

SUPREME COURT OF NORTH CAROLINA

BEROTH OIL COMPANY,)
KENNETH SMITH, BARBARA)
PAMELA MOORE CROCKETT,)
and ELTON V. KOONCE,)
Plaintiffs-Appellants,)

v.)

NORTH CAROLINA)
DEPARTMENT OF)
TRANSPORTATION,)
Defendant-Appellee.)

From Forsyth

IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

2013 APR 22 P 4:05

FILED

DEFENDANT-APPELLEE'S NEW BRIEF

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From Forsyth

DEFENDANT-APPELLEE'S NEW BRIEF

ISSUES PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S USE OF THE ENDS-MEANS TEST IN DETERMINING WHETHER TO CERTIFY APPELLANT'S PURPORTED CLASS?

II. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S DETERMINATION THAT CLASS CERTIFICATION SHOULD BE DENIED BECAUSE INDIVIDUAL ISSUES WILL PREDOMINATE OVER COMMON ISSUES OF LAW AND FACT?

STATEMENT OF THE CASE

Appellants filed this purported class action on 16 September 2010 asserting five statutory and constitutional claims generally related to the Department of Transportation's ("NCDOT") alleged taking of their property in connection with a proposed highway project. (R pp 3-18)

NCDOT timely answered, asserting affirmative defenses and moving to dismiss Appellants' claims pursuant to N.C. R. Civ. P. 12(b)(1), (2) and (6). (R p 40) On 19 April 2011, the trial court dismissed all of Appellants' claims except (1) their claim for inverse condemnation under N.C.G.S. § 136-111 and (2) their claim for a declaratory judgment that the Transportation Corridor Official Map Act ("Map Act"), N.C.G.S. § 136-44.50, *et seq.*, is unconstitutional. (R p 303) No party appealed from that order and those claims remain to be determined by the trial court.

Subsequently, the trial court heard Appellants' motion to certify the matter as a class action pursuant to N.C. R. Civ. P. 23. (R p 184) On 20 May 2011, the trial court denied the motion. (R p 310) On 22 June 2011, Appellants appealed to the North Carolina Court of Appeals.

On 15 May 2012, the Court of Appeals issued its unanimous decision upholding the trial court's denial of class certification. *Beroth Oil Co. v. N.C.*

Dep't of Transp., 725 S.E.2d 651, 663, 667 (N.C. Ct. App. May 15, 2012). The Court of Appeals did not express an opinion as to the merits of Appellants' underlying claims. *Id.*

Appellants noticed appeal to this Court and petitioned for discretionary review on 15 June 2012. On 7 March 2013, the Court dismissed Appellants' appeal but allowed the petition for discretionary review. Appellants' New Brief was served on NCDOT via United States mail on 21 March 2013.

STATEMENT OF FACTS

The Winston-Salem Northern Beltway

In 1989, North Carolina Highway Trust Fund legislation created a schedule of federally-funded Transportation Improvement Program Projects ("TIPs") that included proposed urban loops in metropolitan areas. N.C.G.S. §§ 136-175, 136-180 (1999); *N.C. Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 713 F. Supp. 2d 491, 498 (M.D.N.C. 2010) ("*Alliance IP*").¹ One of those loops is the Winston-Salem Northern Beltway ("Northern Beltway") that is planned to extend approximately 34.2 miles around Winston-Salem. The "Western Loop" (TIP Project R-2247) of the Northern Beltway is planned to extend from U.S. 158 north to U.S. 52 in western Forsyth County. The "Eastern Loop" (TIP

¹ The federal district court's opinion provides historical background for the Northern Beltway

Projects U-2579 and U-2579A) is planned to extend from U.S. 52 to U.S. 311 in eastern Forsyth County. *Id.* at 498-99. The Northern Beltway is but one of ten proposed urban loop projects that compete for the same limited state and federal funds. *See* N.C.G.S. §§ 136-175, 136-180 (2011).² NCDOT must designate and prioritize how legislative funds are allocated and distributed to the urban loops based on United States Census information. N.C.G.S. § 136-180. NCDOT “shall not sacrifice the general statewide interest to the purely local desires of any particular area.” N.C.G.S. § 136-44.1 (2011).

In October 1997, pursuant to the Map Act, N.C.G.S. § 136-44.50, *et seq.*, NCDOT adopted a protected corridor for the Western Loop and recorded the map in the Forsyth County Register of Deeds office. The map lists those properties within the Western Loop’s corridor that are subject to the Map Act’s restrictions, including properties owned by most of the Appellants. (R p 6, ¶¶ 17-18) In November 2008, NCDOT established a protected corridor for the Eastern Loop and recorded that map and list of property owners. (R p 6, ¶¶ 17-18)

One of the purposes of the Map Act and corridor protection is to minimize the number of businesses and people who may be impacted and required to

² Section 136-180 was amended in 2004 to include 10 urban loops, and again in 2011 to remove the statutorily mandated list, though the loop projects remain in the TIP.

relocate due to construction of the proposed highway. (Rule 9 Exh. p. 346) This is accomplished by limiting (not “freezing”) new development within the protected corridor. Corridor protection is often used for large controlled-access highways that are proposed in areas of expected high growth. It may be adopted where pressure from development exists or is anticipated, or in instances where inaction could lead to excessive costs for future right-of-way acquisition, or for the elimination of highway alternatives identified in the environmental evaluation process. (R p 28)

Environmental Permitting Process - NEPA

Proposed highway projects such as the Northern Beltway must comply with federal environmental laws and regulations, particularly the National Environmental Policies Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* (2011), as well as the North Carolina Environmental Policy Act (“NCEPA”), N.C.G.S. § 113A-1 *et seq.* (2011). Compliance under NEPA satisfies NCEPA requirements. 01 N.C.A.C. 25.0402 (2012); *Orange County v. N.C. Dep’t of Transp.*, 46 N.C. App. 350, 365, 265 S.E.2d 890, 901 (1980).

NEPA sets a national policy of protecting and promoting environmental quality and requires NCDOT to “consider detailed information concerning significant environmental impacts and to guarantee that the relevant information will be made available to the public.” *Alliance II*, 713 F. Supp. 2d at 500-01; *see*

42 U.S.C. §§ 4321, 4331(a) (2006). The NEPA provisions are regulated under 23 C.F.R. §§ 771.101 through 771.139, which require NCDOT to prepare Environmental Impact Statements (“EIS”) that evaluate the social, economic and environmental impacts of proposed transportation projects. 23 C.F.R. §§ 771.105, 771.127 (2012).

For large and complex projects like the Northern Beltway, NCDOT must prepare a draft environmental impact statement (“DEIS”) that evaluates and considers all “reasonable alternative[s]” for the project. 23 C.F.R. § 771.123 (2012). A final EIS (“FEIS”) identifies the preferred alternative, which is typically the highway route ultimately selected. 23 C.F.R. § 771.125 (2012). The NEPA rules require NCDOT to initiate the “Public Involvement” process and openly communicate to the public the project’s purpose and need, project alternatives, potential highway routes, major design features, the relocation assistance program and right-of-way acquisition process. The public is given opportunities to be heard and voice concerns about the project during public hearings and at other venues. 23 C.F.R. § 771.111. NCDOT cannot proceed with project-wide right-of-way acquisition and obtain federal funding until the Federal Highway Administration (“FHWA”) approves the FEIS by issuing a Record of Decision (“ROD”). 23 C.F.R. §§ 771.113, 771.127. However, prior to such approval, NCDOT may

perform advance acquisitions of specific parcels on a case-by-case basis. 23 C.F.R §§ 771.510, 771.503.

On 24 June 1992, NCDOT issued its DEIS for the Western Loop of the Northern Beltway. On 29 March 1996, it published the FEIS. On 7 May 1996, the FHWA approved the ROD for the Western Loop. Issuance of the ROD represented FHWA's final approval of the Western Loop and completed the federal environmental review process. *N.C. Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 151 F. Supp. 2d 661, 669-70 (M.D.N.C. 2001) ("*Alliance I*").

Federal Injunction Obtained By Property Owners Caused 11-Year Delay

In 1999, a coalition of property owners filed suit in federal court challenging NCDOT's FEIS and the FHWA's ROD, and sought an injunction preventing right-of-way acquisitions, construction and other irrevocable actions on the project. *Id.* at 670; *Alliance II*, 713 F. Supp. 2d at 497. FHWA withdrew its ROD and NCDOT's authorization to move forward with right-of-way acquisition and construction. The court entered an Order of Dismissal, enjoining federal and state defendants from, *inter alia*, taking any "irrevocable actions relating to construction, right-of-way acquisitions, or negotiations for right-of-way acquisitions" in furtherance of the project until new environmental studies were

completed. The NEPA process was reopened and NCDOT combined the Western and Eastern Loop environmental evaluations. *Alliance II*, 713 F. Supp. 2d at 499.

However, the district court allowed NCDOT to purchase properties under the Map Act's Hardship Program in the Western Loop if particular owners met Hardship criteria, plaintiffs consented to each purchase, and the court approved them. NCDOT was required to move the court to amend the Order of Dismissal each time a Hardship acquisition in the Western Loop was proposed. (R pp 66-114)

On 11 January 2007, NCDOT issued a Supplemental FEIS/FEIS for the entire Northern Beltway ("SFEIS/FEIS"). On 15 February 2008, FHWA signed a new ROD authorizing the Northern Beltway. *Alliance II*, 713 F. Supp. 2d at 500. On 13 August 2008, plaintiffs filed a second suit alleging that the new environmental studies violated NEPA and NCEPA by failing to evaluate greenhouse gases and a connector to the airport. *Id.* at 500. In May 2010, after years of litigation and additional environmental assessment costs, both federal suits were dismissed on defendants' motions, and the injunctions were lifted. *Id.* at 527; (R p 65).

The Map Act, N.C.G.S. § 136-44.50 et seq.

The Map Act contains separate sections and may be utilized by NCDOT and local authorities to temporarily restrict certain types of development in areas where highways are proposed.

1. Transportation Corridors - § 136-44.50

Under § 136-44.50, NCDOT is authorized to create a protected transportation corridor after following certain map adoption procedures, giving notice to the public and holding public hearings. NCDOT is required to record “corridor official maps” with the register of deeds office to give notice to existing and prospective property owners of the Map Act’s restrictions. Recording the corridor map is a prerequisite to NCDOT’s regulation of properties within the corridor. N.C.G.S. § 136-44.50(a) (2010). Protected corridors and their maps may be amended or deleted by the Board of Transportation. *Id.* § 136-44.50(a)-(e) (2010).

2. Restrictions - § 136-44.51

After the corridor map is filed, the Map Act imposes temporary three-year restrictions on new improvements to properties within the corridor. Though § 136-44.51 states that no building permit or subdivision plat approval shall be granted to properties within the corridor, there are several important exceptions. Restrictions do not apply to buildings or structures that existed prior to the filing of the corridor

maps if the size of the building or structure is not increased and the occupancy type is not changed. *Id.* § 136-44.51(a) (2010). The restrictions are lifted, *i.e.*, sunset, three years after submission of an application to the local authority for a building permit or subdivision. *Id.* § 136-44.51(b) (2010); (R pp 19-20; Rule 9 Exh. p. 346). Owners are not prohibited from making repairs and renovations to properties if building permits are not required. Nor does the Map Act restrict an owner's right to sell his property. *Appellants admit that they did not apply for building permits or subdivision plats for their properties.* (R pp 3-36, 149-65; Rule 9 Exh. pp. 93, 154, 178, 207, 293, 317) The Map Act's sunset provisions were never triggered for Appellants because they did not apply for permit or subdivision approval. N.C.G.S. § 136-44.51 (2010).

3. Variances - § 136-44.52

Under § 136-44.52, a property owner may petition NCDOT for a variance to be exempt from the building permit and subdivision plat restrictions of § 136-44.51. *Id.* § 136-44.52 (2010); 19A N.C.A.C. 2B.0317 (2010). The request may be granted if no reasonable return may be earned from the land and the restrictions of § 136-44.51 result in practical difficulties or unnecessary hardships. N.C.G.S. § 136-44.52(d) (2010). If a variance request is denied by NCDOT, an owner may appeal the matter. 19A N.C.A.C. 2B.0317. *None of the Appellants applied for or*

were denied variances. (R pp 3-36, 149-65; Rule 9 Exh. pp. 153, 182, 208, 294, 318)

Owners of property within the Northern Beltway corridor, such as Appellants, are required to take affirmative steps and contact NCDOT if they want to be exempted from the Map Act's restrictions. *None of the Appellants availed themselves of these remedies.*

4. Advance Acquisitions - § 136-44.53

An owner of property within a mapped corridor may petition NCDOT or the mapping authority for acquisition of his property due to an imposed hardship. N.C.G.S. § 136-44.53 (2010). An advance or "early" acquisition is an "acquisition of real property by State or local governments in advance of Federal authorization or agreement to acquire rights-of-way on a project or segment-wide basis. 23 C.F.R. § 710.105. NCDOT's decision to acquire properties in advance of receiving project-wide right-of-way authorization from FHWA is discretionary. N.C.G.S. § 136-44.53. NCDOT uses written criteria and federal regulations as guides in making advance acquisition decisions. (R pp 138-47, 276-306)

Specific parcels may be acquired if the acquisition is in the "best public interest to protect the transportation corridor from development" or the protected corridor "map creates an undue hardship on the affected property owner." N.C.G.S. § 136-44.53. A property owner must request in writing a Hardship

acquisition and document a severe “undue hardship” based on health, safety or financial reasons, and funding must be available for the acquisition. (R pp 276-306); N.C.G.S. § 136-44.53; 23 CFR §§ 710.501, 710.503 (2010). If a property owner is determined to be eligible for a Hardship acquisition and the property is not acquired within three years from the finding, then the improvement restrictions for that parcel are removed by operation of law. N.C.G.S. § 136-44.53(a) (2010).

Federal regulations authorize NCDOT to perform advance acquisitions based on “program or project considerations” for corridor preservation, access management, and other purposes. 23 C.F.R. § 710.501 Prior to NCDOT receiving final environmental approval for a project, NCDOT may request from FHWA reimbursement for advance acquisition of a particular parcel or a limited number of parcels “to prevent imminent development” or to “alleviate hardship to a property owner” on the preferred project location as determined during the EIS process. *Id.* § 710.503(a) (2010). FHWA reimbursement may be authorized if the property owner justifies the request by showing that remaining in the property poses an undue hardship as compared to others within the project area due to health, safety or financial reasons, and “documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.” *Id.* § 710.503 (c)(1)-(2) (2010).

The Hardship Program does not require a finding that the property is *unmarketable, worthless or of no value*. (R pp 166-83). During the pendency of the *Alliance for Transportation Reform* lawsuit, over 300 owners of properties applied for Hardship acquisitions and were approved by the federal court. *Six of the Appellants have admitted that they never applied for Hardship acquisitions*. (R pp 166-83)

STANDARD AND SCOPE OF REVIEW

As correctly noted by the Court of Appeals, the trial court's class certification decision is reviewed for abuse of discretion. *Beroth Oil*, 725 S.E.2d at 657 (citing *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997)); *Peverall v. County of Alamance*, 184 N.C. App. 88, 91, 645 S.E.2d 416, 419 (2007).

The scope of this Court's review is limited to alleged errors of law in the decision of the Court of Appeals, *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 428, 368 S.E.2d 619, 621 (1988); N.C. R. App. P. 16, and to the record on appeal, *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 356 (1968).

ARGUMENT

NCDOT notes that the structure and organization of Appellants' brief prevents effective presentation of the issues on appeal. In an effort to present the issues in a more logical fashion, NCDOT has organized its Argument to show why

the Court of Appeals correctly held that the trial court did not abuse its discretion when it denied Appellants' motion for class certification.

NCDOT will first show that the trial court – as the Court of Appeals held – was correct in relying upon an “ends-means” analysis when examining Appellants' inverse condemnation claim. *See Beroth Oil*, 725 S.E.2d at 659-63. The brief will then show that the trial court – as the Court of Appeals also held – correctly applied that analysis when determining that individual issues would predominate over common issues of law and fact in a trial on the merits of Appellants' inverse condemnation claim and therefore acted within its discretion in denying the motion for class certification. *See id.* at 663-66.

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S USE OF THE ENDS-MEANS TEST IN DETERMINING WHETHER TO CERTIFY APPELLANTS' PURPORTED CLASS.

Generally speaking, it would be inappropriate for a court to extend liability for an alleged taking of a few property owners' rights to hundreds of other owners whose interests were never evaluated by the court, which is what Appellants are attempting to accomplish here by use of the class action mechanism. A takings analysis requires a case-by-case, “ad hoc” inquiry into the factual circumstances of each claim. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138, 57 L. Ed. 2d 631, 648 (1978) (there is no set formula to determine a taking); *Chapel Hill*

Title & Abstract Co. v. Town of Chapel Hill, 362 N.C. 649, 654, 669 S.E.2d 286, 289 (2008) (*ad hoc* inquiry is needed).

To this day inverse condemnation is decided on an *ad hoc* basis other than when there is a per se taking through an actual physical occupation or where the government action results in a total deprivation of the use of the property.

James G. Greilsheimer & Cynthia Loving Sideman, Eminent Domain: A Handbook of Condemnation Law, A.B.A. Journal, 2011, at 1. Appellants admit that their claims do not involve physical interference, and that they retain beneficial use of their properties. (Pl. Ct. of App. Br. pp. 23-24, 26 (“Plaintiffs do not claim that many property owners cannot make some reasonable or economical use of their property.”))

By challenging the court’s use of the ends-means test and advocating “*de facto*” and “unequivocal intent” tests, Appellants are asking the Court to reverse this State’s long-established substantive takings law, which holds that the “threat to take” and “mere mapping” are not compensable. Appellants want to dictate when NCDOT and other authorities must condemn properties according to their private schedules and prices. They propose to create a new cause of action under *de facto* taking and unequivocal intent theories based on factual exaggerations and obscure out-of-state case law. (Pl. Br. pp. 10-11, 25)

Virtually every piece of realty lies under the threat of condemnation or is impacted by some regulation, map or plan that could potentially increase or decrease the property's market value. Appellants' taking theories are variants of the threat and intent to take and mere mapping theories that have been rejected on multiple occasions by this Court. *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 485-84, 57 S.E.2d 817, 819-20 (1950) (threat to take and conducting preliminary surveys on properties do not constitute a taking); *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135-36, 139 S.E.2d 227, 230-31 (1964) (mere plotting or planning in anticipation of a public improvement is not a taking or damaging of property, nor is recording a map showing proposed highway limits). A reduction or increase in property values related to legislation or project construction are "incidents of ownership" and cannot be considered a "taking" in the constitutional sense. *Danforth v. United States*, 308 U.S. 271, 278, 285, 84 L. Ed. 240, 243 (1939); *accord Eckhoff v. Forest Preserve Dist.*, 377 Ill. 208, 214, 36 N.E.2d 245, 248 (Ill. 1941) (an owner of land holds title under the condition that it may be condemned one day through eminent domain).

A number of reasons have been advanced by the courts in support of such rule, the ones most frequently assigned being that plotting or planning does not, in itself, amount to an invasion of property, or deprive the owner of the use and enjoyment thereof; that the projected improvement may be abandoned and the property never actually disturbed; that the threat or possibility of condemnation is one of the conditions

upon which all property is held; and that the rule is in aid of the growth and expansion of municipalities.

J. R. Kemper, LL.B., Plotting Or Planning In Anticipation Of Improvement As Taking Or Damaging Of Property Affected, 37 A.L.R.3d 127, 131 § 2 (1971).

Appellants' constitutional rights to receive just compensation for a taking are preserved for when (and if) NCDOT acquires their properties or portions thereof through voluntary acquisition or formal condemnation. N.C.G.S. §§ 136-103, -112 (2013). The prices paid by NCDOT will be unaffected by any depreciation in market value that may be related to potential "condemnation blight" because NCDOT acquisition appraisals are prohibited from reflecting any increase or decrease in market value that may be caused by the proposed highway project or protected corridor. N.C.G.S. § 136-44.54; 49 C.F.R. § 24.103(b).

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Penn Coal Co. v. Mahon*, 260 U.S. 393, 413, 67 L. Ed. 2d 322, 325 (1922). "Obviously not every act or happening injurious to the landowner, his property, or his use thereof is compensable." *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982); *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 218, 258 S.E.2d 444, 451 (1979) (mere restriction of practical uses or reduction of reasonable value does not result in a taking). Whether a taking has

occurred is often a question of whether the governmental act in question is an exercise of the police power or eminent domain. *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962).

Allowing property owners to dictate when their properties must be condemned in advance of an approved condemnation schedule would destroy NCDOT's ability to program and prioritize transportation projects across North Carolina. Under Appellants' theory, NCDOT would be responsible for acquiring hundreds if not thousands of properties where project schedules are delayed due to events outside of NCDOT's control, including such things as lawsuits, injunctions, economic recessions that decrease motor fuel tax revenues (resulting in reduced highway construction funds), or the discovery of an endangered species requiring a new environmental assessment. Thus, Appellants' taking theories are untenable.

Appellants argue, *inter alia*, that a taking has already occurred based on the Map Act, administration of its provisions, and Hardship acquisitions. (R p 11, ¶ 49) Appellants directly challenge the Map Act's provisions and the impacts they have on Appellants' property rights. (R pp 11, 14, 16, 49, 64-65, 73) Whether those acts fall within NCDOT's police power or constitute a taking necessitates a takings analysis. Because Appellants' allegations challenge actions that are regulatory in nature, a regulatory takings analysis, *i.e.*, ends-means, should be used.

A. North Carolina Takings Jurisprudence.

North Carolina courts generally recognize two lines of cases where a taking is alleged based on diminution of property values and interference with property rights. The first involves non-regulatory, physical or quasi-physical intrusions. *See, e.g., Long*, 306 N.C. at 201, 293 S.E.2d at 110 (airplane flights emitting noise, fumes, and pollutants depressing the value of property); *N.C. Dep't of Transp. v. Harkey*, 308 N.C. 148-49, 301 S.E.2d 64-65 (1983) (NCDOT project physically blocked property owners' access to abutting highway); *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E.2d 510 (1913) (odors from trash dump); *Midgett v. N.C. State Highway Comm'n*, 265 N.C. 373, 144 S.E.2d 121 (1965) (flooding of land caused by highway structure); *Robinson v. N.C. Dep't of Transp.*, 89 N.C. App. 572, 366 S.E.2d 492 (1988) (pile driving vibrations causing house damage). These types of cases typically employ an "actual interference" or "substantial ouster" analysis:

Taking under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the 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.

Ledford v. N.C. State Highway Comm'n, 279 N.C. 188, 190-91, 181 S.E.2d 466, 467 (1971) (obstruction of a private right-of-way by Highway Commission)

(citations omitted). Appellants must show an “actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.” *Long*, 306 N.C. at 199, 293 S.E.2d at 109; *see Penn*, 231 N.C. at 484, 57 S.E.2d at 819 (“injuriously affecting it [property] in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof”).

As noted by the Court of Appeals, the second line of cases falls into the regulatory category. These cases involve allegations that a statute or regulation and their administration caused diminution in property values and interference with property rights. *Beroth Oil*, 725 S.E.2d at 661. These cases employ the ends-means test to determine whether a taking has occurred. *Penn Cent.*, 438 U.S. 104, 129, 136, 57 L. Ed. 2d 631, 651 (adoption of ends-means test holding that non-zoning Landmark Law did not effect a taking where, *inter alia*, present use of property not impacted); *Responsible Citizens in Opposition to Flood Plain Ordinance v. Asheville*, 308 N.C. 255, 264-65, 302 S.E.2d 204, 210-11 (1983) (ends-means test used to determine if city’s flood plain ordinance created a regulatory taking); *Finch v. Durham*, 325 N.C. 352, 385, 384 S.E.2d 8, 26 (1989) (ends-means test used to determine if city’s ordinance rezoning property from O-I to residential was a taking).

The first prong of the ends-means analysis examines whether the ends or goals of the regulation fall within the scope of the state's police power. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208. The second prong, "reasonable means," focuses on the interference with the owner's property rights and examines whether the regulation deprives the owner of all practical use of the property and renders the property of no reasonable value. *Id.* at 264, 302 S.E.2d at 209-10. This was the test applied by the trial court and approved by the Court of Appeals in this case. *Beroth Oil*, 725 S.E.2d at 664.

The ends-means test has been applied by the North Carolina Court of Appeals in several non-zoning cases. *See, e.g., King by & through Warren v. North Carolina Dep't of Env't., Health & Natural Resources*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333 (1997) (denial of permit to build subdivision road did not deprive owner of all practical use and reasonable value of property (citing *Finch*, 325 N.C. 352, 384 S.E.2d 8)), *disc. review denied, King v. State*, 346 N.C. 280, 487 S.E.2d 548 (1997); *E. Appraisal Servs., Inc. v. State*, 118 N.C. App. 692, 696, 457 S.E.2d 312, 314 (1995) (State's obtaining custody of insurance claims files was not a taking based on ends-means test (citing *Responsible Citizens*, 308 N.C. 255, 302 S.E.2d 204)), *disc. review denied*, 341 N.C. 648, 462 S.E.2d 509 (1995); *Weeks v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 225, 388 S.E.2d 228, 234 (1990) (ends-means test used to assess takings claim involving

denial of permit to build a pier), *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990).

Though the ends-means test is often used in zoning-type cases, the Map Act and its provisions are similar to zoning regulations in that they regulate land use and offer waivers from the restrictions through variances (upon a showing of hardship). N.C.G.S. § 136-44.50, *et seq.*; *Chapel Hill Title & Abstract Co.*, 362 N.C. at 651, 669 S.E.2d at 287.

Appellants' complaint revolves around the existence of the Map Act and NCDOT's administration of its provisions: filing the protected corridor maps; the temporary restrictions on new improvements; and acquisition and rental and/or removal of third-party properties under the Hardship Program. (R pp. 3-18) Indeed, Appellants pin their injuries to when NCDOT filed the maps in 1997 and 2008. (R p 11; Rule 9 Exh. pp. 91, 93, 161, 164)

Though Appellants contend that other pre-condemnation conduct such as statements, announcements and publications, and acquisition of other properties effected a taking of their properties, these activities do not rise to the level of a taking. *Danforth*, 308 U.S. at 278, 285, 84 L. Ed. at 243 (no taking occurred through pre-condemnation activities: enactment of flood-control plan contemplating ultimate acquisition and use of plaintiff's property, completion of work elsewhere on project (setback levee), revocation of offer to purchase property

and later filing of condemnation action); *Penn*, 231 N.C. at 485-84, 57 S.E.2d at 819-20 (surveys and intent to condemn); *Browning*, 263 N.C. at 135-36, 139 S.E. 2d at 230-31; *Barbour v. Little*, 37 N.C. App. 686, 690-91, 247 S.E.2d 252, 255 (state agency's intentions and plans that "contemplated ultimate acquisition" of plaintiffs' property were not a taking; too many conditions existed for the plans to constitute a taking, such as review and approval by higher governmental authorities within the executive branch, and approval of funds), *cert. denied*, 295 N.C. 733, 248 S.E.2d 862 (1978); *see also* N.C.G.S. § 136-120 (2011) (NCDOT's entry upon land to conduct surveys in contemplation of condemnation not a taking); N.C.G.S. § 40A-11 (2011) (entry upon land in contemplation of condemnation not a taking by private and local public authorities).

Sound reasons exist for the *threat to take* rule. There is no guarantee that a planned public improvement will be constructed. Plans can change due to a number of factors: lack of funding, the need for various federal and state agency reviews and approvals, and changes in economic and social needs. The legislature has acknowledged that planned government projects may be abandoned at some point by authorizing the payment of costs and fees if a condemning authority abandons an eminent domain proceeding. N.C.G.S. § 136-119(ii) (2011) (NCDOT actions); N.C.G.S. § 40A-8(ii) (2011) (local public condemners).

If pre-condemnation “intent to take” activities constituted a taking, then the entire environmental permitting process mandated under NEPA and NCEPA (which predated the filing of the Northern Beltway protected corridor maps) could potentially give rise to a taking claim. The environmental evaluation processes require NCDOT to communicate to the public its proposed highway plans, maps, planned routes, and properties that may be acquired for the project. 23 C.F.R. § 771.111; N.C.G.S. § 113A-1, *et seq.* Preliminary right-of-way acquisition and construction schedules printed on NCDOT’s Internet website and in NCDOT’s TIP document - which covers hundreds of proposed projects - could also be ripe for attack because the schedules manifest an “intent to condemn” properties. N.C.G.S. § 143-350 (2011). NCDOT crews performing preliminary surveys, mapping and soil research could also give rise to a taking under Plaintiffs’ “unequivocal intent” theory because the acts were done in contemplation of ultimate acquisition.

B. Appellants Mischaracterize The Court of Appeals’ Holding.

Appellants repeatedly mischaracterize the ruling of the Court of Appeals as holding that NCDOT’s alleged actions regarding their properties were exercises of police power. (Pl. Br. p. 16) The Court of Appeals, however, did not hold that NCDOT’s actions fell within its police power. The court approved the trial court’s application of an ends-means analysis because it correctly characterized NCDOT’s

alleged actions as being “regulatory in nature,” not because they were exercises of police power. *Beroth Oil*, 725 S.E.2d at 662-63.

The Court of Appeals correctly noted that the first step in a takings analysis is to classify the alleged government action as either physical (or quasi-physical) or regulatory in nature, and then apply the appropriate test. *Id.* It is the use of the appropriate test that determines whether a government’s action rises to the level of a taking (inverse condemnation) or falls within NCDOT’s police power. *Id.* The Court of Appeals specifically left open the issue of whether NCDOT was exercising its police or condemnation powers with regards to Appellants, as that issue was not before it.

The question whether NCDOT has exercised its police power versus its eminent domain power in the instant case is tantamount to asking whether NCDOT has effected a taking of Plaintiffs’ property. As the merits of Plaintiffs’ claims are not before this Court, we express no opinion on this issue.

Id. at 663-64.

The issue before the Court of Appeals was – and still is before this Court – whether the trial court abused its discretion in denying Appellants’ motion for class certification. The takings analysis is relevant here only to the extent it informs *that* issue.

C. The Map Act Falls Within NCDOT's Police Power.

Appellants' argument that NCDOT's police power is limited solely to preventing harm is baseless. The scope of NCDOT's police power encompasses preservation of the public peace, health, safety, and promotion of the general welfare of North Carolina's citizens, insofar as NCDOT is charged with the responsibility to design, construct and maintain the State's highways, and acquire necessary rights-of-way. *Wofford v. N.C. State Highway Comm'n*, 263 N.C. 677, 682, 140 S.E.2d 376, 380, *cert. denied*, 382 U.S. 822, 15 L. Ed. 2d 67 (1965) (impairment of property value due to closing a street near plaintiff's property fell within police power and was not a taking); N.C.G.S. § 136-18 (2011). NCDOT's police power includes planning, construction and maintenance of controlled-access facilities such as the Northern Beltway.

"The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." *A-S-P Associates*, 298 N.C. at 213, 258 S.E.2d at 448 (holding that ordinance controlling exterior appearance of private properties fell within scope of police power to preserve State's historically significant structures) (citations omitted). "[T]he police power of the State has not been, and by its nature cannot be, placed within fixed definitive limits, it may be extended or

restricted to meet changing conditions, economic as well as social.” *Winston-Salem v. Southern R. Co.*, 248 N.C. 637, 642-43, 105 S.E.2d 37, 41 (1958).

Other police power activities include construction of median strips (*Barnes*, 257 N.C. at 514, 126 S.E.2d 7at 737-38); changing traffic patterns (*Bd. of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980)); and changing grades to highways abutting public highways (*Smith v. N.C. State Highway Comm’n*, 257 N.C. 410, 414, 126 S.E.2d 87, 90 (1962)).

The Map Act’s provisions serve as planning tools that fall within NCDOT’s police power. The Act’s restrictions help to protect the proposed alignment of large-scale transportation projects such as the Northern Beltway by limiting *new* development that may occur in the planned path of the project. Limiting new development in highway corridors located in high-growth urban areas reduces the number of people and businesses that may have to be relocated when and if the project is built. Future right-of-way acquisition costs are reduced because new construction is curtailed. (Rule 9 Exh. p. 346); (R p 28)

Though properties within the protected corridor are subject to the corridor’s improvement restrictions, along with a myriad of underlying local zoning land-use restrictions unrelated to the corridor, the Map Act does not “freeze” development, contrary to Appellants’ assertion. Nor does the Map Act prohibit the sale of properties. N.C.G.S. § 136-44.50, *et seq.* The restrictions are temporary and sunset

three years after an owner applies for a building permit or subdivision approval. N.C.G.S. § 136-44.51. Restrictions on future use of property are not necessarily a taking. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341, 152 L. Ed. 2d 517, 552 (2002) (temporary 32-month moratorium on residential development did not effect a per se taking and did not deprive the owner of all economically beneficial use); *Responsible Citizens*, 308 N.C. at 264, 302 S.E.2d at 210 (restricting certain types of new construction not a taking where *current* use unaffected).

As noted above, Appellants acknowledge that they can use their properties as residences and businesses as they always have: "*Plaintiffs do not claim that many property owners cannot make some reasonable or economical use of their property.*" (Pl. Ct. of App. Br. pp. 23-24 (emphasis added)). If Appellants desired to make *new* improvements to their properties, relief mechanisms were available to them, none of which they pursued. N.C.G.S. § 136-44.51(b) (restrictions sunset three years after submission of building permit application). If an owner does not want to wait three years to develop his property, then he can apply for a variance from the restrictions. *Id.* § 136-44.52. Again, none of the Appellants pursued this option.

Assuming *arguendo* that Plaintiff Beroth Oil had submitted an application to the local authorities in 1997 to improve its property, the improvement restrictions

would have sunset in 2000. N.C.G.S. § 136-44.51(b). Beroth Oil could have earned over 10 years of revenue from a convenience store operation had it pursued these remedies. Instead, all of the Appellants chose to bypass these relief mechanisms in favor of filing suit in 2010 at the height of the national recession and downturn in the real estate market. (R p 3)

Even if the corridor restrictions were not in place, Appellants still would have incurred various site plan and other development costs associated with complying with the local authority's zoning and permit application requirements.

D. North Carolina Courts Do Not Recognize Intent And Threats To Condemn As Takings.

Appellants' "*de facto* taking" and "unequivocal intent" to condemn theories are variations on the "intent to take" theory that was first rejected by this Court in *Penn*, 231 N.C. at 484-85, 57 S.E.2d at 819-20. In *Penn*, the plaintiffs alleged they were entitled to initiate condemnation proceedings and be compensated when a municipal corporation with condemning authority planned to construct a toll road across their property but had not started formal condemnation proceedings. The defendant performed preliminary surveys and staked out the route across the plaintiffs' property. *Id.* at 485, 57 S.E.2d at 820. This Court affirmed dismissal, holding that "[a] threat to take, and preliminary surveys, G.S. 40-3, are insufficient to constitute a taking." *Id.* Plaintiffs "jumped the gun" trying to "chart the course"

and force the commission to start condemnation proceedings when it was not ready. *Id.* at 484, 57 S.E.2d at 819. Appellants herein are attempting to do the same thing.

This principle has been consistently applied by appellate courts in North Carolina and other states. *Browning*, 263 N.C. at 135-36, 139 S.E. 2d at 230-31; *Martin v. United States*, 240 F.2d 326, 327, 330 (4th Cir. 1957) (recording a highway map at register of deeds office depicting land as owned by State did not effect a taking where no exercise of dominion or possession occurred); *Barbour*, 37 N.C. App. at 690-91, 247 S.E.2d at 255 (State's intentions and plans to condemn are not a taking); *accord Tucker v. Charter Med. Corp.*, 60 N.C. App. 665, 671, 299 S.E.2d 800, 804 (city's plans showing proposed street extending over plaintiffs' property and rejection of defendant's site plan due to the conflict with the city's plans did not constitute an inverse condemnation), *disc. review denied*, 308 N.C. 548, 304 S.E.2d 242 (1983); *Morvan v. City of Charlotte*, No. COA02-1343, 2003 N.C. App. LEXIS 2086 (N.C. Ct. App. Nov. 18, 2003) (unpublished) (city's publication of map showing future right-of-way limits of road bisecting plaintiff's property was not a taking, even though plaintiff purchased additional property to avoid the proposed road and relocated its business activities); *6214 S. Blvd. Holdings, LLC. v. City of Charlotte*, No. COA05-1477, 2006 N.C. App. LEXIS 1622 (N.C. Ct. App. July 18, 2006) (unpublished) (inverse

condemnation claim properly dismissed where the city's public announcement, planning and preparation of a light rail system did not constitute a taking even though plaintiff lost tenants due to threat of condemnation); *see Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. 270 (1897) (recording map showing proposed highways and subdivisions was not a taking where it gave notice to public of future condemnation proceedings); *Eckhoff*, 377 Ill. at 214, 36 N.E.2d at 248 (no taking created by enactment of resolutions or ordinances, negotiating with the owner for the purchase of land, or sending multiple notices that land may be condemned, and 13-year delay in condemning property); *Chicago v. Loitz*, 11 Ill. App 3d 42, 46, 295 N.E.2d 478, 481 (Ill. App. Ct. 1st Dist. 1973) (negotiations, planning and preliminary steps in anticipation of condemning property is not a taking); *Chicago Hous. Auth. v. Lamar*, 21 Ill.2d 362, 365, 172 N.E.2d 790, 793 (Ill. 1961) (verbal agreement to purchase property did not set the taking date, even though property became vacant and vandalized afterward); *Merkur Steel Supply, Inc. v. City of Detroit*, 261 Mich. App. 116, 680 N.W.2d 485 (Mich. Ct. App. 2004) (threat of condemnation and related publicity is not a taking); *State v. Vaughan*, 319 S.W.2d 349, 354 (Tex. Civ. App. 1958) (damages due to loss of rent after state sent notice informing owner of future eminent domain action were not compensable).

E. Appellants' Foreign Cases Are Not Persuasive.

Appellants cite to numerous foreign cases that are factually dissimilar to the instant case, many of which involve trial court decisions, and are not persuasive. *Althaus v. United States*, 7 Cl. Ct. 688, 690, 692, 697 (1985) (holding *no de facto* taking for *residential* properties where government published an official land acquisition plan listing plaintiffs' property, and right-of-way agent told plaintiffs at meeting they would be offered only 30 cents on the dollar to settle their claim); *Levine v. City of New Haven*, 30 Conn. Supp. 13, 294 A.2d 644 (Conn. Super. Ct. 1972) (nuisance claim where trial court merely held that the complaint stated a claim); *Foster v. City of Detroit*, 405 F.2d 138, 141 (6th Cir. 1968) (formal condemnation action was filed but withdrawn ten years later); *Gaughen v. Commonwealth, Dep't of Transp.*, 123 Pa. Commw. 550, 566, 554 A.2d 1008, 1016 (Pa. Commw. Ct. 1989) (defendant intentionally delayed plaintiff's ability to develop his property by interfering with ability to get financing to build subdivision, and informed plaintiff it would institute protective buying of its property); *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1329-31 (9th Cir. 1977) (defendant caused physical damage to plaintiff's basement - flooding - resulting in loss of commercial tenants and inability to obtain financing); *Textron, Inc. v. Wood*, 167 Conn. 334, 350, 355 A.2d 307, 316 (Conn. 1974) ("unique facts of this case" showed that defendant told

plaintiff its property would be acquired on a date certain, forcing plaintiffs to move manufacturing plant in reliance on the notice).

In addition, Appellants' references to foreign cases in support of their argument that the Map Act is facially unconstitutional are misleading and involve regulations dissimilar to the Map Act. Regarding *Joint Ventures, Inc. v. DOT*, 563 So. 2d 622 (Fla. 1990), the Florida Supreme Court clarified its holding by stating that Florida's map reservation statute was *not* a *per se* taking. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994). Unlike North Carolina's Map Act, the Florida statute lacked variance and hardship remedies. The zoning ordinance at issue in *Maryland-National Capital Park & Planning Com. v. Chadwick*, 286 Md. 1, 405 A.2d 241 (Md. 1979), was so onerous that it prevented landowners from making *any use* of their properties "other than to remove trash and weeds," whereas the Map Act's restrictions are lifted after three years and do not impact current use. *See also Miller v. Beaver Falls*, 368 Pa. 189, 194-95, 82 A.2d 34, 37 (Pa. 1951) (ordinance's three-year restriction on new construction was invalid where it applied to parks and playgrounds, but *not* highways).

Appellants attempt to bend the instant facts to fit *de facto* and unequivocal intent fact patterns from foreign jurisdictions. But neither the record before this Court nor the findings of the lower courts support a conclusion that NCDOT

employees acted with bad faith, malfeasance, or coercion, or in a manner consistent with the extraordinary situations cited in Appellants' foreign cases. The 11-year "delay" in acquiring properties on the Western Loop and any resulting "condemnation blight" is attributable to the federal injunction arising out of the *Alliance for Transportation Reform* litigation and not to any wrongful conduct by NCDOT. Project-wide right-of-way acquisitions on the Western Loop were authorized in 1996 but prohibited in 1999 after the injunction was issued. *Alliance II*, 713 F. Supp. 2d at 499. Appellants' argument that NCDOT caused the delay is entirely incorrect. Furthermore, the alleged 11-year *delay* applies only to the Western Loop, not to the Eastern Loop, whose map was recorded in 2008.²

F. NCDOT'S Hardship Acquisitions Are Irrelevant To The Class Certification Question.

Plaintiffs distort the significance and nature of NCDOT's Hardship acquisitions. (Pl. Br. p. 18) NCDOT is not "flexing" its eminent domain powers through these purchases. The Court of Appeals correctly debunked this theory, stating that the advance acquisitions were not an exercise of eminent domain powers, but an attempt to "mitigate the negative impact of the Map Act's restrictions on some of the affected property owners." *Beroth Oil*, 725 S.E.2d at

²The corridor maps are not in an owner's "chain of title" because NCDOT claims no ownership interest in the properties, though the maps are cross-indexed in the land records at the register of deeds office. Black's Law Dictionary 41 (7th ed. 1999); N.C.G.S. § 136-44.50(b).

662. Hardship acquisitions are intended to assist people experiencing severe hardships through the purchase of properties in advance of the authorized condemnation schedule. (R p 139) These purchases do not involve a "taking" of property or filing condemnation lawsuits. N.C.G.S. § 136-44.53.

Appellants misinterpret the Court of Appeals' conclusion that NCDOT's acquisitions were not an exercise of police power. The court was simply referring to the fact that NCDOT did not file condemnation proceedings to acquire the Hardship parcels. In any event, Appellants are not entitled to compensation related to third-party acquisitions. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 401, 137 S.E.2d 497, 505 (1964) (a property owner is not entitled to damages in an eminent domain context for the diminution in value of his property that may be "caused by the acquisition and use of adjoining lands of others for the same undertaking") (citing *United States v. Miller*, 317 U.S. 369, 376, 87 L. Ed. 336, 344 (1943)); accord *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 269, 237 S.E.2d 854, 856 (1977) (generally, compensability for a taking of one property cannot include damages caused by the taking of some other property, or caused by mere neighborhood effects from the highway project).

Though Appellants argue that NCDOT's properties depress Appellants' property values, the same could be argued about other properties in the proposed Northern Beltway that are not owned by NCDOT. In any event, an alleged

reduction in market value attributable to the close proximity of adjacent State-owned property is not a taking. *Twitty v. State*, 85 N.C. App. 42, 54, 354 S.E.2d 296, 304 (1987) (plaintiffs failed to show an *actual interference* with their use and enjoyment that was caused by the location and operation of the PCB facility). Appellants' reference to the *Carolina Mills* case is taken out of context. *Carolina Mills, Inc. v. Catawba County Bd. of Educ.*, 27 N.C. App. 524, 526, 219 S.E.2d 509, 511 (1975). The decision merely stands for the proposition that a condemning authority obtains title free and clear of restrictive covenants, regardless of whether acquisition was accomplished by purchase or formal eminent domain proceedings.

In sum, the record does not support a finding that NCDOT's properties "actually" interfered with Appellants' properties or deprived them of all practical use. Thus, the Court of Appeals correctly affirmed the trial court's determination that the governmental acts at issue here were regulatory in nature and its use of the ends-means test was proper.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT CLASS CERTIFICATION SHOULD BE DENIED BECAUSE INDIVIDUAL ISSUES WILL PREDOMINATE OVER COMMON ISSUES OF LAW AND FACT.

An order denying class certification will be upheld if there is no manifest abuse of discretion and the trial court's findings of fact are supported by competent evidence. *Nobles v. First Carolina Commn'ns, Inc.*, 108 N.C. App. 127, 132, 423

S.E.2d 312, 315 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993).

A party seeking to bring a class action has the burden of showing that the prerequisites for a class action have been met. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987).

[A] class exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. Other prerequisites for bringing a class action are that (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenbury, 345 N.C. at 697, 483 S.E.2d at 431 (citations omitted). When individual issues predominate over the common ones, then a court is justified in denying the motion for class certification. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 552, 613 S.E.2d 322, 328 (2005) (no error in denial of class certification because individual issues relating to each plaintiff's employment relationship with defendant would predominate over common issues). If all of the prerequisites are met, then it is within the discretion of the trial court to determine

whether a class action is “superior to other available methods for the adjudication of this controversy.” *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

Plaintiffs’ inverse condemnation claim is inappropriate for class certification. “The class action scheme is incompatible with the fundamental maxim that each parcel of land is unique.” *Basurco v. 21st Century Ins. Co.*, 108 Cal. App. 4th 110, 120, 133 Cal. Rptr. 2d 367, 374 (Cal. Ct. App. 2003). Liability for a taking cannot be determined in a broad-brush manner, but must be determined only after an individualized factual analysis of each property and the owner’s interests. *Penn Cent.*, 438 U.S. at 124, 138, 57 L. Ed. 2d at 657, 648 (there is no set formula for determining whether a taking has occurred); *Chapel Hill Title & Abstract Co.*, 362 N.C. at 654, 669 S.E.2d at 289 (courts must rely on “ad hoc” factual inquiry into facts of each particular claim); *Palm Beach County v. Wright*, 641 So. 2d 50, 54 (Fla. 1994) (takings claims regarding map of reservation required “ad hoc, factual inquiries” into each property); *Dep’t of Fish & Game v. Superior Court*, 197 Cal. App. 4th 1323, 1359, 129 Cal. Rptr. 3d 719, 749 (Cal. App. 3d Dist 2011) (ad hoc analysis needed for non-physical takings cases); *Argent v. United States*, 124 F.3d 1277, 1282 (Fed. Cir. 1997) (no set formula can be used to determine a taking in airport over-flight case).

As a general rule, state courts addressing whether the class action device was appropriate to an inverse condemnation proceeding have held that a class action was not appropriate,

concluding that allegations of governmental taking of property inherently involved variations of legal theories of liability or differences in proving damages better resolved through individual adjudications.

Daniel P. Jones, Inverse Condemnation State Court Class Actions, 49 A.L.R.4th 618, 622, § 2a (1986). Under N.C.G.S. § 136-111, a complaint must “allege with particularity” the facts giving rise to the taking, including the specific property involved, relevant dates, and the area and interests allegedly taken. N.C.G.S. § 136-111 (2011).

It is evident from the case law that courts take an *ad hoc* approach reviewing the facts and circumstances of each case individually to determine whether a particular map of reservation denies the affected landowner the reasonable use of his or her property.

Nichols on Eminent Domain, Vol. 8A, § G17.04[2][a] at 47, (Matthew Bender, 3rd Ed.). The term “ad hoc” means “formed for a particular purpose.” Black’s Law Dictionary 41 (7th ed. 1999). Indeed, “de facto” takings cases, some cited by Appellants, acknowledge that liability for a taking can only be determined on a case-by-case basis., *Gaughen*, 123 Pa. Commw. at 559, 554 A.2d at 1013 (“[t]here is no exact test”); *Commonwealth, Dep’t of Transp. v. Myers*, 104 Pa. Commw. 356, 360, 522 A.2d 112, 114 (Pa. Commw. Ct. 1987); *Althaus*, 7 Cl. Ct. at 693 (“ad hoc” determination is needed based on peculiar facts of the case); *People ex rel.*

Dept. of Transp. v. Diversified Properties Co. III, 14 Cal. App. 4th 429, 441, 17 Cal. Rptr. 2d 676, 680 (Cal. Ct. App.1993) (case-by-case taking analysis required).

Consistent with this Court's prior holdings, the Court of Appeals examined the nature of Appellants' underlying claims when assessing whether the trial court abused its discretion in its class certification determination. The court concluded that a case-by-case analysis must be performed on each property where a taking is alleged because each parcel is unique, with its own characteristics, and each owner has different interests in and expectations for the property. *Beroth Oil*, 725 S.E.2d at 664, 666. The court correctly noted that each owner's expectations and interests would need examination. *Id.* at 664.

Appellants acknowledge the diversity of the purported class members' properties and interests: some own residences, others commercial businesses; some claims involve "homes, parsonages, farms, churches, gas stations, and vacant land, rental houses." (Pl. Br. p. 10); (Rule 9 Exh. pp. 320-41)

Indeed, Appellants' own evidence shows that the proposed boundaries of the Northern Beltway cut across different parts of their properties: some are entirely within the corridor's boundaries, others only partially, whereas others are barely touched by the corridor's limits. (Rule 9 Exh. pp. 68-81) Moreover, Appellants' properties are covered by different corridor maps filed in different years: 1997 and 2008. (Rule 9 Exh. pp. 91, 93, 161, 164) The *Smith* Appellants admit that they are

not listed in any of the maps. (Pl. Br. p. 4) These facts alone preclude class certification.

Efficient means of litigating multiple claims and parties involving the Northern Beltway already exist. Chief Justice Parker entered orders on 31 July and 21 November 2012 designating 52 individual cases (11-CVS-7119, *et al*; 11-CVS-5953, *et al*) that were filed against NCDOT involving the Northern Beltway (and nearly identical claims) as “exceptional” under Rule 2.1 of the General Rules of Practice for Superior and District Courts. The Chief Justice assigned the cases to Resident Superior Court Judge John O. Craig, III, for resolution.³ App. A, p. 1. Counsel for Appellants also represent the litigants in the Rule 2.1 cases. In short, Appellants’ counsel agreed that the Rule 2.1 designation would “promote significant efficiencies,” “greater certainty of decision-making,” “enhance judicial efficiency,” and “prevent the risk of inconsistent judgments” for these claims. *Id.* These types of cases are manageable under a Rule 2.1 mechanism.

Holding a single “class” liability trial followed by separate damages trials, as Appellants suggest, would not promote the kinds of efficiencies that class actions are intended to accomplish. The same or similar evidence needed to prove that a

³ NCDOT asks this Court to take judicial notice of Chief Justice Parker's orders designating the cases as “exceptional” and the joint motions for designation entered into by counsel for Appellants and NCDOT in the individual cases regarding the Northern Beltway.

taking has occurred would have to be presented again in each damages trial – for example, loss of all practical use and reasonable value. *Ario v. Metropolitan Airports Com.*, 367 N.W.2d 509, 515-16 (Minn. 1985) (class certification not proper in inverse condemnation claim where key facts needed to prove a taking would also be needed to show damages). Every single property owner would have to participate in the damages trials. Appellants' argument that some of the damages cases would settle potentially holds true absent class certification.

In addition, Appellants' facial challenge to the Map Act has not been dismissed. As the Court of Appeals noted, obtaining a favorable ruling on the facial declaratory judgment claim would apply to all property owners within the Northern Beltway, potentially obviating any need for class certification. *Beroth Oil*, 725 S.E.2d at 666.

Foreign cases cited by Appellants' in support of class certification are highly distinguishable and inapposite. *Amen v. Dearborn*, 718 F.2d 789, 796-97 (6th Cir. 1983) (city engaged in deliberate course of wrongful conduct designed to force owners to sell properties by, inter alia, encouraging looting of vacant houses, coercing owners to make unnecessary improvements); *Moore v. United States*, 41 Fed. Cl. 394, 398 (Fed. Cl. 1998) (class certification allowed where plaintiffs' fee simple reversionary interest to railroad were defined in prior grants).

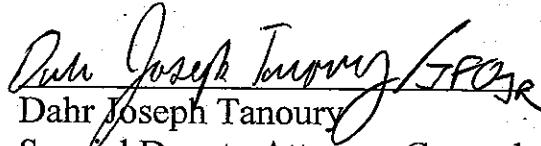
In summary, the Court of Appeals – like numerous courts in other jurisdictions – correctly found that the class mechanism is ill-suited for takings claims, given the uniqueness of land. Facts that create liability for a taking in some cases may not in others. *Beroth Oil*, 725 S.E.2d at 665; *see, e.g., Basurco*, 108 Cal. App. 4th at 110, 120 (holding class certification improper in inverse condemnation case where liability can be established only after extensive examination into property use and characteristics); *Mattoon v. City of Norman*, 1981 OK 92, 633 P.2d 735, 739-40 (Okla. 1981) (no abuse of discretion in denial of class where individual issues of fact for a takings analysis would predominate over the common legal question). Thus, the Court of Appeals was correct in concluding that the trial court did not abuse its discretion in denying Plaintiffs' motion for class certification.

CONCLUSION

Defendant NCDOT respectfully requests that this Court affirm the Court of Appeals.

Respectfully submitted, this the 22nd day of April 2013.

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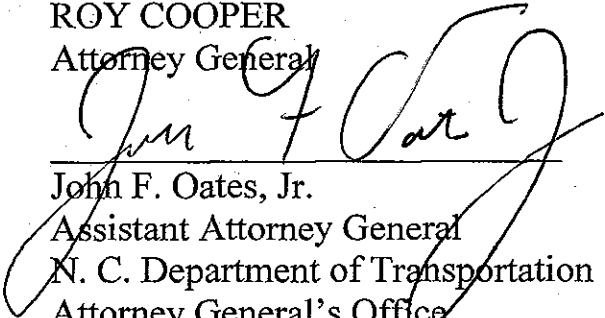
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing DEFENDANT-APPELLEE'S NEW BRIEF was this day served upon opposing counsel by placing the same in the United States mail, postage prepaid, and addressed as follows:

Matthew H. Bryant
Attorney for Plaintiffs Appellants
Hendrick Bryant & Nerhood, LLP
723 Coliseum Drive, Suite 101
Winston Salem, N.C. 27106

This the 22nd day of April 2013.

ROY COOPER
Attorney General



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Appendix Index

Chief Justice Parker's orders App. 1-20

**OFFICE OF THE
CHIEF JUSTICE OF THE SUPREME COURT
OF THE
STATE OF NORTH CAROLINA**

ORDER

*Marla Brabham, Verdell Brabham v. North Carolina Department of
Transportation
File No. 12-CVS-5953*

And

*Scott C. Diehl v. North Carolina Department of Transportation
File No. 12-CVS-5954*

And

*Everett Dean Hiatt, Theresa H. Hiatt v. North Carolina Department of
Transportation
File No. 12-CVS-5955*

And

*Kathryn M. Lasley v. North Carolina Department of Transportation
File No. 12-CVS-5956*

And

*Omega Seafood Inc. v. North Carolina Department of Transportation
File No. 12-CVS-5957*

And

*Gary W. Peak v. North Carolina Department of Transportation
File No. 12-CVS-5958*

And

*John Douglas Shropshire & Bessie Shropshire Trust, Kent Shropshire, Don
Shropshire, Darla Haizlip, and Rhonda Glascock v. North Carolina Department
of Transportation
File No. 12-CVS-5959*

And

*Chester Monroe Smith, Betty M. Smith v. North Carolina Department of
Transportation
File No. 12-CVS-5960*

And

*Brenda Sue Thore, Sarah Thore Hammond, James Thore v. North Carolina
Department of Transportation
File No. 12-CVS-5961*

And

*Ceola Tuning v. North Carolina Department of Transportation
File No. 12-CVS-5962*

And

*James Turpin, Marjorie Hutchens v. North Carolina Department of
Transportation
File No. 12-CVS-5963*

And

*David R. White, Melissa R. White v. North Carolina Department of
Transportation
File No. 12-CVS-5964*

And

*Anita McGowan v. North Carolina Department of Transportation
File No. 12-CVS-6320*

And

*Mark Howell, Melissa Howell v. North Carolina Department of Transportation
File No. 12-CVS-6321*

And

*James Watkins, Deloris Watkins v. North Carolina Department of Transportation
File No. 12-CVS-6322*

And

*Jerry B. Lewis, Dennis Lewis v. North Carolina Department of Transportation
File No. 12-CVS-6652*

*Forsyth County File Numbers: 12-CVS-5953, 12-CVS-5954, 12-CVS-5955,
12-CVS-5956, 12-CVS-5957, 12-CVS-5958,
12-CVS-5959, 12-CVS-5960, 12-CVS-5961,
12-CVS-5962, 12-CVS-5963, 12-CVS-5964,
12-CVS-6320, 12-CVS-6321, 12-CVS-6322,
12-CVS-6652*

*To the Honorable Judson D. DeRamus, Jr., one of the Senior Resident Judges of the
Superior Court of North Carolina, Greeting:*

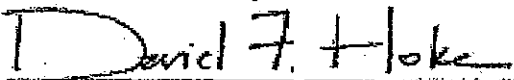
*As Chief Justice of the Supreme Court of North Carolina, by virtue of authority
vested in me by the Constitution of North Carolina, and in accordance with the laws of
North*

*Carolina, the Rules of the Supreme Court and, specifically, **Rule 2.1** of the General Rules of Practice for the Superior and District Courts, I hereby designate the above-referenced cases as **exceptional**. Therefore, I hereby assign the Honorable **John O. Craig, III**, one of the **Regular** Judges of the Superior Court of North Carolina, to hold such sessions of court as may be set and to attend to such in-chambers matters and other business as may be necessary and proper for the orderly disposition of the cases until otherwise ordered.*

*In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this day, **November 21, 2012**.*



Chief Justice of the Supreme Court of North Carolina



Administrative Assistant to the Chief Justice

NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

BRABHAM	12 CVS 5953)
DIEHL	12 CVS 5954)
HIATT	12 CVS 5955)
LASLEY	12 CVS 5956)
OMEGA SEAFOOD, INC.	12 CVS 5957)
PEAK	12 CVS 5958)
SHROPSHIRE	12 CVS 5959)
SMITH	12 CVS 5960)
THORE	12 CVS 5961)
TUNING	12 CVS 5962)
TURPIN	12 CVS 5963)
WHITE	12 CVS 5964)
MCGOWAN	12 CVS 6320)
HOWELL	12 CVS 6321)
WATKINS	12 CVS 6322)
LEWIS	12 CVS 6652)
WEISNER	12 CVS _____)

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION

Defendant.

See File No. 12 CVS 5953
for Original Joint Motion

2012 NOV 16 PM
FILED

JOINT MOTION
PURSUANT TO RULE 2.1 OF THE
NORTH CAROLINA RULES OF
SUPERIOR AND DISTRICT
COURTS
FOR DESIGNATION OF CASE AS
EXCEPTIONAL

Now come the Counsel for Plaintiffs and Counsel for Defendant in the above-captioned matter and move the Court pursuant to Rule 2.1 of the North Carolina Rules of Superior and District Courts for designation of this case and a series of companion cases as exceptional. In support of this Motion, the parties how the Court the following:

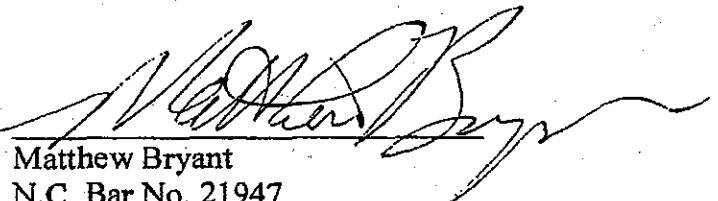
- 1) The above captioned civil actions against Defendant are filed in the Superior Court for Forsyth County by property owners in the Winston-Salem Northern Beltway (the "Plaintiffs").
- 2) These Plaintiffs are all represented by Plaintiffs' counsel Matthew H. Bryant and the firm of Hendrick Bryant Nerhood & Otis, LLP. Matthew H. Bryant affirms that he is counsel of record for the cases.
- 3) Plaintiffs each allege, *inter alia*, that they own property within the proposed Winston-Salem Northern Beltway highway project planned for construction by Defendant, and that their property rights have been taken without just compensation by Defendant through, but not limited to, the following:
 - a) Defendant's delay in acquiring Plaintiff's property for the proposed highway project;

- b) Defendant's filing of a Transportation Corridor Official Map, pursuant to N.C.G.S. § 136-44.50, et seq., with the register of deeds office that lists Plaintiff's property as being located within a protected transportation corridor;
 - c) The restrictions imposed on Plaintiff's property by N.C.G.S. § 136-44.51.
 - d) Statements made by Defendant's personnel regarding the use of their properties and property acquisition timeframe.
 - e) Plaintiffs also challenge the Transportation Corridor Official Map Act, N.C.G.S. § 136-44.50, et seq. and seeks a declaration that it effects an unconstitutional taking of Plaintiff's property rights.
 - f) Plaintiffs' Complaints list four claims for relief: Inverse Condemnation, N.C.G.S. § 136-111; Uniform Relocation Act claims under state and federal law; violation of the North Carolina Constitution, Law of the Land clause; and Declaratory Relief.
- 4) Defendant timely answered and moved to dismiss the Complaints. Defendant contends that no unconstitutional taking of Plaintiff's property rights has occurred; that Defendant complied with statutory procedures and the provisions of N.C.G.S. § 136-44.50 et seq., which are constitutional and do not constitute a taking of property rights. Defendant has pending before the trial court motions to dismiss the complaints based upon failure to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C.G.S. § 136-111, lack of standing and ripeness, statutes of limitations and repose, failure to exhaust administrative remedies, and failure to join necessary parties.
 - 5) Defendant NCDOT has been served with the above captioned lawsuits in Forsyth County Superior Court by Plaintiff's counsel that involve the same legal issues and are very similarlypleaded save for the name of each plaintiff owner and the specific property that is at issue.
 - 6) Counsel for Plaintiffs will file an undetermined number of additional cases in Forsyth County Superior Court that involve the same or similar legal issues and are very similar to the Cases, each of which will be by property owners in the NCDOT's proposed urban loop known as the Northern Beltway. Defendant's counsel is aware of the likelihood of additional Northern Beltway lawsuits being filed in Forsyth County Superior Court.
 - 7) In all of the above-named cases, each plaintiff has alleged a taking of property rights in connection with the proposed Winston-Salem Northern Beltway and causes of action listed in ¶ 3) f) above.
 - 8) Given the identical or similar nature of the causes of action and legal theories, similarity of the subject matter, need for similar discovery, expert testimony, and other factual issues, between this action and the other Cases and cases to be filed, the parties agree that this matter should also be assigned to Judge John O. Craig III by Chief Justice Sarah E. Parker.

- 9) Counsel for Plaintiff and Defendant agree that the assignment of a specific judge for these Cases, and all cases to be filed in the future against Defendant NCDOT in Forsyth County Superior Court that involve the same or similar causes of action and are related to the Northern Beltway will promote significant efficiencies in the administration and adjudication of these claims.
- 10) Assignment of this case will ensure that the rarely interpreted body of law pertaining to such litigation will develop more uniformly. That, in turn, will promote greater certainty of decision-making, enhance judicial efficiency, and conserve judicial resources. Moreover, judicial familiarity with the subject matter of this case will aid this process and will prevent the risk of inconsistent judgments.
- 11) Judge John O. Craig III has consented to preside over these Cases.
- 12) The aforementioned cases meet the definition for exceptional cases under Rule 2.1 in that there are now thirty-six(36) lawsuits pending in Forsyth County Superior Court relating to the Northern Beltway. Resolution of these issues is thus likely to involve substantial judicial expertise, requiring the Court to engage in a study and examination of various issues relating to the Winston-Salem Northern Beltway and apply the applicable principles of law.
- 13) The Plaintiff and the Defendant voluntarily agree to waive venue for hearing pretrial motions; however, neither party intends this designation to be a waiver of any of their claims or defenses.
- 14) For all of the foregoing reasons, and because the aforementioned cases involve complex legal issues and numerous parties; it will promote the efficient administration of justice for this action and the aforementioned cases; and all future lawsuits involving causes of action listed in ¶ 3) f) above and owners of property located within the Northern Beltway, to be designated as an "exceptional case."

WHEREFORE, the parties respectfully request that this Court recommend to the Chief Justice of the North Carolina Supreme Court that this action and the aforementioned cases, and all future cases that will be filed against Defendant NCDOT in Forsyth County Superior Court involving the same or similar causes of action listed in ¶ 3) f) above and owners of property located within the Northern Beltway, to be designated as an "exceptional" case and that such cases be assigned to The Honorable John O. Craig III.

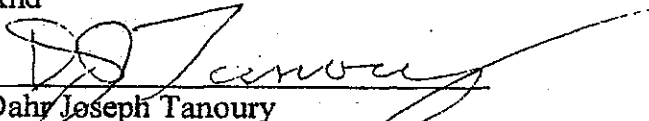
This the ^{CTH} 6 day of November 2012


Matthew Bryant
N.C. Bar No. 21947
Attorney for Plaintiffs

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And


Dahr Joseph Tanoury
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Special Deputy Attorney General
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Raleigh, NC 27699-1505
919.707.4480v; 919.733.9329 fax
Counsel for Defendant NCDOT

OFFICE OF THE
CHIEF JUSTICE OF THE SUPREME COURT

FILED

OF THE

2012 JUL 31 PM 3:29

STATE OF NORTH CAROLINA

FORSYTH COUNTY, C.S.C.

ORDER

Michelle Buler

Kirby v. North Carolina Department of Transportation
File No. 11-CVS-7119

And

Harris Triad Homes, Inc. v. North Carolina Department of Transportation
File No. 11-CVS-7120

And

Hendrix v. North Carolina Department of Transportation
File No. 11-CVS-8170

And

Engelkemeir v. North Carolina Department of Transportation
File No. 11-CVS-8171

And

Hutagalung v. North Carolina Department of Transportation
File No. 11-CVS-8172

And

Maendl v. North Carolina Department of Transportation
File No. 11-CVS-8173

And

Stept v. North Carolina Department of Transportation
File No. 11-CVS-8174

And

Nelson v. North Carolina Department of Transportation
File No. 11-CVS-8338

And

Republic Properties, LLC v. North Carolina Department of Transportation
File No. 12-CVS-2998

And

Shugart Enterprises, LLC v. North Carolina Department of Transportation
File No. 12-CVS-4851

And

Patton v. North Carolina Department of Transportation
File No. 12-CVS-4852

And

Stump, Trustees v. North Carolina Department of Transportation
File No. 12-CVS-4853

And

Jade Associates, LLC v. North Carolina Department of Transportation
File No. 12-CVS-4854

And

Clayton, Trustee v. North Carolina Department of Transportation
File No. 12-CVS-4855

And

Pegram v. North Carolina Department of Transportation
File No. 12-CVS-4856

And

Trident Properties, LLC v. North Carolina Department of Transportation
File No. 12-CVS-4857

And

McAllister v. North Carolina Department of Transportation
File No. 12-CVS-4858

And

Marshall v. North Carolina Department of Transportation
File No. 12-CVS-4859

And

Algood v. North Carolina Department of Transportation
File No. 12-CVS-4860

And

Seidelmann v. North Carolina Department of Transportation
File No. 12-CVS-4861

And

Pope v. North Carolina Department of Transportation
File No. 12-CVS-4862

And

Patee v. North Carolina Department of Transportation
File No. 12-CVS-4863

And

McFadden v. North Carolina Department of Transportation
File No. 12-CVS-4864

And

Mann v. North Carolina Department of Transportation
File No. 12-CVS-4865

And

Hiatt v. North Carolina Department of Transportation
File No. 12-CVS-4866

And

Little v. North Carolina Department of Transportation
File No. 12-CVS-4867

And

Lewis v. North Carolina Department of Transportation
File No. 12-CVS-4868

And

Lawson v. North Carolina Department of Transportation
File No. 12-CVS-4869

And

Kinney v. North Carolina Department of Transportation
File No. 12-CVS-4870

And

Hauser v. North Carolina Department of Transportation
File No. 12-CVS-4871

And

Hampton v. North Carolina Department of Transportation
File No. 12-CVS-4872

And

Fulk v. North Carolina Department of Transportation
File No. 12-CVS-4873

And

Eudy v. North Carolina Department of Transportation
File No. 12-CVS-4874

And

Dillon v. North Carolina Department of Transportation
File No. 12-CVS-4875

And

Bullins v. North Carolina Department of Transportation
File No. 12-CVS-4876

And

CW Myers Trading Post v. North Carolina Department of Transportation
File No. 12-CVS-4916

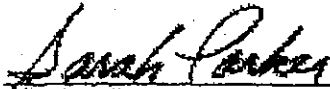
*Forsyth County File Numbers: 11-CVS-7119, 11-CVS-7120, 11-CVS-8170,
11-CVS-8171, 11-CVS-8172, 11-CVS-8173,
11-CVS-8174, 12-CVS-8338, 12-CVS-2998,
12-CVS-4851, 12-CVS-4852, 12-CVS-4853,
12-CVS-4854, 12-CVS-4855, 12-CVS-4856,
12-CVS-4857, 12-CVS-4858, 12-CVS-4859,
12-CVS-4860, 12-CVS-4861, 12-CVS-4862,
12-CVS-4863, 12-CVS-4864, 12-CVS-4865,
12-CVS-4866, 12-CVS-4867, 12-CVS-4868,
12-CVS-4869, 12-CVS-4870, 12-CVS-4871,
12-CVS-4872, 12-CVS-4873, 12-CVS-4874,
12-CVS-4875, 12-CVS-4876 and 12-CVS-4916*

To the Honorable *Judson D. DeRamus, Jr.*, one of the Senior Resident Judges of the Superior Court of North Carolina, Greeting:

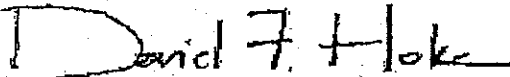
As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, and in accordance with the laws of North Carolina, the Rules of the Supreme Court and, specifically, Rule 2.1 of the General Rules of Practice for the Superior and District Courts, I hereby designate the above-referenced cases as **exceptional**. Therefore, I hereby assign the Honorable **John O. Craig, III**, one of the **Regular Judges** of the Superior Court of North Carolina, to hold such sessions of court as may be set and to attend

to such in-chambers matters and other business as may be necessary and proper for the orderly disposition of the cases until otherwise ordered.

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this day, July 31, 2012.



Chief Justice of the Supreme Court of North Carolina



Administrative Assistant to the Chief Justice

COPY

NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

KIRBY	11 CVS 7119)
HARRIS TRIAD HOMES, INC.	11 CVS 7120)
HENDRIX	11 CVS 8170)
ENGELKEMEIR	11 CVS 8171)
HUTAGALUNG	11 CVS 8172)
MAENDL	11 CVS 8173)
STEPT	11 CVS 8174)
NELSON	11 CVS 8338)
REPUBLIC PROPERTIES, LLC	12 CVS 2998)
SHUGART ENTERPRISES, LLC	12 CVS 4851)
PATTON	12 CVS 4852)
STUMP, TRUSTEES	12 CVS 4853)
JADE ASSOCIATES LLC	12 CVS 4854)
CLAYTON, TRUSTEE	12 CVS 4855)
PEGRAM	12 CVS 4856)
TRIDENT PROPERTIES, LLC	12 CVS 4857)
MCALLISTER	12 CVS 4858)
MARSHALL	12 CVS 4859)
ALGOOD	12 CVS 4860)
SEIDELMANN	12 CVS 4861)
POPE	12 CVS 4862)
PATEE	12 CVS 4863)
MCFADDEN	12 CVS 4864)
MANN	12 CVS 4865)
HIATT	12 CVS 4866)
LITTLE	12 CVS 4867)
LEWIS	12 CVS 4868)
LAWSON	12 CVS 4869)
KINNEY	12 CVS 4870)
HAUSER	12 CVS 4871)
HAMPTON	12 CVS 4872)
FULK	12 CVS 4873)
EUDY	12 CVS 4874)
DILLON	12 CVS 4875)
BULLINS	12 CVS 4876)
CW MYERS TRADING POST	12 CVS 4916)

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION

Defendant.

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2012 JUN 27 PM 10 26

JOINT MOTION
PURSUANT TO RULE 2.1 OF THE
NORTH CAROLINA RULES OF
SUPERIOR AND DISTRICT
COURTS
FOR DESIGNATION OF CASE AS
EXCEPTIONAL

Now come the Counsel for Plaintiffs and Counsel for Defendant in the above-captioned matter and move the Court pursuant to Rule 2.1 of the North Carolina Rules of Superior and District Courts for designation of this case and a series of companion cases as exceptional. In support of this Motion, the parties show the Court the following:

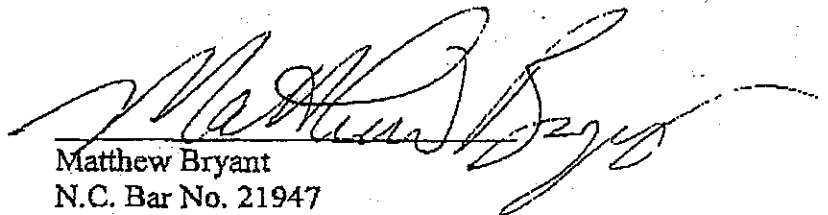
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- 1) The above captioned civil actions against Defendant are filed in the Superior Court for Forsyth County by property owners in the NCDOT Northern Beltway (the "Plaintiffs").
- 2) These Plaintiffs are all represented by Plaintiffs' counsel Matthew H. Bryant and the firm of Hendrick Bryant Nerhood & Otis, LLP. Matthew H. Bryant affirms that he is counsel of record for the cases.
- 3) Plaintiffs each allege, *inter alia*, that they own property within the proposed Winston-Salem Northern Beltway highway project planned for construction by Defendant, and that its property rights have been taken without just compensation by Defendant through, but not limited to, the following:
 - a) Defendant's delay in acquiring Plaintiff's property for the proposed highway project;
 - b) Defendant's filing of a Transportation Corridor Official Map, pursuant to N.C.G.S. § 136-44.50, et seq., with the register of deeds office that lists Plaintiff's property as being located within a protected transportation corridor;
 - c) The restrictions imposed on Plaintiff's property by N.C.G.S. § 136-44.51.
 - d) Statements made by Defendant's personnel regarding the use of their properties and property acquisition timeframe.
 - e) Plaintiffs also challenge the Transportation Corridor Official Map Act, N.C.G.S. § 136-44.50, et seq. and seeks a declaration that it effects an unconstitutional taking of Plaintiff's property rights.
 - f) Plaintiffs' Complaints list five claims for relief: Inverse Condemnation, N.C.G.S. § 136-111; a taking in violation of the 5th Amendment of the U.S. Constitution; violation of the 14th Amendment of United States Constitution - Equal Protection Claim; violation of the North Carolina Constitution, Law of the Land clause; and Declaratory Relief.
- 4) Defendant timely answered and moved to dismiss the Complaint. Defendant contends that no unconstitutional taking of Plaintiffs' property rights has occurred; that Defendant complied with statutory procedures and the provisions of N.C.G.S. § 136-44.50 et seq., are constitutional and do not constitute a taking of property rights. Defendant has pending before the trial court motions to dismiss the Complaints based upon failure to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C.G.S. § 136-111, lack of standing and ripeness, statutes of limitations and repose, and failure to exhaust administrative remedies.
- 5) Defendant NCDOT has been served or will shortly be served the above captioned lawsuits in Forsyth County Superior Court by Plaintiff's counsel that involve the same legal issues and are very similarly pleaded save for the name of each plaintiff owner and the specific property that is at issue.

- 6) Counsel for Plaintiffs will file an undetermined number of additional cases in Forsyth County Superior Court that involve the same legal issues and are very similar to the Cases, each of which will be by property owners in the NCDOT's proposed urban loop known as the Northern Beltway. Defendant's counsel is aware of the likelihood of additional Northern Beltway lawsuits being filed in Forsyth County Superior Court.
- 7) In all of the above-named cases, each plaintiff has alleged a taking of property rights in connection with the proposed Winston-Salem Northern Beltway and causes of action listed in ¶ 3) f) above.
- 8) Given the identical nature of the causes of action and legal theories, similarity of the subject matter, need for similar discovery, expert testimony, and other factual issues, between this action and the other Cases and cases to be filed, the parties agree that this matter should also be assigned to Judge John O. Craig III by Chief Justice Sarah E. Parker.
- 9) Counsel for Plaintiff and Defendant agree that the assignment of a specific judge for these Cases, and all cases to be filed in the future against Defendant NCDOT in Forsyth County Superior Court that involve the same or similar causes of action and are related to the Northern Beltway, will promote significant efficiencies in the administration and adjudication of these claims.
- 10) Assignment of this case will ensure that the rarely interpreted body of law pertaining to such litigation will develop more uniformly. That, in turn, will promote greater certainty of decision-making, enhance judicial efficiency, and conserve judicial resources. Moreover, judicial familiarity with the subject matter of this case will aid this process and will prevent the risk of inconsistent judgments.
- 11) Judge John O. Craig III has consented to preside over these Cases.
- 12) The aforementioned cases meet the definition for exceptional cases under Rule 2.1 in that there are now thirty-six (36) lawsuits pending in Forsyth County Superior Court relating to the Northern Beltway. Resolution of these issues is thus likely to involve substantial judicial expertise, requiring the Court to engage in a study and examination of various issues relating to the Winston-Salem Northern Beltway and apply applicable principles of law.
- 13) The Plaintiff and the Defendant voluntarily agree to waive venue for hearing pretrial motions; however, neither party intends this designation to be a waiver of any of their claims or defenses.
- 14) For all of the foregoing reasons, and because the aforementioned cases involve complex legal issues and numerous parties, it will promote the efficient administration of justice for this action and the aforementioned cases, and all future lawsuits involving causes of action listed in ¶ 3) f) above and owners of property located within the Northern Beltway, to be designated as an "exceptional case."

WHEREFORE, the parties respectfully request that this Court recommend to the Chief Justice of the North Carolina Supreme Court that this action and the aforementioned cases, and all future cases that will be filed against Defendant NCDOT in Forsyth County Superior Court involving the same or similar causes of action listed in ¶ 3) f) above and owners of property located within the Northern Beltway, to be designated as an "exceptional" case and that such cases be assigned to The Honorable John O. Craig III.

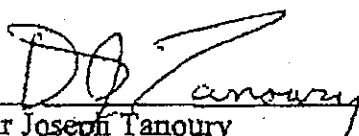
This the ^{25TH} day of July 2012


Matthew Bryant
N.C. Bar No. 21947
Attorneys for Plaintiffs.

Of Counsel:
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723 Coliseum Drive, Suite 101
Winston Salem, NC 27106
Telephone: (336) 723-7200
Facsimile: (336) 723-7201

And

This the 20 day of July 2012


Dahr Joseph Tanoury
North Carolina Bar No. 29462
Assistant Attorney General
N.C. Department of Justice
1505 Mail Service Center
Raleigh, NC 27699-1505
Counsel for Defendant NCDOT

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NORTH CAROLINA
FORSYTH COUNTY
FORSYTH CO. N.C.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CVS 7120

HARRIS TRIAD HOMES, INC.)

Plaintiff,)

v.)

NORTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)

Defendant.)

JOINT MOTION
PURSUANT TO RULE 2.1 OF THE
NORTH CAROLINA RULES OF
SUPERIOR AND DISTRICT COURTS
FOR DESIGNATION OF CASE AS
EXCEPTIONAL

Now come the Counsel for Plaintiff and Counsel for Defendants in the above-captioned matter and move the Court pursuant to Rule 2.1 of the North Carolina Rules of Superior and District Courts for designation of this case and a series of companion cases as exceptional. In support of this Motion, the parties show the Court the following:

- 1) The Plaintiff commenced this civil action against Defendants on October 12, 2011, by the filing in the Superior Court for Forsyth County of a Complaint.
- 2) Plaintiff alleged, *inter alia*, that it owns property within the proposed Winston-Salem Northern Beltway highway project planned for construction by Defendant, and that its property rights have been taken without just compensation by Defendant through, but not limited to, the following:
 - a) Defendant's delay in acquiring Plaintiff's property for the proposed highway project;
 - b) Defendant's filing of a Transportation Corridor Official Map, pursuant to N.C.G.S. § 136-44.50, et seq., with the register of deeds office that lists Plaintiff's property as being located within a protected transportation corridor;
 - c) The restrictions imposed on Plaintiff's property by N.C.G.S. § 136-44.51.
 - d) Statements made by Defendant's personnel regarding the use of their properties and property acquisition timeframe.
 - e) Plaintiff also challenges the Transportation Corridor Official Map Act, N.C.G.S. § 136-44.50, et seq. and seeks a declaration that it effects an unconstitutional taking of

Plaintiff's property rights.

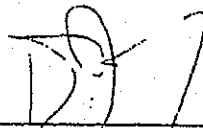
- f) Plaintiff's Complaint lists five claims for relief: Inverse Condemnation, N.C.G.S. § 136-111; a taking in violation of the 5th Amendment of the U.S. Constitution; violation of the 14th Amendment of United States Constitution - Equal Protection Claim; violation of the North Carolina Constitution, Law of the Land clause; and Declaratory Relief.
- 3) Defendant timely answered and moved to dismiss the Complaint. Defendant contends that no unconstitutional taking of Plaintiff's property rights has occurred; that Defendant complied with statutory procedures and the provisions of N.C.G.S. § 136-44.50 et seq., are constitutional and do not constitute a taking of property rights. Defendant has pending before the trial court motions to dismiss the complaint based upon failure to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C.G.S. § 136-111, lack of standing and ripeness, statutes of limitations and repose, and failure to exhaust administrative remedies.
- 4) Defendant NCDOT has been served with nine (9) other lawsuits in Forsyth County Superior Court by Plaintiff's counsel that involve the same legal issues and are very similarly pleaded save for the name of each plaintiff owner and the specific property that is at issue (the cases listed below and the captioned case to be referred to as the "Cases"). The currently filed cases are:
- | | |
|-----------------------------------|-------------|
| Berth Oil Co. et. Al v. NCDOT | 10 CVS 6926 |
| Everette Kirby v. NCDOT | 11 CVS 7119 |
| Hendrix v. NCDOT | 11 CVS 8170 |
| Engelkemeir v. NCDOT | 11 CVS 8171 |
| Hutagalung v. NCDOT | 11 CVS 8172 |
| Maendl v. NCDOT | 11 CVS 8173 |
| Stept v. NCDOT | 11 CVS 8174 |
| Nelson v. NCDOT | 11 CVS 8338 |
| Republic Properties, LLC v. NCDOT | 12 CVS 2998 |
- 5) Counsel for plaintiffs intends to file an undetermined number of additional cases in Forsyth County Superior Court that involve the same legal issues and are very similar to the Cases, each of which will be by property owners in the NCDOT's proposed urban loop known as the Northern Beltway. Defendant's counsel is aware of the likelihood of additional Northern Beltway lawsuits being filed in Forsyth County Superior Court.
- 6) The Berth Oil Co. case is presently in the appellate court system on a petition for discretionary review. Whatever the ultimate disposition of the Berth Oil Co. case is, counsel for Plaintiff and Defendant understand that it would be in the best interest of each party and serve judicial economy if the Berth Oil Co., case were handled by the same judge as would preside over this action (Harris Triad v. NCDOT) and the above Cases.

- 7) In all of the above-named cases, each plaintiff has alleged a taking of property rights in connection with the proposed Winston-Salem Northern Beltway and causes of action listed in ¶ 2) f) above.
- 8) Given the identical nature of the causes of action and legal theories, similarity of the subject matter, need for similar discovery, expert testimony, and other factual issues, between this action and the other Cases and cases to be filed, the parties agree that this matter should also be assigned to Judge John O. Craig III by Chief Justice Sarah E. Parker.
- 9) Counsel for Plaintiff and Defendant agree that the assignment of a specific judge for these Cases, and all cases to be filed in the future against Defendant NCDOT in Forsyth County Superior Court that involve the same or similar causes of action and are related to the Northern Beltway, will promote significant efficiencies in the administration and adjudication of these claims.
- 10) Assignment of this case will ensure that the rarely interpreted body of law pertaining to such litigation will develop more uniformly. That, in turn, will promote greater certainty of decision-making, enhance judicial efficiency, and conserve judicial resources. Moreover, judicial familiarity with the subject matter of this case will aid this process and will prevent the risk of inconsistent judgments.
- 11) Judge John O. Craig III has consented to preside over these Cases.
- 12) The aforementioned cases meet the definition for exceptional cases under Rule 2.1 in that there are now ten (10) lawsuits (with a total of sixteen plaintiffs) pending in Forsyth County Superior Court relating to the Northern Beltway. Resolution of these cases is thus likely to involve substantial judicial expertise, requiring the Court to engage in a study and examination of various issues relating to the Winston-Salem Northern Beltway and apply the applicable principles of law.
- 13) The Plaintiff and the Defendant voluntarily agree to waive venue for hearing pretrial motions. However, neither party intends this designation to be a waiver of any of their claims or defenses.
- 14) For all of the foregoing reasons, and because the aforementioned cases involve complex legal issues and numerous parties, it will promote the efficient administration of justice for this action and the aforementioned cases, and all future lawsuits involving causes of action listed in ¶ 2) f) above and owners of property located within the Northern Beltway, to be designated as an "exceptional case."

WHEREFORE, the parties respectfully request that this Court recommend to the Chief Justice of the North Carolina Supreme Court that this action and the aforementioned cases, and all future cases that will be filed against Defendant NCDOT in Forsyth County Superior Court involving the same or similar causes of action listed in ¶ 2) f) above and owners of property located within

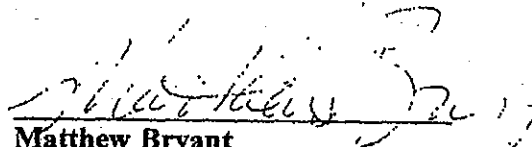
the Northern Beltway, to be designated as an "exceptional" case and that such cases be assigned to The Honorable John O. Craig III.

This is the 17 day of June 2012.



Dahr Joseph Tanoury
Special Deputy Attorney General
Counsel N. C. Department of Transportation
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Email: dtanoury@ncdoj.gov
N.C. Bar # 29462

This is the 25 day of June 2012.



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Facsimile: (336) 723-7201
www.hendricklawfirm.com

Addendum Index

Morvan v. City of Charlotte, No. COA02-1343
(N.C. Ct. App. Nov. 18, 2003) (unpublished) ADD. 1-3

6214 S. Blvd. Holdings, LLC v. City of Charlotte,
No. COA05-1477 (N.C. Ct. App. July 18, 2006)
(unpublished) ADD. 4-6

AL B. MORVAN, JOY A. MORVAN, RAYMOND H. PIERCE, JR., BRENDA C. PIERCE, E.A. ARDNT, JR., LANA K. ARDNT and PRECAST CONSTRUCTION PRODUCTS, INC., Plaintiffs, v. CITY OF CHARLOTTE, a North Carolina Municipality, Defendant.

NO. COA02-1343

COURT OF APPEALS OF NORTH CAROLINA

2003 N.C. App. LEXIS 2086

**June 3, 2003, Heard in the Court of Appeals
November 18, 2003, Filed**

NOTICE:

[*1] PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Reported at Morvan v. Charlotte, 588 S.E.2d 585, 2003 N.C. App. LEXIS 2150 (N.C. Ct. App., Nov. 18, 2003)

PRIOR HISTORY: Mecklenburg County. No. 02 CVS 6078.

DISPOSITION: Affirmed.

COUNSEL: DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III for the plaintiff-appellants.

City of Charlotte by Assistant City Attorney R. Suzanne Todd for the defendant.

JUDGES: ELMORE, Judge. Judges TIMMONS - GOODSON and McCULLOUGH concur.

OPINION BY: ELMORE

OPINION

Appeal by plaintiffs from an order entered 10 July 2002 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 03 June 2003.

ELMORE, Judge.

Plaintiffs are the owners of a parcel of

commercial property located in the City of Charlotte on which is located a 6,000 square foot concrete manufacturing plant. In 1995, plaintiffs sought a building permit from the defendant city of Charlotte in order to construct a larger facility. Defendant advised the plaintiffs that the permit was denied because the property was going to be condemned for a future road. Defendant [*2] held a public meeting in November 1996, and at the meeting produced a map showing that the proposed road bisected the plaintiffs' property, rendering their plant unusable. Plaintiffs then acquired ten acres of adjacent property upon which to move their facilities. In October 2000, the defendant sent to the plaintiffs through its agent what appears from the record to be an option agreement to purchase the plaintiffs' property for the sum of \$ 245,000.00, which plaintiffs determined was undervalued. By the end of 2001, plaintiffs had been notified that the defendant had decided not to condemn the property.

Plaintiffs brought suit alleging damages under a theory of laches and a violation of their constitutional rights for depriving them of the use of their property without just compensation or due process. Defendant City of Charlotte filed a motion to dismiss, alleging the complaint failed to show a legal basis for recovery. The motion was allowed. Plaintiffs now bring this appeal.

I.

Plaintiffs assign error to the trial court's dismissal of their case on the

grounds that the defendant took their property without just compensation. We have stated:

The preparation of maps or even [*3] the adoption of a plan (which may never be carried out) is not a taking or damaging of the property affected so as to constitute a condemnation in any form. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, review denied, 295 N.C. 733, 248 S.E. 2d 862 (1978).

Tucker v. Charter Medical Corp., 60 N.C. App. 665, 671, 299 S.E.2d 800, 804 (1983). Plaintiffs have not shown, nor sufficiently alleged in their complaint, a taking which requires compensation under the constitution. They have alleged that the city's plan to build a roadway interfered with their plans for expanding their business, but this does not constitute a taking under the law. The trial court did not err in dismissing the action.

II.

The plaintiffs also argue that the trial court erred in dismissing their case on the grounds that the city is estopped from switching the location of the proposed road, and must pay damages under the doctrine of laches.

The doctrine of laches is an affirmative defense, and offers no relief to the plaintiffs here. The doctrine of laches is applied ordinarily to situations in which the complainant has failed to act while the other [*4] party has materially changed his position. In such a case the doctrine would operate to prevent a complainant

from asserting his rights when he has waited too long to do so, thereby causing the other party to change his position in a way that would be to his detriment were the complainant then allowed to assert his right.

In the case at bar, the plaintiffs wish to extend the doctrine of laches to compel the defendant city to exercise a right, because the plaintiffs changed their position in anticipation of the right to condemn being exercised. The doctrine, however, does not operate to that end. Although six years is a considerable

amount of time to restrict the use of a private citizen's business, the doctrine of laches is not an appropriate avenue of relief in such a case. The trial court properly dismissed the case as the plaintiffs did not articulate a legal basis for relief.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).

**6214 SOUTH BOULEVARD HOLDINGS, LLC., a North
Carolina Limited Liability Company, v . CITY OF
CHARLOTTE, a municipal corporation.**

NO. COA05-1477

COURT OF APPEALS OF NORTH CAROLINA

2006 N.C. App. LEXIS 1622

**June 7, 2006, Heard in the Court of Appeals
July 18, 2006, Filed**

NOTICE:

[*1] PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: Mecklenburg County. No. 04 CVS 10310. 6214 S. Blvd Holdings v. Charlotte, 178 N.C. App. 562, 631 S.E.2d 893, 2006 N.C. App. LEXIS 1605 (N.C. Ct. App., 2006)

DISPOSITION: AFFIRMED.

COUNSEL: Andresen & Associates, by Kenneth P. Andresen, for plaintiff-appellant.

Assistant City Attorney Catherine C. Williamson, for defendant-appellee.

JUDGES: STEELMAN, Judge. Judges McGEE and ELMORE concur.

OPINION BY: STEELMAN

OPINION

Appeal by plaintiff from judgment entered 1 July 2005 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2006.

STEELMAN, Judge.

The City of Charlotte (defendant), along with the County and other towns of Mecklenburg, initiated planning for a light rail transit system before 1994. Planning, with input from the community, was ongoing, and included the 2025 Integrated Transit/Land-Use Plan produced in 1998. This 1998 plan included recommendation of a light rail transit system using existing rail right-of-way along South Boulevard

(South Corridor Project). The 1998 plan also recommended Archdale Drive as a station location on the South Boulevard route. Voters approved a 1/2 cent sales tax to fund the South Corridor [*2] Project in November 1998.

In June of 2000, plaintiff purchased a long-term lease on real estate located at 6214 South Boulevard (the property). This property is found at the intersection of South Boulevard and Archdale Drive, and includes an existing railroad right-of-way encumbering the westernmost sixty-five feet. Plaintiff purchased its interest in the property with the intention of subleasing it. There was an existing sublease on a portion of the property at the time plaintiff acquired its lease.

Plaintiff attempted to sublease another portion of the property between March and August of 2002. Three entities expressed interest in subletting that portion of the property, but all withdrew interest upon learning that a portion of the property might be condemned for use by the proposed light rail project.

Plaintiff initiated this action on 10 June 2004, alleging that defendant had publicly announced its intention to develop the light rail project in January of 2002, and that this announcement constituted a taking of plaintiff's interest in the property. Defendant filed a condemnation complaint and declaration of taking for the property on 1 July 2004. This matter was heard 6 June 2005 on [*3] defendant's motion to decide issues other than damages pursuant to N.C. Gen. Stat. § 136-108 (2005). The trial court ordered:

"There having been no taking of Plaintiff's property on or about January of 2002, this case is DISMISSED with prejudice." From this order plaintiff appeals. In plaintiff's sole argument on appeal, it contends that the trial court erred in concluding defendant's actions prior to 1 July 2004 did not constitute a taking of plaintiff's property interests. We disagree.

Plaintiff argues that defendant's activities in preparation of implementing its light rail plan constituted an inverse condemnation of its property rights. Plaintiff argues that defendant's actions deprived it of its ability to sub-let the property, which was the sole reason plaintiff obtained an interest in the property.

An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose. Although an actual occupation of the land, dispossession of the landowner, or physical touching of the land is not necessary, a taking of private property requires "a substantial interference with elemental rights growing out of the ownership [*4] of the property." A plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.

Adams Outdoor Advertising v. North Carolina Dep't of Transp., 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993) (citations omitted).

Although the courts which have been called upon to consider the question posed

by the present subject have not always expressed their views in terms of a broad legal principle, it would appear to be well settled, as a general rule of law, that mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected.

A number of reasons have been advanced by the courts in support of such rule, the ones most frequently assigned being that plotting or planning does not, in itself, amount to an invasion of property, or deprive the owner of the use and enjoyment thereof; that the projected improvement may be abandoned and the property never actually disturbed; that the threat or possibility of condemnation is one of the conditions upon which all property is held; and that the rule is in aid of the growth [*5] and expansion of municipalities.

37 A.L.R.3d 127, 2 (2004); *see also*, *Browning v. North Carolina State Highway Com.*, 263 N.C. 130, 135-36,

139 S.E.2d 227, 230-31 (1964); *Tucker v. Charter Medical Corp.*, 60 N.C. App. 665, 671, 299 S.E.2d 800, 804 (1983); *Barbour v. Little*, 37 N.C. App. 686, 691-92, 247 S.E.2d 252, 255 (1978).

In the instant case defendant conducted a thorough planning process, involving its citizens through a series of public hearings at an early stage, before making final decisions and instituting condemnation actions. This necessary planning and preparation, without more, does not constitute a taking under the law, even though it may have impacted plaintiff's interest in the property. *Id.*; *see also Adams Outdoor Advertising*, 112 N.C. App. 120, 434 S.E.2d 666 (affirming dismissal where injury to property rights was merely consequential or incidental). This argument is without merit.

AFFIRMED.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).