

SUPREME COURT OF NORTH CAROLINA

EVERETTE E. KIRBY and wife,)
 MARTHA KIRBY; HARRIS TRIAD)
 HOMES, INC.; MICHAEL)
 HENDIRX, as Executor of the)
 Estate of Frances Hendrix;)
 DARREN ENGELKEMIER; IAN)
 HUTAGALUNG; SYLVIA MAENDL;)
 STEPHEN STEPT; JAMES W.)
 NELSON and wife, PHYLISS)
 NELSON; and REPUBLIC)
 PROPERTIES, LLC, a North)
 Carolina company(Group 1)
 Plaintiffs),)
)
 Plaintiffs,)
)
 vs.)
)
 NORTH CAROLINA DEPARTMENT OF)
 TRANSPORTATION,)
)
 Defendant.)
)

FROM FORSYTH COUNTY
 NO. COA14-184

Case Nos. 11 CVS 7119
 11 CVS 7120
 11 CVS 8170
 11 CVS 8171
 11 CVS 8172
 11 CVS 8173
 11 CVS 8174
 11 CVS 8338
 12 CVS 2898

MOTION BY WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE
 SUPREME COURT OF NORTH CAROLINA

WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION
 ("WMPO"), by and through its undersigned counsel, hereby moves the
 Court, pursuant to Rule 28(i) and Rule 2 of the North Carolina

Rules of Appellate Procedure, for leave to file an *amicus curiae* brief and conditionally submits the attached *amicus curiae* brief with this Motion.

In support of this motion, WMPO shows unto the Court the following:

NATURE OF WMPO'S INTEREST

WMPO is the designated Metropolitan Planning Organization ("MPO") for the greater Wilmington area. The WMPO consists of the following twelve member agencies: New Hanover County, Brunswick County, Pender County, City of Wilmington, Town of Leland, Town of Wrightsville Beach, Town of Carolina Beach, Town of Kure Beach, Town of Belville, Town of Navassa, Cape Fear Public Transportation Authority, and the North Carolina Board of Transportation.

The WMPO is one of 19 MPOs in North Carolina. MPOs are federally-funded organizations charged with coordinating and planning transportation projects in urbanized areas with more than 50,000 residents. MPOs are established pursuant to 23 U.S.C. § 134 and are recognized under North Carolina law pursuant to N.C. Gen. Stat. § 136-200.1.

The WMPO has authority under N.C. Gen. Stat. § 136-44.50(a)(5) to adopt or amend a transportation corridor official map for North Carolina Department of Transportation ("NCDOT") projects R-3300 and U-4751.

The WMPO is a co-defendant with NCDOT in a current total of seventeen (17) lawsuits related to the Transportation Official Corridor Map Act (Article 2E of Chapter 136 of the General Statutes) and NCDOT projects R-3300 and U-4751, which cases are pending in the Superior Courts of Pender and New Hanover counties.¹ One of these 17 cases is on appeal to the North Carolina Court of Appeals.²

On July 16, 2015, Governor McCrory signed Session Law 2015-151 (Senate Bill 654) into Law, which provides in new subsection (g) of N.C. GEN. STAT. § 136-44.50 as follows:

(g) The Department of Transportation shall defend, indemnify, and hold harmless the Wilmington Urban Area Metropolitan Planning Organization and its members against any claims, civil actions, and proceedings related to or arising out of the Wilmington Urban Area Metropolitan Planning Organization's adoption, filing, or amendment of a transportation corridor official map pursuant to this Article.

N.C. GEN. STAT. § 136-44.50(g). Section 5 of Session Law 2015-151 states in relevant part that subsection (g) of N.C. GEN. STAT. § 136-44.50 "is effective when this act becomes law and applies to maps filed, adopted, or amended before that date."

¹ Pender County Superior Court File Nos. 14 CVS 528, 15 CVS 433, 15 CVS 434, 15 CVS 556, 15 CVS 554, 15 CVS 557, 15 CVS 555, 15 CVS 624, 15 CVS 694, 15 CVS 788, 15 CVS 790, 15 CVS 844; New Hanover County Superior Court File Nos. 14 CVS 1036, 15 CVS 1579, 15 CVS 1562, 15 CVS 1923, 15 CVS 2046

² Jamestown Pender, L.P. vs. NCDOT and WMPO, NO. COA 15-925 (Pender County, 14 CVS 528).

WMPO respectfully urges this Court to reverse the Court of Appeals' decision and determine that this case is unripe based upon the U.S. Supreme Court's holding and analysis in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985).

WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

In *Williamson County*, the U.S. Supreme Court held that a regulatory-based takings claim is not ripe for adjudication where a plaintiff has failed to pursue a variance, as the aggrieved property owner "has not yet obtained a final decision regarding how it will be allowed to develop its property". *Id.* at 190, 105 S. Ct. at 3118. The WMPO respectfully contends that the Court of Appeals' decision is inconsistent with *Williamson County*, and aggrieved property owners cannot file inverse condemnation claims based upon the Map Act without first resorting to the procedure for obtaining a variance from transportation corridor official map pursuant to N.C. GEN. STAT. § 136-44.52.

ISSUE OF LAW TO BE ADDRESSED

The Court of Appeals' decision "hold[s] the trial court erred when it concluded Plaintiffs' claims for inverse condemnation were not yet ripe based upon its determination that Plaintiffs did not suffer a taking at the time NCDOT filed the transportation corridor maps". *Kirby v. North Carolina Dep't of*

Transp., --- *N.C. App.* ---, 769 S.E.2d 218, 236 (2015) (emphasis added); Slip Op. p. 45. With the sole exception of Plaintiff Harris Triad Homes, Inc., however, "no Group 1 Plaintiffs applied for variances, permits, or the Hardship Program, or accepted any offers from NCDOT to purchase their respective properties" *Id.* at ---, 769 S.E.2d at 225 (emphasis added); Slip Op. p. 12. The Court of Appeals' decision is contrary to and inconsistent with the U.S. Supreme Court's analysis and holding in *Williamson County*.

WHEREFORE, WMPO respectfully moves this Honorable Court for leave to file this *amicus curiae* brief in support of the NCDOT.

Respectfully submitted,

This the 6th day of October, 2015.

SHANKLIN & NICHOLS, LLP

ELECTRONICALLY SUBMITTED

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing MOTION BY WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT NORTH CAROLINA DEPARTMENT OF TRANSPORTATION has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope, and via e-mail properly addressed as follows:

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