

NORTH CAROLINA  
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

Re: Winston-Salem Northern Beltway

Owner	Case No.
Beroth Oil Company	10-CVS-6926
Smith, Paula and Kenneth	10-CVS-6926
Clapp, Barbara	10-CVS-6926
Crockett, Pamela Moore	10-CVS-6926
Estate of WR Moore	10-CVS-6926
N&G Properties, Inc.	10-CVS-6926
Koonce, Elton V.	10-CVS-6926
Republic Properties	11-CVS-2998
Kirby, Eugene and Martha	11-CVS-7119
Harris Triad Homes, Inc.	11-CVS-7120
Hendrix, Michael	11-CVS-8170
Engelkemier, Darren	11-CVS-8171
Hutagalung, Ian	11-CVS-8172
Maedl, Sylvia	11-CVS-8173
Stept, Stephen	11-CVS-8174
Nelson, James and Phyliss	11-CVS-8338
Shugart Enterprises, LLC	12-CVS-4851
Stump, Franklin and Minnie	12-CVS-4853
Jade Associates, LLC.	12-CVS-4854
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Pegram, Elaine Smith	12-CVS-4856
Trident Properties, LLC	12-CVS-4857
McAllister, Judith T.	12-CVS-4858
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McFadden, Kenneth and Pamela	12-CVS-4864
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Little, Loren A. and Margaret	12-CVS-4867
Lewis, Henry and Rebecca	12-CVS-4868
Lawson, Kathryn L.	12-CVS-4869
Kinney, Lois K.	12-CVS-4870
Fulk, Michael David	12-CVS-4873

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FORSYTH CO., C.S.C.  
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**ORDER**  
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Brabham, Verdell & Marla	12-CVS-5953
Diehl, Scott C.	12-CVS-5954
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v.

North Carolina Department of Transportation

**NORTH CAROLINA  
GUILFORD COUNTY**

**IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION**

**Re: Greensboro Outer Loop**

<b>Owner</b>	<b>Case No.</b>
Bell, Kenneth E.	14-CVS-10615
Barley, Jo Ellen and Mary B. Watson	15-CVS-4278
Summers, Michael and Brenda	15-CVS-4276
Grundman, Robert E. and Linda L.	15-CVS-4277
Pickard, Mark J. and Linda J.	15-CVS-4799
Felts Family Limited Partnership	15-CVS-6926

v.

North Carolina Department of Transportation

**ORDER**  
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## **ORDER**

This order covers the Motion for Partial Summary Judgment filed by the plaintiffs (a/k/a the “Kirby 9”)<sup>1</sup> and the remaining Plaintiffs’ Motions for Judgment on the Pleadings under Rule 12(c) on their respective inverse condemnation claims for NCDOT’s taking of their property that lies within the right of way boundaries Winston-Salem Northern Beltway (“Beltway”) and the Greensboro Outer Loop (the “Loop”). The Court has consolidated all of the cases in question pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, for the purposes of hearing these motions.

Based upon the *Kirby* opinions in \_\_\_ N.C.App. \_\_\_, 769 S.E.2d 218, *aff’d*, \_\_\_ N.C. \_\_\_, 786 S.E.2d 919 (2016), and for the reasons stated herein, the Court (i) reverses its prior order denying summary judgment to the Kirby 9 and grants summary judgment to the Kirby 9 as set forth herein as directed by the Court of Appeals and Supreme Court; and (ii) grants in part the remaining Plaintiffs’ motions for partial judgment on the pleadings on the issue of inverse condemnation as set forth herein. Using the powers afforded this Court under N.C.G.S. § 136-114 to fashion such rules and procedures necessary to carry out the object and intent of Article 9 of Chapter 136 of the North Carolina General Statutes, the Court will establish a procedure and timetable for the NCDOT to file plats, make deposits with the required statutory interest, and, if any plaintiff rejects the NCDOT offer, scheduling Section 108 hearings if either party requests it, in order to implement and comply with the requirements of N.C.G.S. § 136-111.

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<sup>1</sup> The Kirby 9 are Eugene & Martha Kirby, Harris Triad Homes, Inc., Michael Hendrix, Darren Engelkemier, Ian Hutagalung, Sylvia Maendl, Stephen Stept, James & Phylliss Nelson, and Republic Properties, LLC.

## **PLAINTIFFS' PROPERTIES ARE IN THE BELTWAY OR LOOP**

The Plaintiffs have alleged that their properties are within the corridors shown on the published Beltway and Loop maps and the filing of the respective maps resulted in a taking by the NCDOT.<sup>2</sup> The Court grants judgment establishing that each of the plaintiffs are within the mapped corridors of the Beltway and the Loop for the following reasons:

1. NCDOT's Answers to the first sixty-nine (69) lawsuits admitted the allegations that properties were in the Beltway and were subject to the Map Act restrictions.
2. NCDOT's uniform responses to identical allegations in the Plaintiffs' first 69 complaints filed prior to July 15, 2015, were consistently admitted or denied. As a consequence, the Court rules that the doctrine of legal estoppel precludes the NCDOT from denying the same allegations in subsequent Answers filed after July 2015. For instance, in its answers in the approximately 132 cases filed after July 15, 2015, the NCDOT made a blanket denial of all allegations, denying even the legal existence of the NCDOT as an entity, and whether it is capable of owning property. While N.C.G.S. § 136-111 provides that NCDOT need not file an answer and plaintiffs' inverse condemnation allegations are thus deemed denied (to prevent a default being entered against the State), the Supreme Court's ruling in *Kirby, supra*, (*i.e.*, that the Map filing is a taking) removes the general denial "safe harbor" to NCDOT. NCDOT's general denials in post-July 15, 2015 filings are legally untenable and are therefore deemed admitted.

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<sup>2</sup> To the extent that there are a small number of properties in the cases assigned to the Court as 2.1 cases that are outside the Beltway corridor itself but are impacted by the Beltway, (*See* 7/18/16 transcript, pp 56-57), those cases are not included in this order and are not in the captioned cases.

They must be made consistent with the prior admissions in the 69 cases filed before July 2015.

3. Pursuant to Evidence Rule 201, the Court takes judicial notice of the public land records filed in the Offices of the Forsyth and Guilford County Register of Deeds that show the Beltway or the Loop within the Plaintiffs' chain of title.

### **DOT HAS TAKEN PLAINTIFFS' PROPERTIES**

As to those plaintiffs who are not part of the Kirby 9, the Court grants Plaintiffs' motions on the pleadings that a taking has occurred for the following reasons:

4. Despite an initial reluctance by NCDOT to admit that a taking occurred, NCDOT conceded that point on July 18, at least as to the nine owners in *Kirby* (the "Kirby 9"). See the transcript of the hearing before the Court on July 18, 2016, pp. 57-59.

5. Based on the Supreme Court *Kirby* opinion, a taking of some nature has occurred, with the dates of the takings corresponding to the publishing and recordation of the two Beltway corridor maps and the two Loop corridor maps. The Supreme Court's holding has the legal effect of being a deemed admission, so that under N.C.G.S. §136-111, NCDOT is found to have "admitted" a taking, as pertaining to the Kirby 9. The doctrine of legal estoppel applies in this instance, so that this admission, in order to maintain legal consistency wherever possible, applies to all properties within the Beltway and Loop corridor boundaries.

6. To the extent the Plaintiffs requested the Court to find a taking at fee simple valuation, the Court is not prepared at this stage of the proceedings to rule that the takings are in the nature of fee simple valuation; therefore, so the court will deny the Plaintiffs'

motions at this time in this regard. The issue may, and will likely be, revisited at the Section 136-108 hearing phase.

7. In its valuation of the Plaintiffs' properties, the NCDOT should consider the factors noted by the Court in its discussions and correspondence with the parties on valuation regarding the *de minimus* number of arms' length, fair market value transfers in the Beltway since the maps were filed, NCDOT's acquisition practices in the Beltway and Loop over the many years, the standards and instructions for appraisal valuations set forth in NCDOT's own manuals, and the reasoning set out in *North Carolina State Highway Commission v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954).

### **PROCEDURE**

8. In granting the Plaintiffs' motions in part, and in following the clear mandate from the Supreme Court that a taking has occurred in each of these cases, the Court finds that it is now incumbent upon the NCDOT to comply with N.C.G.S. § 136-111 by filing its plats and making the good faith deposits with interest at the statutory rate from the date of taking with the Forsyth County Clerk of Court or Guilford County Clerk of Court, as the case may be.

9. In an effort to assist the NCDOT in publishing the plats, the plaintiffs have indicated a willingness to stipulate that the metes and bounds are unchanged from the area shown on the corridor maps, and that only in those parcels of land where the NCDOT is now wishing to take some portion of land that differs from the corridor map,

would NCDOT be required to publish a new plat. Nothing herein shall prevent NCDOT from producing plats as it deems necessary for the purposes of conducting appraisals.

10. NCDOT may issue instructions to its appraisers to make appraisals based on something other than a fee simple taking, such as the concept of a negative easement. While this Court has not yet judicially imposed a fee simple valuation upon NCDOT at this juncture, NCDOT may ultimately conclude, based on the actual location of the property and the fact that said property will be graded and covered with asphalt, that it only makes sense to treat the appraisal as a fee simple valuation, based on the Supreme Court's holding in *Black, supra*.

11. Upon filing the deposit, NCDOT shall provide the Plaintiffs' counsel with a copy of the plat in accordance with Paragraph 9 herein, and of the appraisal which accompanies each deposit.

12. Each Plaintiff shall have the right to withdraw the deposit without compromising his or her claim for the taking or seeking additional compensation for the taking and other costs allowable under N.C.G.S. §§ 136-111 and 136-119.

13. Pursuant to the power conferred upon the Court in N.C.G.S. § 136-114, the Court is vested with the power to set time frames outside the statutory time frames of N.C.G.S. §136-111. The time frame for the NCDOT's platting of the Kirby 9 shall be within 45 days of this order (unless Paragraph 9 of this Order applies to the Kirby 9) and completing appraisals and making deposits within 90 days of the date of this order. The timeframe for the NCDOT's platting, appraising, and making deposits of all other plaintiffs shall be as follows:

**NCDOT Schedule:**

- a. NCDOT shall file the required plat within ninety (90) days of this order, or notify the plaintiffs that it intends to rely on the stipulation in Paragraph 9 of this Order.
- b. NCDOT shall cause appraisers to conduct appraisals of properties or cause appraisers to update previously-conducted appraisals on all plaintiffs' properties within six (6) months of the date of this Order; to that end, NCDOT shall immediately begin the process of hiring appraisers to conduct appraisals in order to stagger the submission and review of the appraisals relatively equally throughout the six month period. NCDOT shall also conduct title examinations of the properties during this six (6) month appraisal period.
- c. NCDOT has one (1) month to review appraisals upon submission by the appraiser to NCDOT and to make the deposit of a good faith estimate of just compensation (to include interest from the date of taking).
- d. At the time of deposit, the NCDOT shall list any mortgagor, lien holder or other party with an interest in the property on the filing of deposit.
- e. NCDOT shall undertake relocation assistance to the property owners where required during this six (6) month period (*e.g.*, businesses, homeowners, tenants).
- f. The Clerks of Court of either Forsyth County, or Guilford County, as applicable, shall then pay the deposited sums to the plaintiffs' counsel, Hendrick Bryant Nerhood Sanders & Otis, LLP, per standing order of the

Court and without prejudice to the Plaintiffs' rights to contest the valuations, interest, or area taken.

**Owners' Schedule:**

- g. Upon deposit and delivery of the appraisal, each owner will have six (6) months to review and conduct appraisals (if desired).
- h. One (1) month after the owner's review and appraisal period is over, the owner will notify NCDOT whether it accepts or rejects the valuation as just compensation, and if not accepted, will set the case for mediation for an attempt to resolve the issue of valuation as well as all other compensable items, including, but not limited to costs, expenses, and fees.
- i. Mediations are to take place within six (6) weeks of plaintiff's notice of rejection of the NCDOT's valuation.
- j. Cases not resolved at mediation will be set for trial and further scheduling orders.
- k. For cases that conclude by settlement, consent orders will be filed for court approval.

**Section 108 Hearings:**

- l. Upon the filing the plat, making the deposit, delivery of the appraisal, and notice from the property owner that the NCDOT valuation is rejected, either party may ask for Section 108 hearings if there is a controversy regarding the necessary and proper parties, title to the land, interest taken, or area taken.

14. The Clerks of Court For Forsyth or Guilford County, as applicable, are hereby instructed, as a standing order:

- a. For any Plaintiff which has no mortgagor, lien holder or other party listed by NCDOT at the time its makes the deposit for that specific Plaintiff's property may petition the Clerk for reimbursement, and the clerk shall disburse the deposit without any further order of the Court. Said disbursement shall be made to the law firm of Hendrick Bryant Nerhood Sanders & Otis, LLP.
- b. Any Plaintiff for which a mortgagor, lien holder or other party is listed by NCDOT at the time its makes the deposit, the Clerk may disburse the deposit upon order of the Court, as a joint check to all parties listed or as instructed by all the listed parties.

**THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED:**

1. The Kirby 9's motion for partial summary judgment as to the NCDOT's liability for a taking in inverse condemnation under N.C.G.S. § 136-111 is hereby granted, pursuant to Rule 56 of the Rules of Civil Procedure.

2. The remaining plaintiffs' motions for partial judgment on the pleadings as to the NCDOT's liability for a taking in inverse condemnation under N.C.G.S. § 136-111 are hereby granted, in accordance with Rule 12(c) of the Rules of Civil Procedure.

3. NCDOT's general denials in its post-July 15, 2015 Answers are legally untenable and are therefore deemed admitted, in accord with the doctrine of legal estoppel. They must be made consistent with the prior admissions in the sixty-nine (69) cases filed before July 2015, and

NCDOT shall file Amended Answers for all of its Answers filed after July 1, 2015 within sixty (60) days from the date of this order.

4. Plaintiffs' motions for a fee simple taking are denied at this time, without prejudice to raise the issue at a later time.

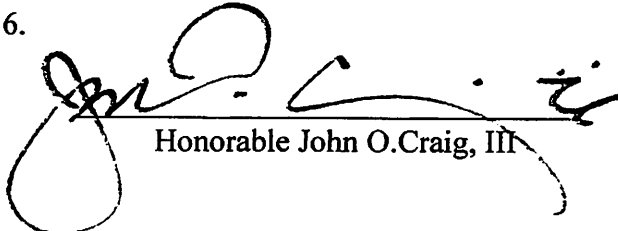
5. Nothing in this order shall prejudice Plaintiffs' rights under N.C.G.S. § 136-111 and 136-119 to petition the Court for reimbursement of fees, expenses, and costs, as may be allowable by law.

6. NCDOT shall make deposits for the Kirby 9 plaintiffs' properties within 90 days of this order and within seven (7) months for all other Plaintiffs. At the time of deposit, the NCDOT shall list any mortgagor, lien holder, or other party with an interest in the property on the filing of deposit. The Clerks of Court for Forsyth or Guilford Counties, where applicable, shall disburse the deposits made for each Plaintiff to the law firm of Hendrick Bryant Nerhood Sanders & Otis, LLP; or, if other parties are listed on the deposit by NCDOT, as those parties may instruct, as well as comply with any other aspects stated under Paragraph 14 of this Order.

7. NCDOT shall file plats of the Kirby 9 plaintiffs' properties within 45 days of this order, unless NCDOT decides to avail itself of the Kirby 9 plaintiffs' offer under Paragraph 9 of the "Procedure" portion of this order; and within ninety (90) days for all other Plaintiffs.

8. If NCDOT experiences difficulty in complying with the time frames as stated herein, it shall apply to the Court and request extensions or modifications of the deadlines, for good cause shown.

This the 29<sup>th</sup> day of September, 2016.

  
Honorable John O. Craig, III

**CERTIFICATE OF SERVICE**

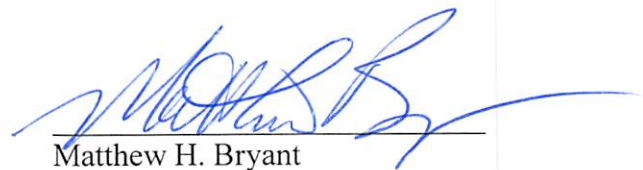
I hereby certify that I have this day served a copy of the foregoing **Order on 12(c) Motion** upon all parties to this matter by placing a copy in the United States Mail, First Class, postage prepaid and addressed as follows and by facsimile:

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This the 3<sup>RD</sup> day of October, 2016

  
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