

NO. 56PA14-2

JUDICIAL DISTRICT TWENTY-ONE

SUPREME COURT OF NORTH CAROLINA

EVERETTE E. KIRBY and wife,)
MARTHA KIRBY; HARRIS TRIAD)
HOMES, INC.; MICHAEL HENDRIX,)
as Executor of the Estate of Frances)
Hendrix; DARREN ENGELKEMIER;)
IAN HUTAGALUNG; SYLVIA)
MAENDL; STEPHEN STEPT; JAMES)
W. NELSON and wife, PHYLLIS)
NELSON; and REPUBLIC) From Forsyth County
PROPERTIES, LLC, a North Carolina) No. COA14-184
Company (Group 1 Plaintiffs),)
)
Plaintiffs,)
)
v.)
)
NORTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)
)
Defendant.)

BRIEF OF AMICUS CURIAE

NORTH CAROLINA JUSTICE CENTER

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BRIEF OF AMICUS CURIAE

NORTH CAROLINA JUSTICE CENTER

The North Carolina Justice Center and Center for Responsible Lending

respectfully submit this brief as *amicus curiae* in support of Plaintiffs-Appellees.

INTEREST OF AMICUS NORTH CAROLINA JUSTICE CENTER

The North Carolina Justice Center (Justice Center) is a non-profit legal advocacy organization. The mission of the Justice Center is to secure economic justice for disadvantaged persons and communities.

The Justice Center provides legal assistance in civil matters to indigent people, including civil matters involving consumer and housing issues. The Justice Center's goal is to ensure justice and fair treatment for all, particularly those whose financial situation renders them disadvantaged to demand accountability from the economic marketplace. The Justice Center has advocated on consumer and housing issues before North Carolina state and county agencies, as well as the North Carolina General Assembly; participates in numerous continuing legal education trainings; and coordinates a state-wide "Fair Lending and Home Defense Project," the purpose of which is to provide legal assistance to low income consumers in cases involving predatory mortgage lending and foreclosure defense. The Justice Center also conducts litigation on behalf of low-income North Carolina consumers in all areas of poverty law.

ISSUES PRESENTED

- I. Is the Map Act an Exercise of the State's Eminent Domain Power Requiring Just Compensation to be Paid to Landowners?

II. STATEMENT OF THE FACTS

Amicus Curiae adopts by reference Respondent-Appellee's Statement of the Facts. N.C. R. App. P. 28(f).

ARGUMENT

I. THE MAP ACT IS AN EXERCISE OF THE STATE'S EMINENT DOMAIN POWER REQUIRING JUST COMPENSATION TO BE PAID TO APPELLEES.

The state can and must condemn property if it seeks to control its future acquisition costs; instead, DOT puts owners in a recorded and restricted roadway of indefinite duration. The Transportation Corridor Official Map Act, N.C. Gen. Stat. §§ 136-44.50 *et seq.*, (“Map Act”), permits the North Carolina Department of Transportation (DOT) to file a “transportation corridor map” with the local register of deeds identifying property where it anticipates putting a road. The map lists all properties located within the planned road corridor and protects that property from development or any other action that might improve the value of the property – in effect, holding down the purchase price until the DOT is ready to buy. DOT admits as much. In a fact sheet distributed to affected property owners, DOT lists a number of frequently asked question, among them, “How long can a property be in the ‘protected corridor’?” The answer: “For as long as it takes North Carolina to get enough money to build the road.” (R. p. 19). The Court of Appeals correctly determined that the Map Act is “a cost-controlling mechanism” (Slip Op. 34) that

“foreshadow[s] which properties will eventually be taken for roadway projects and in turn, decrease[s] the future price the State must pay to obtain those affected parcels.” (Slip Op. at 34, quoting *Beroth Oil Co. v. N.C. Department of Transportation (Beroth II)*, 367 N.C. 333, 349, 757 S.E. 2d 466, 478 (2014) (Newby, J., dissenting in part and concurring in part)).

Property values for homes included within the corridor become significantly depressed and owners are unable to sell their property for market value. McCracken Depo. pp. 15-16. Affected property owners thus live in limbo, waiting for the DOT to make a move. In Winston-Salem / Forsyth County, where the state has filed corridor maps for the Northern Beltway, this situation is nearing the end of its second decade. The Beltway impacts perhaps 807 residential households in total with an impact on 694 residential households on the east side alone. Depo. Ex. 77 p. 2216¹, Depo. Ex. 72 p. 2185.

The General Assembly provided an advance acquisition hardship program to provide some protection to the more vulnerable property owners in projects such as the Beltway. N.C. Gen. Stat. § 136-44.53 (the “Hardship Program”). If the landowner can prove that there is a health, safety or financial reason that poses an undue hardship and the property is unmarketable. Ex. 8 pp. 241, 251, then the

¹ References to an Exhibit and page (“Ex. p.#”) are to Appellees Rule 9(d) Exhibits Books 1-4. Reference to Affidavits and page (“Aff. P.#”) are to Appellees’ Rule 9(d) affidavits in Book 5. Reference to “Depo.” are to the Appellees Rule 9(c) transcripts.

homeowner can qualify for a hardship acquisition. DOT has acquired over 454 properties under the early acquisition hardship program. Exs. 7&9, pp. 221-231, 253-254

As the record in this case makes clear, however, the program has been administered by DOT in such a way as to harm many landowners. The Hardship Program is a discretionary, with approval or denial being made solely by one DOT employee. Ex. 100 p. 2391 ¶ 14-16; Joines depo. pp. 22-23. There is no right to appeal. Joines depo. p. 29. DOT gives owners a take it or leave it price. If the owner does not agree with the price offered, DOT will end discussions and return when acquisition would normally occur (which is an unknown date). Depo. Ex. 8 p. 253; Barr depo. pp. 30-33; Williams depo. pp. 8-11, Lambert depo. p. 100. DOT makes these non-negotiable offers to owners who by DOT guidelines are in medical or financial duress to begin with. Depo. Ex. 8 p. 253; Barr depo. pp. 30-33; Williams depo. pp. 8-11, Lambert depo. p. 100. DOT even takes advantage of owner's being in foreclosure, considering that owner's situation to be an opportunity to eventually buy from the bank. Depo. Ex. 13 (Piedmont Federal Savings & Loan offers property to DOT upon foreclosure, Board of Transportation approves acquisition).

The very existence of the DOT Hardship Program recognizes that the owners' properties will be unmarketable because the properties are in the protected

corridor. Depo. Ex. 8 p. 241. By the sheer volume of Beltway hardships, DOT has long understood the distress its actions were causing these homeowners. Depo. Exs. 12 and 66. The testimony of owners that sold to DOT speak to the coercive nature of DOT's use of the Map Act. Affs. Bowen ¶ 10-14 p. 2412, Barrett ¶ 17-22 p. 2409, Reynolds ¶ 20-24 p. 2522, Hendrix ¶ 5-11 p. 2431, Hriniak ¶ 11-15 p. 2554.

A review of the process used with the few Beltway properties that were actually condemned shows the disparity in price when constitutional protections are enforced. In the ten cases where DOT went through the condemnation proceedings pursuant to Chapter 40A of the North Carolina General Statutes, the owners ultimately received anywhere from 33% to 150% above what the DOT initially estimated as the appraised value of the property. Ex. 24 pp. 635-675.

The amount of money DOT has saved by not going through the condemnation proceedings with its 454 or more hardship acquisitions in the Beltway is undoubtedly a significant sum. Since Map Act litigation began in September 2010, DOT has purchased dozens of properties. Depo. Ex. 25. The deed stamps indicate DOT paid \$14,438,500 for these properties. App. p. 2. If DOT had been forced to pay even a 33% increase over its appraisal value for these properties, (Depo. Ex. 24), DOT would have underpaid these owners by \$4,764,705.00. Looking at the total of acquisition purchases, if one assumes the

average price of the 454 hardship purchases was \$150,000.00 for a total of \$68,100,000.00, a 33% underpayment is \$22,473,000 or \$49,500 per owner. The use of official maps since 1992 has certainly provided DOT cost savings by avoiding condemnation and just compensation. While saving North Carolina taxpayers money is commendable, the burden of financing the road should not be shifted from the general public to a few owners in the protected corridor.

Just compensation is a fundamental right. *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). DOT has purposefully avoided this constitutional obligation and instead has taken advantage of these homeowners' plight. Absent inverse condemnation, owners cannot avail themselves of the safeguards of the court system and its juries to ensure they receive just compensation. Without the protections of the *Kirby* decision, many homeowners will be unable to withstand DOT's indefinite acquisition schedule and be coerced by the situation into accepting non-negotiable offers.

The Map Act enables our government to disadvantage the elderly, those of modest income and live in formerly rural areas who are less able to withstand or confront the power of the State. DOT has used the Act to shift the burden of financing North Carolina roads from the general public to a few owners in protected corridors. For this reason alone the Map Act is exercise of the power of

eminent domain and compels the DOT to pay complaining property owners just compensation.

The Court should affirm Kirby, require payment of just compensation to the owners in the Beltway filing inverse actions thus allowing these owners to promptly receive long overdue just compensation.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the Court of Appeals.

This the 6th day of November, 2015.

NORTH CAROLINA JUSTICE CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2015, I electronically filed the foregoing **BRIEF OF NORTH CAROLINA JUSTICE CENTER** with the Clerk of Court. The following counsel of record will be served via U.S. Mail with a copy via e-mail:

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This the 6th day of November, 2015.

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