do not create county contracts)).)

O'Neal is particularly inapplicable, since the Defendants did not notify the Museum that they were acting in their individual capacities: Their doing so would only further evince their fraud, since they had purported to be acting on the City's behalf—and the Museum had reasonably relied on their representations.

2. The City Was Authorized to Enter into the Contract.

The City next contends that it could not have entered into the Contract because of legal constraints on lease lengths. (RA 166, 175.) This argument is fundamentally misguided: The very statute the City cites expressly permits leases "for terms of more than 10 years," providing guidelines for executing them. There has been no allegation that the Property Lease did not satisfy such requirements. (*See* RA 166, 175.) *See* N.C. Gen. Stat. § 160A-272. Additionally, the Contract here was not the first time the City entered into a Contract exceeding 10 years: It had done so on at least two other occasions with the Museum alone. (RA 66-75, 102-03.)

Furthermore, such a position further implicates the Defendants in additional wrongdoing vis-a-vis the City as well as the Museum, which should not be penalized for such wrongdoing, when it merely acted in good faith in contracting with the City—and in honoring its obligations under that Contract.

B. The City Is Estopped From Denying The Contract Under Which It Acted In Entering The Property And Destroying The Museum Building.

The City contends that it should not be estopped from denying the Contract. (RA 166-67.) However, the record clearly sets forth the basis for such estoppel, given that the Museum let the City destroy and occupy its Property in good-faith belief that the City would honor the Contract by letting the Museum continue operations on the same site.

The City argues that it may not be estopped in performing a governmental function. (RA 167-68 (citing *Sykes v. Belk*, 278 N.C. 106, 121-22, 179 S.E.2d 439, 448-49 (1971); *Blevins v. Denny*, 114 N.C. App. 766, 770, 443 S.E.2d 354, 356 (1994) (addressing immunity from tort liability arising from governmental function); *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001) (immunity for governmental—not proprietary—activities)).)

A city's power to lease or rent property is exercised by its governing body acting in its *proprietary—not* its governmental—capacity. *Lewis v. City of Washington*, 63 N.C. App. 552, 553-54, 305 S.E.2d 752, 754, *aff'd in part, rev'd in part*, 309 N.C. 818, 310 S.E.2d 610 (1983); *Long v. City of Charlotte*, 306 N.C. 187, 203, 293 S.E.2d 101, 111-12 (1982) (governmental immunity no defense to taking private property for public use, *regardless* of whether use is proprietary or

governmental). However, the City here acted in its proprietary capacity. (Spencer Aff. ¶ 13.)

C. Wrongful Conduct, Particularly With Apparent Authority, Does Not Exonerate The City.

The City contends that any contract with the Museum was ultra vires and thus void. (RA 168-69, 171-72.) The Museum should not be penalized for the Defendants' wrongful actions in inducing it to contract, particularly where they acted with colorable authority. N.C. Gen. Stat. § 59-34(c) (estoppel and apparent authority both depend on third party's reliance on communication from principal to extent that difference may be merely semantic); *Volkman v. DP Assocs.*, 48 N.C. App. 155, 159, 268 S.E.2d 265, 268 (1980) (reasonable reliance on agent's apparent authority binds principal); *Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 282, 258 S.E.2d 778, 781-82 (1979) (agent had apparent authority to bind defendant to contract without notice of lack of actual authority).

The Defendants acted with at least apparent authority in negotiating the Contract. If they lacked actual authority, then their purportedly acting on the City's behalf was additional fraud, as discussed in greater depth below. Any dispute regarding the scope of such authority is a genuine issue of material fact rendering summary judgment inappropriate; accordingly, the Order should be reversed.

D. <u>The Contract Is Sufficiently Definite</u>.

The City next contends that the Contract was not clear and definite enough, relying upon Mr. Spencer's statement summarizing his understanding that the Museum's occupation of the Depot would be with "no strings attached," concluding that such a contract would be void for indefiniteness. (RA 169-71.) However, a layperson's understanding of contract terms does not render it void for indefiniteness—particularly where that person is elderly and hard of hearing. (Spencer Dep. 8:7-8, 88:5-15.)

The City itself clarifies that Mr. Spencer's contract summation is not a legal analysis: His statement that "there were no terms or conditions at any time whatsoever" (RA 175) confirms that he was merely summarizing, not providing terms of art to describe specific contract terms, since "no terms" and "no conditions" would be contradictory, particularly given that *numerous* conditions were placed on the Museum's Depot occupation after the City tore down the Museum Building. (*See* RA 159 (referencing "certain conditions," "these conditions," "conditions [that] were set forth in a letter of [1 December 2005]," including a "recapture provision," the need "to assure that any artifacts or exhibits . . . would be available for at least 25 years"); Spencer Aff. ¶ 2(C).)

Nor does the lone authority cited by the City shed any illumination on its position. (*See* RA 171 (citing *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281

(1945)).) The City's reliance on *Brumley* is unclear: It discusses property donated to provide recreational facilities. To the extent that *Brumley* tangentially addresses municipalities' contracting power, it supports the Museum: The supreme court held that to justify voiding municipal action, "its unconstitutionality must clearly appear and reasonable doubts are to be resolved *in favor of its validity*." *Brumley*, 225 N.C. at 698-99, 36 S.E.2d at 286-87 (confirming city's power to appropriate even for nonessential purposes).

Accordingly, the Museum's claim for breach of contract should not have been dismissed, and the Order should be reversed.

III. DEPRIVING THE MUSEUM OF ITS PROPERTY RIGHTS AND DESTROYING THE MUSEUM BUILDING AMOUNTED TO A TAKING WITHOUT COMPENSATION, IF THERE WAS NO CONTRACT.

The City destroyed the Museum Building and then moved the Depot there and deprived the Museum of continued use of the site, without compensating the Museum for having either destroyed its building or taken its Property. The second question presented is whether this deprivation of property rights was a taking without compensation. The Museum answers yes. Assignment of Error No. 1, R p. 187-88.

There is no dispute that the City entered the Museum's Property, that it destroyed the Museum Building, that it occupied the Property, and that it has not

compensated the Museum for that taking. If it was not permitted to do so by the Contract, then the City's actions were a taking without compensation, violating the Law of the Land provision of the North Carolina and U.S. Constitutions. Accordingly, summary judgment for the City on the claim for taking without compensation was erroneous and should be reversed.

A. The City's Own Governing Body Determined That Its Actions Were Taken Pursuant To Either Contract Or A Taking.

The City's own affiliates have determined that it either entered a Contract or conducted a taking. (RA 147-154 (Correspondence from North Carolina Cities United ("NCCU"), 29 Nov. 2007).) Specifically, the NCCU determined that the City had obligations "by reason of the assumption of liability in a contract." (RA 150.) Alternatively, it believed that the City took action "relating to condemnation [or] eminent domain." (RA 150.) The NCCU further referenced the Defendants' wrongful actions in analyzing the claims here asserted. (RA 151 (outlining exclusions for City officials' wrongful actions).)

B. The Law Of The Land Prohibits Taking Without Just Compensation.

The North Carolina Constitution prohibits taking property without just compensation:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.

N.C. Const. art. I, § 19. The North Carolina Supreme Court has inferred that this clause prohibits the taking of private property for public use without just compensation, referring to this fundamental right as being integral to the "law of the land." *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989); *Long*, 306 N.C. at 196, 293 S.E.2d at 107-08; *State ex rel. Util. Comm'n v. Buck Is., Inc.*, 162 N.C. App. 568, 579-80, 592 S.E.2d 244, 251-52 (2004); *Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 592, 562 S.E.2d 832, 834 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003); *Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 11-12, 441 S.E.2d 177, 182-83 (1994); *Armstrong v. Armstrong*, 85 N.C. App. 93, 97-98, 354 S.E.2d 350, 353 (1987), *rev'd on other grounds*, 322 N.C. 396, 368 S.E.2d 595 (1988).

A "taking" is defined as

> entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Stillings v. City of Winston-Salem, 311 N.C. 689, 692, 319 S.E.2d 233, 236 (1984); *Buck Is.*, 162 N.C. App. at 580, 592 S.E.2d at 252; *E. Appraisal Servs. v. State*, 118 N.C. App. 692, 695, 457 S.E.2d 312, 312, *appeal dismissed, disc. review denied*, 341 N.C. 648, 462 S.E.2d 509 (1995). When property is taken for a public use, just compensation *must* be paid. *In re Trusteeship of Kenan*, 261 N.C. 1, 8, 134 S.E.2d 85, 91 (1964); *Buck Is.*, 162 N.C. App. at 580, 592 S.E.2d at 252.

The City's actions here constituted a "taking" in entering the Museum's Property "for more than a momentary period" and, under color of legal authority (whether pursuant to the Contract or other authority), destroying the Museum Building ("appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof"). Clearly, the Museum has been deprived of all beneficial enjoyment of the destroyed Museum Building and of the use and enjoyment of its Property.

C. The City Has Not Compensated The Museum For The Taking.

There also is no dispute that the City has not compensated the Museum for the taking, also in contravention of North Carolina law.

North Carolina authorities have made clear that takings must be compensated fairly under the Law of the Land. *Dep't of Transp. v. Rowe*, 353 N.C. 671, 680-81, 549 S.E.2d 203, 210-11 (2001) (reversing no-compensation judgment; owner allowed

to choose greater of fair market value before and after taking); *N. Asheboro-Cent. Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 752, 114 S.E.2d 577, 580 (1960) (just compensation includes reasonable market value); *Myers v. Wilmington-Wrightsville Beach Causeway Co.*, 204 N.C. 260, 167 S.E. 858, 861 (1933) (just compensation embraces property's reasonable value and decreased value of residual property by reason of any easement); *Concrete Mach. Co. v. City of Hickory*, 134 N.C. App. 91, 97-98, 517 S.E.2d 155, 159 (1999) (owner shall be put in as good a position as if property had not been taken).

Determining just compensation is generally a jury question, inappropriate for determination on summary judgment. *See generally Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708-09 (1999); *Pitt & Greene Elec. Membership Corp. v. Raspberry*, 153 N.C. App. 200, 569 S.E.2d 33 (2002); *Piedmont Triad Reg'l Water Auth. v. Lamb*, 150 N.C. App. 594, 596, 564 S.E.2d 71, 73 (2002); *Town of Hillsborough v. Crabtree*, 143 N.C. App. 707, 708, 547 S.E.2d 139, 140 (2001); *City of Fayetteville v. M.M. Fowler, Inc.*, 122 N.C. App. 478, 479, 470 S.E.2d 343, 344 (1996); *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 11, 415 S.E.2d 111, 112 (1992); *Dep't of Transp. v. Craine*, 89 N.C. App. 223, 224, 365 S.E.2d 694, 696 (1988); *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 57, 58, 330 S.E.2d 622, 623 (1985).

Even if the City lets the Museum reenter the Depot and continue operations on the site, the Museum is entitled to compensation for the temporary taking. *See Williams v. State Highway Comm'n*, 252 N.C. 141, 144, 113 S.E.2d 263, 266 (1960) (awarding compensation for temporary occupancy of leased premises).

The City contends that the Museum "voluntarily" gave up the Engine or its Lease on the Property. (RA 159, 172-73.) This contention overlooks the obvious fact that the Engine's relocation and renovation were all part and parcel of the underlying Contract pursuant to which the City would be permitted to destroy the Museum Building—in which the Engine was housed—in exchange for permitting the Museum to occupy the Depot on the same site. The Engine's removal was a collateral agreement entered into only *because of* the Contract at issue here—the Engine had to be removed from the site when the City destroyed the Museum Building housing it—but that arrangement was a consequence of, and separate from, the agreement to enter the Property and destroy the Museum Building. The Engine restoration agreement "was a separate agreement" having nothing to do with the Contract. (Spencer Aff. ¶¶ 1(G), 2(I), (K).)

D. The Museum's Lease Created Property Rights For Law Of The Land Purposes.

Note that the Museum's rights to the Property, for purposes of the Law of the Land, are not decreased by their arising pursuant to lease rather than ownership.

Contract rights (such as the Property Lease on which the City has infringed here) are a form of property and as such may be taken for a public purpose only if just compensation is paid. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *Buck Is.*, 162 N.C. App. at 580, 592 S.E.2d at 252.

Note that if property interests were limited to those arising from ownership, longstanding North Carolina authorities could easily have said so, rather than specifying that

> [t]he word "property" *extends to every aspect of right and interest capable of being enjoyed* as such upon which it is practicable to place a money value. The term comprehends *not only the thing possessed* but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use.

Long, 306 N.C. at 201, 293 S.E.2d at 110 (emphasis added); *Hildebrand v. Tel. Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941); *see United States v. GMC*, 323 U.S. 373 (1945).

North Carolina property rights created by lease are governed by the same legal principles applicable to ownership. *See State v. Allen*, 216 N.C. 621, 5 S.E.2d 844, 845 (1939) (even mineral rights leases create interest in real estate governed by

principles of law applicable to land (citing *Piney Oil & Gas Co. v. Allen*, 235 Ky. 767, 32 S.W.2d 325, 326 (1930))).

A lessee as tenant takes and holds his term in the same manner as any other owner of realty holds his title, subject to the sovereign right to take any part of it for public use *only upon payment of just compensation*. *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 536 (1968); 26 Am. Jur. 2d *Eminent Domain* § 79.

Here, the City tore down the Museum Building, moved the Depot onto the site, occupied it, and excluded the Museum. Clearly, the City has taken private property for public use without compensation. Accordingly, the Museum is entitled to recover the reasonable value of that taking. *Long*, 306 N.C. 187, 293 S.E.2d 101 (immunity no defense to taking private property for public use).

E. The City's Technical Arguments Lack Merit.

In response to the taking allegations, the City raises several weak technical arguments. (RA 172-73.) The lack of substantive response is significant, confirming the merit of the claims and the lack of any real defense.

1. The Statute of Limitations Did Not Run.

First, the City argues that any taking occurred when the Engine restoration agreement was signed (15 October 2005), after which slightly more than the statutory 24 months elapsed before this action was filed (29 October 2007).[2] (RA 172.)

However, limitations here could not have begun to run on the date of the Engine restoration agreement, since (in addition to that agreement's being collateral to the Contract here, as noted above) there was no way the Museum could have discovered the City's breach or the Defendants' wrongful conduct then, and no cause of action accrued for limitations purposes, until the City breached the Contract.

The City did not wrongfully refuse to honor its obligations under the Contract until August 2004, when its council voted, and first made clear to the Museum its intent, not to let the Museum operate in the Depot as agreed. (RA 120 (Mem., 6 Feb. 2006 (detailing City's actions in refusing to honor Contract); RA 121-23 (City Council Meeting Minutes, 15 Dec. 2005 (reflecting Mot., RA 122-23); Spencer Dep. 97:12-25.) The falsity of the Defendants' misrepresentations was not discovered until the Defendants began articulating additional limitations and restrictions for the

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[2]Even this technical argument is technically *invalid*, because 24 calendar months had *not* elapsed: North Carolina's Legislature has chosen to word its limitations language in terms of months rather than days, dates, or years, and October 2005–October 2007 is a term of precisely 24 months, meaning that the filing did not run afoul of the limitations period.

Contract, contending that those limitations and restrictions had been contemplated all along, despite representations to the contrary. Accordingly, the statute of limitations was tolled at least until the Defendants' wrongdoing was discovered and arguably until the City refused to honor its contractual commitments.

If and to the extent that the date of discovery of a defendant's fraud is in question, the matter must be reversed and remanded for determination by the factfinder. *See Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 400, 653 S.E.2d 181, 183 (2007) (whether limitations bars claim is jury question when evidence supports inference that limitations has not expired).

Because limitations was never raised as a defense prior to a hearing on the merits, that issue was waived and could not have supported summary judgment. *Sherrill v. Carolina Cable Contractors, Inc.*, 166 N.C. App. 759, 604 S.E.2d 366, 2004 WL 2339989, at *3 (2004) (unpublished table decision) (limitations "must be affirmatively raised prior to a hearing on the merits or it is waived"); *Nelson v. Food Lion, Inc.*, 92 N.C. App. 592, 594, 375 S.E.2d 162, 164 (citing *Gragg v. Harris & Son*, 54 N.C. App. 607, 284 S.E.2d 183 (1981)), *disc. review denied*, 324 N.C. 336, 378 S.E.2d 795 (1989).

2. Limitations Was Tolled by the Discovery Rule at Least Until the Museum Discovered the Defendants' Dishonesty.

North Carolina recognizes the "discovery rule," which tolls limitations on fraud claims until the fraud is discovered. *See Misenheimer v. Burris*, 360 N.C. 620, 623-24, 637 S.E.2d 173, 175-76 (2006). Although the parties' rights are determined as of the date of a fraudulent transaction, limitations on fraud claims begins to run when the fraud is discovered or should have been discovered. *Horne v. Cloninger*, 256 N.C. 102, 104, 123 S.E.2d 112, 113 (1961).

For this purpose, "discovery" means either actual discovery or when the fraud *should* have been discovered with reasonable diligence under the circumstances. *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 523-24, 652 S.E.2d 677, 684-85 (2007) (limitations on property occupiers' fraud claim began to run when they discovered fraud); *Brown v. King*, 166 N.C. App. 267, 269, 601 S.E.2d 296, 297-98 (2004) (homeowner's fraud claim did not accrue for limitations purposes until she was served with notice of facts giving rise to claim); *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (insureds' fraud and misrepresentation claims against insurer and agents did not accrue when they received policy with disclaimer and information about premium payments until death of second insured, where insureds discovered alleged fraud more than 10 years later), *review denied*, 358 N.C. 543, 599 S.E.2d 48, *and review denied*, 358 N.C. 543, 599

S.E.2d 49 (2004); *Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 54, 560 S.E.2d 829, 839 (plaintiff had no way to know whether defendants' actions constituted fraud), *review denied and cert. denied sub nom. Neugent v. Neugent*, 356 N.C. 675, 577 S.E.2d 628 (2002); *Spears v. Moore*, 145 N.C. App. 706, 708-09, 551 S.E.2d 483, 485 (2001) (dispute as to diligence in discovering fraud and misrepresentation precluded summary judgment). Where intertwined fraud and breach-of-contract claims may arise from outside rules and regulations, an action for fraud accrues upon notice of violation of those rules. *Nash v. Motorola Commc'ns & Elec., Inc.*, 96 N.C. App. 329, 331-32, 385 S.E.2d 537, 538-39, *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1989).

When there is a dispute as to a material fact regarding when a plaintiff should have discovered fraud, summary judgment on limitations grounds is inappropriate, and it is for the jury to decide whether the plaintiff should have discovered the fraud. *Spears*, 145 N.C. App. at 708-09, 551 S.E.2d at 485.

3. The City Is Estopped from Asserting Limitations as a Defense.

Equitable estoppel precludes a limitations defense where intentional and active concealment of facts delayed the bringing of the action. *See Friedland v. Gales*, 131 N.C. App. 802, 805, 509 S.E.2d 793, 796 (1998), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). Equitable estoppel is available when a party "has been

induced by another's acts to believe that certain facts exist, and that party 'rightfully relies and acts upon that belief to his detriment.'" *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980); *Jordan v. Crew*, 125 N.C. App. 712, 720, 492 S.E.2d 735, 739, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997).

Equitable estoppel prohibits a party from "using a statute of limitations as a sword, so as to unjustly benefit from his own conduct." *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 663 S.E.2d 1 (2008); *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004); *Friedland*, 131 N.C. App. at 806, 509 S.E.2d at 796. A defendant is equitably estopped from asserting that limitations has run where its own actions prevent a plaintiff from discovering facts giving rise to its claims. *Harrington v. Gerald*, 189 N.C. App. 530, 659 S.E.2d 490, 2008 WL 850958 (2008) (unpublished table decision). In other words, a plaintiff induced to delay filing can assert equitable estoppel to bar limitations application. *Id.*, 2008 WL 850958, at *3.

4. The Property Has Been Adequately Described in the Pleadings and Contained in the Record.

Third, the City contends that the complaint here did not meet "certain technical requirements." (RA 173.) Specifically, the City maintains that the property taken was not described. However, the property taken—the right to occupy the Property

and the destruction of the Museum Building itself—has been described in the complaint and in other pleadings and documents throughout the record. (*See, e.g.*, RA 66-72 (Statement of Purpose (denoting premises subject to 99-year lease as described in attached Ex. A); RA 84-85 (Mem. (referencing the real property described at "Deed Book 634, Page 874, The County Registry")); *see also* Spencer Dep. 79:12-14; Spencer Aff. ¶¶ 2(B), (H), 5; Compl. ¶¶ 9, 12, 13, 23.)

The City's additional technical allegations were never before raised during the course of this litigation and are wholly unsupported in the record and therefore should not properly be countenanced here. (RA 173.)

There is no dispute that the City destroyed the Museum Building and occupied the Depot on the same site, on the Museum's leased Property. Accordingly, the Museum is entitled to just compensation for the taking of its property rights, unless the taking was made pursuant to the Contract—in which case the Museum is entitled to damages for breach of that Contract, as discussed above.[3] Accordingly, the

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[3] Note that the Museum does not here address the procedural deficiencies in the taking. The City bypassed condemnation requirements when the Museum acquiesced to its actions, based on the good-faith belief that both were bound by the Contract, pursuant to which the Museum let the City enter the Property and destroy the Museum Building. However, if and to the extent that there was no valid Contract, then the City not only conducted a taking without compensation but also failed to follow statutory condemnation procedures.

Museum's claim for taking without compensation should not have been dismissed, so the Order should be reversed.

IV. THE DEFENDANTS' MISREPRESENTATIONS, AND THEIR PURPORTEDLY ACTING ON THE CITY'S BEHALF IF THEY LACKED AUTHORITY, WERE FRAUDULENT.

The City suggests that the Defendants acted outside their authority, despite contrary representations to the Museum, in making numerous material misrepresentations to induce the Museum to enter into the Contract. (RA 165, 168-69, 171.) The third question presented is whether the Defendants perpetrated a fraud on the Museum in knowingly making false representations, intending for the Museum to rely upon them, which the Museum did to its detriment. The Museum answers yes. Assignment of Error No. 1, R p. 187-88.

Again, if and to the extent of any dispute regarding the Defendants' misrepresentations, the scope of their authority, or whether they acted on the City's behalf (which the City apparently disputes), such disputes are genuine issues of material fact precluding summary judgment; accordingly, the Order was erroneous and should be reversed.

A. The Defendants Acted Fraudulently In Making False, Material Misrepresentations To The Museum During The Contract Negotiations And The Ultimate Museum Building Destruction.

The City's commissioners individually committed willful, malicious fraud. The Museum acted in good faith in letting its Museum Building be torn down and letting the City move the Depot onto the Property, with the unequivocal understanding that the Museum would occupy the Depot. (*See* RA 104-11.)

The City argues that its councilmen intended for the Museum to occupy the Depot (RA 156, 174, 176-77) but fails to acknowledge the material changes effected by the additional restrictions and limitations to that occupation—changes that it had apparently intended all along but shared with the Museum only *after* having entered the Property and destroyed the Museum Building. The Brief only belies the Defendants' wrongful, misleading conduct, repeatedly indicating that they acted individually or outside the scope of their authority (RA 165, 168-69, 171) while representing to the Museum that they acted on the City's behalf in making promises that they knew the City would not keep.

The City received funds from various entities after having represented that the Museum would occupy the Depot, while knowing that the Museum would not be allowed to do so unless it either gave or leased the Property back to the City, along with its artifacts and museum operations. The Defendants knew full well what they were doing.

The elements of fraud in North Carolina are "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 609, 659 S.E.2d 442, 449 (2008) (internal quotation marks omitted); *McLouglin v. Droog*, 189 N.C. App. 787, 661 S.E.2d 56, 2008 WL 1722990, at *4 (2008) (unpublished table decision); *McGahren v. Saenger*, 118 N.C. App. 649, 654, 456 S.E.2d 852, 855 (1995); *Piles*, 187 N.C. App. at 406, 653 S.E.2d at 186; *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (distinguishing ascertainable facts from opinions or representations about future prospects; noting significance of tendency to deceive under circumstances; jury question existed regarding whether statements were intended and received as mere expressions of opinion or statements of fact); *Brooks Equip. & Mfg. Co. v. Taylor*, 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949); *see also Freeman v. Rothrock*, 189 N.C. App. 31, 38, 657 S.E.2d 389, 394 (2008).

The City now contends that the Defendants never intended to allow the Museum unequivocally to reoccupy the Property unconditionally, despite representations to the contrary, as reflected in the Contract. (*See* RA 104-11.) This is fraud, plain and simple.

B. The City's Misrepresentations To Others Do Not Negate Those Made To The Museum.

The City's suggestion that the Museum's complaint bemoans the use of the Museum name on grant applications and to solicit funds (RA174) misses the point. The Museum did not object to the use of its name.[4] The problem is not with the City's *representations* regarding the Museum's use of the Depot but with the *falsity* of those representations. (*See* Spencer Dep. 82:19-20, 94:17-24, 96:9-11.)

That other entities have not requested the return of grant funds as a result of the changed arrangement (RA 174) may indicate that they were not harmed. This action does not concern other entities—which are free to raise their own complaints against the Defendants—but concerns the *Museum*, which has been harmed by the City's failure or refusal to honor the Contract.

C. The Fraud Of Which The Museum Complains Occurred Prior To The Parties' Contract, The City's Actions, And The Museum's Performance.

The City argues that the failure to reach terms on a contract cannot be the basis of a fraud claim. (RA 175.) While this statement is true as far as it goes, fraud claims

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[4]The City represented that the Museum "will be relocated to the north wing of the historic Depot ." (RA 108 (Applic'n).) No conditions or restrictions were ever noted as contingencies with these representations, which the City made to the Museum as well as in its grant applications. (RA 106-11.)

can be based on the failure to honor terms of a contract already entered into and completely performed by one of its parties. While the City's subsequent actions in trying to strong-arm the Museum into another, less favorable agreement are deplorable, they do not change the fraudulent nature of the misrepresentations already made to successfully induce the Museum to enter into the Contract that the City now refuses to honor.

North Carolina courts long have recognized that agreements regarding land may be entered into and that the doctrine of part performance warrants enforcing such agreements, even though they are not in writing, "when the enforcement is necessary to prevent fraud." *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331, 332-33 (1933) (citing *Albea v. Griffin*, 22 N.C. 9, 1838 WL 547 (1838)).

D. The City's Arguments Are Contradictory, Inapposite, And Unpersuasive.

The City contends that intent to deceive was lacking. (RA 175-76.) However, elsewhere in the Brief, it suggests that its own councilmen acted outside the scope of their authority and/or in their individual capacity in their interactions with the Museum. (RA 165, 168-69, 171.)

The City relies on authorities vastly distinguishable from the facts here. (RA 176 (citing *Watts v. Cumberland County Hosp. Sys.*, 317 N.C. App.[5] 110, 343 S.E.2d 879 (1986); *Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 486 S.E.2d 443 (1997) (allegation that professor relied on University's promise to follow guidelines and procedure and on possibility of tenure was insufficient to state fraud claim, where he failed to establish University's intent to deceive or never to abide by guidelines and policies)).)

The *Watts* decision was reversed based on case-specific facts: The physician did not meet the patient until two years after she was told of the medical condition that he had allegedly fraudulently concealed from her, so she could not have been deceived by him. *Watts*, 317 N.C. at 117, 343 S.E.2d at 884-85. Similarly, the *Claggett* plaintiff professor was unable to establish intent to deceive, where the complaint alleged only reliance on an implied promise of tenure "possibilities." *Claggett*, 126 N.C. App. at 610, 486 S.E.2d at 447.

The City argues that "[r]eckless indifference as to the truth or falsity of a representation is not sufficient to satisfy the element of scienter." (RA 176 (citing *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983) (fraud involves aggravation or intentional wrongdoing)).) The City's reliance on *Shaver* is

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[5]The Defendants incorrectly cite *Watts* as "317 N.C. App. 110" (RA 176); the correct citation for *Watts* is "317 N.C. 110, 343 S.E.2d 879 (1986)."

somewhat perplexing. First, reckless indifference is not an issue here, since the Defendants' *actual* fraud obviates the need to consider mere reckless indifference. The City misconstrues *Shaver*, which did *not* hold, as Defendant claims, that "fraud involves the element of aggravation or intentional wrongdoing" (RA 176), but that *punitive damages* involve the element of aggravation or intentional wrongdoing. *Shaver*, 63 N.C. App. at 616, 306 S.E.2d at 526. *Shaver* actually supports the Museum's position here, warranting a new trial where evidence suggested that false representations had been made, that they were calculated to deceive, and that the plaintiff had been deceived and damaged as a result.

The City repeatedly insists that the Defendants are without fault since the Museum could "occupy the restored depot." (RA 156, 174, 176-77.) However, merely being permitted to "occupy" the Depot, subject to numerous additional restrictions and limitations, was not the benefit for which the Museum bargained. The City's misrepresentations fraudulently induced the Museum to enter and honor the Contract, and the Defendants who made the misrepresentations on which it was based must be held accountable for the fraud they perpetrated.

Accordingly, the Museum's fraud claims should not have been dismissed, and the summary judgment doing so should be reversed.

CONCLUSION

The Contract required the Museum to let the City enter its Property and destroy the Museum Building in exchange for letting the Museum continue its operations in a Depot placed on the same site. The City made numerous fraudulent misrepresentations about its intent to unequivocally let the Museum continue operating in the Depot, which induced the Museum to enter into the Contract to its detriment. After the Museum fully performed its part of the Contract, the City refused to honor its obligations, instead imposing numerous significant limitations and restrictions on the Museum's continued operation, thus breaching the Contract.

If and to the extent that there was no enforceable Contract, then the City's actions in destroying the Museum Building and depriving the Museum of its Property constituted a taking without compensation. If and to the extent that any dispute exists regarding these facts, it is a genuine issue of material fact precluding summary judgment—and either way, the City was not entitled to judgment as a matter of law.

Accordingly, the Museum prays that the Order be reversed.

Respectfully submitted,
ADAM Q. SMITH, P.C.

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By: Adam Q. Smith, Esquire
123 South Carolina Street
Post Office Box 456
Village, NC 12345
Telephone: (555) 123-4567
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

As indicated by the WordPerfect word-count tool, this Brief, including footnotes and citations, contains 8,086 words, fewer than the 8,750 words allowed by Rule 28(j)(2) for Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellate Brief was served upon George P. Washington by depositing it in an official depository of the U.S. Postal Service, in a postage-paid envelope, addressed to

George P. Washington, Esquire
Washington, Adams & Jefferson, P.A.
Post Office Box 999
Town, NC 98765

On 5 February 2008.

_____
Adam Q. Smith, Esquire

CONTENTS OF APPENDIX