NO. 390PA11-2 **TWENTY FIRST DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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BEROTH OIL COMPANY, PAULA AND KENNETH SMITH, BARBARA CLAPP, PAMELA MOORE CROCKETT, W.R. MOORE, N&G PROPERTIES, INC., AND ELTON V. KOONCE,

Appellants,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

Appellee.

FROM
N.C. COURT OF APPEALS
(11-1012)

APPEAL FROM
FORSYTH COUNTY

Case No. 10-CVS-6926

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APPELLANTS' REPLY BRIEF

(N.C. Rule App. Proc. 28(h))

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INDEX

TABLES OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

ADDITIONAL STATEMENT OF FACTS

A. The Protected Corridor, Development and Marketability.

The NCDOT states the Map Act "limit[s] (not freezes) new development within the protected corridor ... where inaction could lead to excessive costs…" Appellee Brief ("App. Br.") p. 5. NCDOT calls the restrictions "temporary," but they are in place today. Id. p. 22. While the Map Act provides for variances and a three-year wait for permits, NCDOT declares that improvements will not be allowed that increase acquisition costs. R.p. 10 ¶44, p. 19, pp. 109 (¶7), 203 (¶8), 208 (¶6). Three years after application, the permit shall issue or NCDOT may (but is not required to) condemn the property. N.C.G.S. § 136-44.51(b). No Owners have applied for a permit since the respective Maps were filed and only two variances have been granted (a shed and garage enclosure).[1] True, Appellants haven't sought permits; but more accurately, Appellants elected not to invest money in improvements on unmarketable property. NCDOT urges Appellants to apply for(economically nonsensical) permits.

NCDOT disingenuously notes that Owners are free to sell their property. App. Br. p. 10. If true, this lawsuit and the

[1] Testified to by NCDOT in discovery (post COA opinion), as is the fact ath 454 properties have been bought by NCDOT

Hardship Program would be unwarranted. NCDOT knows full well that commerce is dead in the Beltway.[2]

B. NEPA and the Injunction (App. Br. p. 5-8).

The NEPA process is apparently a long and intricate process. Whether NEPS requires a decade or that is how NCDOT manages NEPA is unexplained. We do know NCDOT and FHWA acted recklessly and in bad faith. *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 151 F. Supp. 2d 661 (M.D.N.C. 2001) ("*Case 1*"), *N.C. Alliance*, 2002 WL 1009725 (M.D.N.C. Feb. 26, 2002) ("*Case 2*") and *N. C. Alliance*, 713 F. Supp. 2d 491 (M.D.N.C. 2010)("*Case 3*") explain the Beltway history.

NCDOT submitted a draft EIS ("DEIS") in June 1992. *Case 1* p. 669. In 1996, the ROD was submitted and approved one day later. The next day, the Clean Air Act standards changed and the Forsyth County TIP was non-conforming. The project could not receive any federal funds until the TIP was conforming. In April 1999, FHWA told NCDOT that the NEPA process was being reopened to consider whether a new or supplemental EIS was needed. Id. at 671-672. FHWA failed to analyze the Eastern and Western Loops together in one EIS, and thus violated NEPA. *Case 1* at 676-78. The Court held that FHWA acted in bad faith by approving the ROD after only a "cursory" one-day review. *Id.* at 676. The new EIS

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[2] In discovery, NCDOT experts identified only nine qualified transfers of properties in the Beltway. There were 16,188 qualified sales within one mile of the Beltway in the same period.

was not completed until January 2007 and the new ROD approved February 2008. *Case 3* at 500. Appellants, innocent in this "bad faith" behavior, have suffered from the governments' disregard of the NEPA rules and NCDOT's lack of urgency.

NCDOT refers to an injunction it neither pleads nor produces. NCDOT fails to mention the "injunction" was a negotiated consent motion whereby NCDOT agreed to the order.[3] Thereafter, court permission was required for Western Loop purchases. R. p.67, 76, 89, 100. The Beltway stopped not due to a lawsuit but because FHWA and NCDOT toyed with the NEPA process and funding was curtailed as a result. *Case 1* at 676-678.

In *Case 2*, Judge Bullock found that the Hardship owners' properties were "unmarketable." *Case 2* p.*3-4. NCDOT filed five similar motions. R.p.66-114. In each, NCDOT cites the requirement that owners "document an inability to sell the property…" R.p. 71,80,93,101. NCDOT represented 15 times that the owners' properties were "unmarketable." R.p. 81-82,94-95,102,111-112. Vienna Baptist was bought because "the Church believes that it will not be able to grow or properly minister to its members and community unless it can relocate." R. p. 102.

C. Hardship Acquisitions and NEPA / ROD.

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[3] In discovery, Walter Holton, former US Attorney for the Middle District, testified that the Consent Motion for Dismissal and the corresponding Order were negotiated, and there was no hearing or adjudication on an injunction.

Hardship acquisitions require NCDOT to determine that "the project design is sufficiently complete to determine that the property is needed for the proposed right of way and to describe the limits of the property acquisition." R. p. 139, 143-145; 23 C.F.R. § 710.503(c)(2)("impending project.") NCDOT was buying properties well before both FEIS (1996 and 2007) and the approval of the ROD (Feb. 2008). *Case 3* at 500. Marshallberg Road lots in the Eastern Loop (3226A003 etc.) were bought in 1998. R. p. 136. Over 160 Eastern Loop properties were purchased before the November 2008 Map filing. R. p. 127-137.

ARGUMENT IN REPLY

Appellants seek review of the Court of Appeals' ruling because an "all practical use" analysis is inapplicable to the Map's pre-condemnation purpose and NCDOT's actions. Class certification was evaluated using the wrong test. NCDOT cannot defend the use of this test by relying on "planning" or its remedies - Hardship buyouts for ill and financially distressed and a variances or three-year wait for building permits. NCDOT's "ends" is cost-control and its remedies are unconstitutional.

A. NCDOT FAILS TO EXPLAIN HOW IT IS PROPERLY EXERCISING ITS POLICE POWERS OVER APPELLANTS' PROPERTIES.

1. **NCDOT Admits to Obtaining A Public Benefit, Not Preventing Public Harm.** (Appellee Brief p. 26-29).

The Map is used in anticipation of condemnation. NCDOT restricts development to control acquisition costs when NCDOT

ultimately starts condemnations. Until "North Carolina get(s) enough money to build the road" (whenever that may be), Owners are left in the Protected Corridor. Meanwhile, Appellants witness NCDOT buy neighboring properties, demolish or rent nearby homes and turn neighborhoods into NCDOT rental communes. Without inverse condemnation, medical or financial misfortune offers Appellants the only exit from the Beltway and then NCDOT will make non-negotiable offers without compensation for the 16 year "option" placed on their property. R.p. 141.

The Map does not balance the competing interests of neighbors, address a public harm or concern health, morals, safety or general welfare. NCDOT is unconcerned about owners operating bars near schools, harming shorelines by building in wetlands, building in flood zones or distracting drivers with moving/flashing signs. *Finch* and the "all practical use" progeny deal with regulations that balance private use against community interests, not schemes depressing prices for public benefit.

The Map was never a "planning tool," even 16 years ago when it was filed after the ROD was approved. NCDOT planned, acquired and built thousands of miles of roads without Protected Corridors. Planning is the NEPA / EIS process, a public meeting, proposing alternate routes, a survey, geology study, a map in the planning office. The CFR section governing advanced purchases says, "impending project" <u>not</u> "planned project." 23

C.F.R. § 710.503(c)(2). The Map is a crutch that permits NCDOT to delay and buy the unfortunate at advantageous prices.[4]

NCDOT's defense of the Map ignores planning and trumpets cost savings: "Limiting new development ... reduces the number of people and businesses that may be relocated when and if the project is built. Future right of way acquisition costs are reduced because new construction in curtailed." App. Br. p. 27. NCDOT affirms that owners are not allowed to improve their property because that activity impacts acquisition costs. See App. Br. p. 5. ("inaction might lead to excessive costs").

NCDOT describes a public benefit: lower costs. Extracting this benefit implicates the State's eminent domain power and demands analysis focused on interference with property rights, not "all practical use." Conversely stated, the Map achieves an illegitimate "ends." This Beltway-wide misuse of the State's police powers is applicable to all owners and alone would support class certification.

2. Thrift Is Not A Constitutionally Permissible Exercise of the State's Police Power.

Other jurisdictions do not permit the "police powers" to be used to game the system. *Hillcrest Prop., LLP v. Pasco Cnty.*,

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[4] In contrast, Tennessee mandates that property in an official map shall be removed from the map unless acquisition or construction starts in seven years. Acquisition of mapped property "shall proceed as expeditiously as feasible." Tenn. Code Ann. § 54-18-208. Building permits will issue in 40 days unless property is purchased or condemned. Tenn. Code Ann. § 54-18-215.

2013 WL 1502627 (M.D. Fla. Apr. 12, 2013), struck down a scheme whereby owners who wanted building permits on land adjacent to the planned roadway expansion could only get a permit if the owner donated land in the planned roadway to the county. The County attorney "proudly declares, 'The right of way preservation ordinance... saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages.'" Id. p.*1. "Although the thrifty accomplishment of a legitimate objective is a proper governmental purpose, thrifty accomplishment of a legitimate objective by the circumvention of the constitutional guarantees attendant to eminent domain is neither a legitimate objective nor a proper governmental purpose." Id. p. *16-17.

In San *Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex. App. 1975), the local government used zoning laws to prevent the development on property intended for future acquisition to control future acquisition cost. *Id.* at 270. The court disapproved of this scheme.

> But where the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government, the situation is patently different... It is no longer an impartial weigher of the merits of competing interest among its citizens. *Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its*

> *citizens, the scales will tip in its own favor.* The social desirability of leaving government free to seek its own enrichment at the expense of those whom it governs under the guise that it has the power to regulate harmful conduct is not readily apparent. *To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.*

Id. at 273-274 (emphasis added)

In *Lackman v. Hall,* 364 A.2d 1244 (Del.Ch.Ct. 1976), the court struck down a statute that allowed designation of future road right-of-ways as "corridor routes," which put development restrictions on properties. The purpose of the "corridor route" restrictions was to save the state and its taxpayers money for the acquisition of land for highway expansion.

> Zoning cannot be used as a substitute for eminent domain proceedings to defeat the payment of just compensation by depressing (property) values and so reducing the amount of damages to be paid when private property is to be taken for public use.
>
> The Corridor Route legislation, . . . not only has this unacceptable regulation of property values as its primary purpose, *it goes even further by virtue of the ax it hands the State to hold over the head of selected property owners.* While it is undoubtedly an administrative planning act, *it is also one which contemplates condemnation.*

Lackman at 1251-1253 (emphasis added). Saving NCDOT money on Owners' backs is not a legitimate purpose. Again, NCDOT's "ends" are improper for all owners, supporting a class.

3. NCDOT Has No Police Powers Outside Its Right of Way.

NCDOT cites to *Wofford, Barnes, Terminal Warehouse Corp.,* and *Smith* for the proposition that NCDOT has police powers. App. Br. p. 26-27. NCDOT cites cases that do not deal with police powers over privately owned property, but over use in or near NCDOT right of way. NCDOT's police powers exist only when it regulates use in or near property it has acquired. See N.C.G.S. § 136-18(NCDOT's powers do not include regulating private property). NCDOT has no police powers; it has condemnation powers. The Appellants' claims require an eminent domain analysis not police powers.

4. The "Practical Use / Reasonable Value" Analysis Is Inappropriate When State is Extracting Public Benefit and Exercising Eminent Domain Power.

NCDOT cannot defend the Map as a valid exercise of police powers, thus an analysis focused on "all practical use, reasonable value" is inappropriate. *"Ends-Means"* cases (*Finch, Weeks etc)*) involve the government balancing the concerns of community neighbors against each other. North Carolina "Ends-Means" cases do not involve property targeted for acquisition for an "impending project." Here, NCDOT is not neutral; it wants lower costs for itself (and public taxpayers). NCDOT must pay

for that benefit. Thus, the proper test focuses on NCDOT's interference with fundamental property rights to possess use, enjoy and dispose of one's property.

NCDOT's Hardship Program and its motions (R.p.66-114) had no concern with "practical use" or "reasonable value" and only analyze lack of marketability. This is a substantial interference with property rights test. In practice, NCDOT recognizes the Map is not an exercise of police powers but an act of eminent domain interfering with owners' property rights.

There should not be two classes of owners and two tests in the Beltway: hardship applicants ("marketability" test) versus inverse condemnation plaintiffs ("practical use" test). A homeowner or landlord should not be doomed to the Beltway for another decade or more simply because their rental property or house has "practical use." Hardship sellers and Appellants should have the same test which examines interference with fundamental property rights.

B. THE DE FACTO TAKING CLAIM DOES NOT CHALLENGE NCDOT'S PREROGATIVE TO LEGITMATELY PLAN WITHOUT LIABILITY.

Appellants' de facto taking claim asserts that an inverse condemnation claim exists if NCDOT substantially interferes with the owners' property rights without physical invasion. NCDOT paints "de facto taking" as tantamount to turning all planning into takings claims. Nonsense. Appellants do not contest

legitimate and accepted planning activities: land surveys, route alternatives, public meetings, announcements, staking property and planning maps. Appellants contest delay and discrimination in NCDOT purchases. While NCDOT has discretion in how it exercises its duties, such discretion is not unfettered. *Drewry v. NCDOT,* 168 N.C. App. 332, 338, 607 S.E.2d 342, 346-47 (2005) (NCDOT vested with broad discretion in carrying out its duties ..."unless [its] action is so clearly unreasonable as to amount to oppressive and manifest abuse"). NCDOT should not have indefinite time to plod along, acquire some owners but not others, without liability. See *Lincoln Loan Co. v. State Hwy Comm'n,* 545 P.2d 105 (Ore. 1976)(approved inverse claims based upon combination of acts - nearby acquisitions, long delay, restrictions, rent decreases and demolitions - that result in substantial interference with use and enjoyment of property).

Appellants did not file this claim when NCDOT was ostensibly planning in 1992, 1996 or 1997. NCDOT has finished planning and is just looking for funding. This de facto claim was filed after NCDOT: 1) finished the NEPA process, 2) officially marked Appellants' properties for acquisition, 3) bought hundreds of properties, 4) tore down structures and 5) bluntly announced: "do not improve your property" and "wait ten more years." Appellants use the Vienna Baptist purchase and subsequent demolition for several reasons. The church cannot

qualify under the Hardship Program ("properly minister" is not a criteria). It highlights the 454 purchased properties. But mainly, by spending $1.6m of scarce public money to tear down a church, NCDOT signals it is firmly committed to the Beltway.

What remedy, other than Hardship, would NCDOT offer owners confronted with years of government neglect and indifference? More waiting? North Carolina has not addressed where the line might be, but other states have found takings after three years once oppressive conduct begins and values impacted. Imposing de facto taking liability on NCDOT for conduct rendering Owners' property unmarketable re-balances the burdens between owners and NCDOT. NCDOT can better shoulder that burden as it controls the project. Otherwise, NCDOT procrastinates and plays coy without consequence, all to the detriment of innocent owners. Ironically, the outcome NCDOT seeks to avoid is being ordered to buy property it intends to buy anyway. Appellants asked to be bought now, not ten or more years from now. The case should be remanded for class consideration that NCDOT may be liable for a taking if it has substantially interfered with property rights.

C. NCDOT'S MAP AND PLANNING CASES ARE NOT APPLICABLE AS BELTWAY MAP IS NO MERE MAP AND NOT MERE PLANNING.

NCDOT cites *Browning*, *Martin*, *Tucker* and *Morvan*, among other cases (App. Br. p. 30-31) for the proposition that maps and plans do not result in a taking. Appellants agree that mere

maps and mere planning do not support takings claims. NCDOT's cases involve mere maps and do ***not*** deal with maps or plans filed in the register deeds and cross indexed (N.C.G.S. § 136-44.50(b)), that are depicted in tax maps (Id.), that impose un-expiring development restrictions or 454 hardship acquisitions due to the "impending project." Appellants are *not* confronting mere maps and mere planning. NCDOT's cases fall flat.

Penn v. Carolina Virginia (App. Br. p. 29) likewise has no traction here. *Penn*, from March 1950, involved a 1949 law and the posting of survey marks and stakes on property. There was a one year delay was involved, no recorded map, 16-year delay, restrictions, acquisitions, demolitions or rental properties.

Tampa-Hillsborough (App. Br. p. 33) has none of the same course of conduct present here. Like *Penn*, *Tampa* did not involve 16 year delay, announcements of more delays, 454 acquisitions, demolitions, and over 100 rental properties (R.p. 123-126). *Tampa*, which is difficult to reconcile with *Joint Ventures*, wrongly focuses on the exercise of police powers when the Florida DOT was obtaining a public benefit by imposing restrictions to control acquisition costs.

D. APPELLANTS ARE COMPLAINING ABOUT PROPERTY RIGHTS NOT PROPERTY DEVALUATION.

Appellee asserts that Appellants are complaining about a decline in their property values as a result of both the Beltway

and Hardship acquisitions of their neighbors. NCDOT cites *Carolina Power & Light*, *Twitty*, and *Bd. Of Transp. v. Brown* to support this position. App. Br. p. 35-36. These cases deal with properties that are not in the project right of way or targeted for acquisition. The case properly hold, and Appellants' agree, there is no constitutional right to the value of one's property.

Again, NCDOT's cases offer nothing for property in the Beltway. Appellants' properties, and all proposed class members' properties, are in the Protected Corridor and are targeted for acquisition. Appellants' counsel has told countless owners: "It's better to be right in the Beltway, than right beside it. If you are just near the Beltway you have no claim even though your house value is worth less."

Appellants complain that their properties are unmarketable because NCDOT has clearly demonstrated that it will condemn their property. If properties are unmarketable and cannot be sold, as 454 Hardship sellers demonstrated to NCDOT, then it follows that the Appellants' property values have indeed declined. This unmarketable condition, occasioned by NCDOT's actions and delays, highlights why the provision for obtaining building permits and variances is a red herring waved before the Court by NCDOT. A building permit or variance does not cure the constitutional injury: substantial interference with property rights. This unmarketable condition also highlights why the

"all practical use" test affirmed by the Court of Appeals is inappropriate to a non-zoning takings case. Homeowners, landlords, and farmers can use their land but they cannot make economically sound improvements or sell for a fair price. NCDOT, the author of the mistakes and delays in the Beltway, should not benefit from the misfortune and distress it visits on the Appellants and Property Owners.

CONCLUSION

The Appellants' taking allegations require both an analysis based on a substantial interference with fundamental property rights and an endorsement of the de facto taking claim. The Court will not be dictating to NCDOT how to plan, when to buy or how to build roads. But injurious delay, oppressive behavior and gross indifference should afford owners a remedy and expose NCDOT to liability. NCDOT wants the Owners' properties. It should buy them, not trap them.

This the 3rd day of May 2013.

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CERTIFICATE OF SERVICE
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This is to certify that the undersigned has on May 3, 2013 served this Appellants' Brief in the above-entitled action upon all other parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, properly addressed to:

ADDRESSEE:

Dahr Joseph Tanoury
Assistant Attorney General
N. C. Department of Justice
1505 Mail Service Center
Raleigh, NC 27699-1505

This the 3rd day of May 2013.

Matthew H. Bryant

§ 136-44.50. Transportation corridor official map act, NC ST § 136-44.50

West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 2E. Transportation Corridor Official Map Act (Refs & Annos)

N.C.G.S.A. § 136-44.50

§ 136-44.50. Transportation corridor official map act

Currentness

(a) A transportation corridor official map may be adopted or amended by any of the following:

(1) The governing board of any local government for any thoroughfare included as part of a comprehensive plan for streets and highways adopted pursuant to G.S. 136-66.2 or for any proposed public transportation corridor included in the adopted long-range transportation plan.

(2) The Board of Transportation, or the governing board of any county, for any portion of the existing or proposed State highway system or for any public transportation corridor, to include rail, that is in the Transportation Improvement Program.

(3) Regional public transportation authorities created pursuant to Article 26 of Chapter 160A of the General Statutes or regional transportation authorities created pursuant to Article 27 of Chapter 160A of the General Statutes for any portion of the existing or proposed State highway system, or for any proposed public transportation corridor, or adjacent station or parking lot, included in the adopted long-range transportation plan.

(4) The North Carolina Turnpike Authority for any project being studied pursuant to G.S. 136-89.183.

(5) The Wilmington Urban Area Metropolitan Planning Organization for any project that is within its urbanized boundary and identified in G.S. 136-179.

Before a city adopts a transportation corridor official map that extends beyond the extraterritorial jurisdiction of its building permit issuance and subdivision control ordinances, or adopts an amendment to a transportation corridor official map outside the extraterritorial jurisdiction of its building permit issuance and subdivision control ordinances, the city shall obtain approval from the Board of County Commissioners.

(a1) No property may be regulated under this Article until:

(1) The governing board of the city, the county, the regional transportation authority, the North Carolina Turnpike Authority, or the Department of Transportation has held a public hearing in each county affected by the map on the proposed map or amendment. Notice of the hearing shall be provided:

a. By publication at least once a week for four successive weeks prior to the hearing in a newspaper having general circulation in the county in which the transportation corridor to be designated is located.

Next

b. By two week written notice to the Secretary of Transportation, the Chairman of the Board of County Commissioners, and the Mayor of any city or town through whose corporate or extraterritorial jurisdiction the transportation corridor passes.

c. By posting copies of the proposed transportation corridor map or amendment at the courthouse door for at least 21 days prior to the hearing date. The notice required in sub-subdivision a. above shall make reference to this posting.

d. By first-class mail sent to each property owner affected by the corridor. The notice shall be sent to the address listed for the owner in the county tax records.

(1a) The transportation corridor official map has been adopted or amended by the governing board of the city, the county, the regional transportation authority, the North Carolina Turnpike Authority, or the Department.

(2) A permanent certified copy of the transportation corridor official map or amendment has been filed with the register of deeds. The boundaries may be defined by map or by written description, or a combination thereof. The copy shall measure approximately 20 inches by 12 inches, including no less than one and one-half inches binding space on the left-hand side.

(3) The names of all property owners affected by the corridor have been submitted to the Register of Deeds.

(b) Transportation corridor official maps and amendments shall be distributed and maintained in the following manner:

(1) A copy of the official map and each amendment thereto shall be filed in the office of the city clerk and in the office of the district engineer.

(2) A copy of the official map, each amendment thereto and any variance therefrom granted pursuant to G.S. 136-44.52 shall be furnished to the tax supervisor of any county and tax collector of any city affected thereby. The portion of properties embraced within a transportation corridor and any variance granted shall be clearly indicated on all tax maps maintained by the county or city for such period as the designation remains in effect.

(3) Notwithstanding any other provision of law, the certified copy filed with the register of deeds shall be placed in a book maintained for that purpose and cross-indexed by number of road, street name, or other appropriate description. The register of deeds shall collect a fee of five dollars ($5.00) for each map sheet or page recorded.

(4) The names submitted as required under subdivision (a1)(3) of this section shall be indexed in the "grantor" index by the Register of Deeds.

(c) Repealed by Laws 1989, c. 595, § 1.

(d) Within one year following the establishment of a transportation corridor official map or amendment, work shall begin on an environmental impact statement or preliminary engineering. The failure to begin work on the environmental impact

statement or preliminary engineering within the one-year period shall constitute an abandonment of the corridor, and the provisions of this Article shall no longer apply to properties or portions of properties embraced within the transportation corridor. A local government may prepare environmental impact studies and preliminary engineering work in connection with the establishment of a transportation corridor official map or amendments to a transportation corridor official map. When a city or county prepares a transportation corridor official map for a street or highway that has been designated a State responsibility pursuant to G.S. 136-66.2, the environmental impact study and preliminary engineering work shall be reviewed and approved by the Department of Transportation. An amendment to a corridor shall not extend the one-year period provided by this section unless it establishes a substantially different corridor in a primarily new location.

(e) The term "amendment" for purposes of this section includes any change to a transportation corridor official map, including:

(1) Failure of the Department of Transportation, the North Carolina Turnpike Authority, a city, a county, or a regional transportation authority to begin work on an environmental impact statement or preliminary engineering as required by this section; or

(2) Deletion of the corridor from the transportation corridor official map by action of the Board of Transportation, the North Carolina Turnpike Authority, or deletion of the corridor from the long-range transportation plan of a city, county, or regional transportation authority by action of the city, county, or regional transportation authority governing Board.

(f) The term "transportation corridor" as used in this Article does not include bikeways or greenways.

Credits

Added by Laws 1987, c. 747, § 19. Amended by Laws 1989, c. 595, § 1; S.L. 1998-184, § 1, eff. Nov. 1, 1998; S.L. 2005-275, § 1, eff. Aug. 12, 2005; S.L. 2005-418, § 9, eff. Jan. 1, 2006; S.L. 2006-237, § 1, eff. Aug. 13, 2006; S.L. 2008-180, § 3, eff. Aug. 4, 2008; S.L. 2009-332, §§ 1, 2, eff. Aug. 1, 2009; S.L. 2009-570, § 44, eff. Aug. 28, 2009.

Notes of Decisions (2)

N.C.G.S.A. § 136-44.50, NC ST § 136-44.50

West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 2E. Transportation Corridor Official Map Act (Refs & Annos)

N.C.G.S.A. § 136-44.51

§ 136-44.51. Effect of transportation corridor official map

Currentness

(a) After a transportation corridor official map is filed with the register of deeds, no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor. The Secretary of Transportation or his designee, the director of a regional public transportation authority, or the director of a regional transportation authority, as appropriate, shall be notified within 10 days of all submittals for corridor map determination, as provided in subsections (b) and (c) of this section.

(b) In any event, no application for building permit issuance or subdivision plat approval for a tract subject to a valid transportation corridor official map shall be delayed by the provisions of this section for more than three years from the date of its original submittal to the appropriate local jurisdiction. A submittal to the local jurisdiction for corridor map determination shall require only the name of the property owner, the street address of the property parcel, the parcel number or tax identification number, a vicinity map showing the location of the parcel with respect to nearby roads and other landmarks, a sketch of the parcel showing all existing and proposed structures or other uses of the property, and a description of the proposed improvements. If the impact of an adopted corridor on a property submittal for corridor map determination is still being reviewed after the three-year period established pursuant to this subsection, the entity that adopted the transportation corridor official map affecting the issuance of building permits or subdivision plat approval shall issue approval for an otherwise eligible request or initiate acquisition proceedings on the affected properties. If the entity that adopted the transportation corridor official map has not initiated acquisition proceedings or issued approval within the time limit established pursuant to this subsection, an applicant within the corridor may treat the real property as unencumbered and free of any restriction on sale, transfer, or use established by this Article.

(c) No submittal to a local jurisdiction for corridor map determination shall be construed to be an application for building permit issuance or subdivision plat approval. The provisions of this section shall not apply to valid building permits issued prior to August 7, 1987, or to building permits for buildings and structures which existed prior to the filing of the transportation corridor, provided the size of the building or structure is not increased and the type of building code occupancy as set forth in the North Carolina Building Code is not changed.

Credits

Added by Laws 1987, c. 747, § 19. Amended by S.L. 1998-184, § 1, eff. Nov.1, 1998; S.L. 2011-242, § 1, eff. Dec. 1, 2011.

N.C.G.S.A. § 136-44.51, NC ST § 136-44.51

West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 2E. Transportation Corridor Official Map Act (Refs & Annos)

N.C.G.S.A. § 136-44.53

§ 136-44.53. Advance acquisition of right-of-way within the transportation corridor

Currentness

(a) After a transportation corridor official map is filed with the register of deeds, a property owner has the right of petition to the filer of the map for acquisition of the property due to an imposed hardship. The Department of Transportation, the regional public transportation authority, the regional transportation authority, or the local government that initiated the transportation corridor official map may make advanced acquisition of specific parcels of property when that acquisition is determined by the respective governing board to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner. The procedure established by a regional public transportation authority or a regional transportation authority pursuant to subsection (b) of this section shall provide for a hearing de novo by the Department of Transportation for any request for advance acquisition due to hardship that is denied by an authority. All hearings held by the Department under this subsection shall be conducted in accordance with procedures established by the Department pursuant to subsection (b) of this section. Any decision of the Department pursuant to this subsection shall be final and binding. Any property determined eligible for hardship acquisition shall be acquired within three years of the finding or the restrictions of the map shall be removed from the property.

(b) Prior to making any advanced acquisition of right-of-way under the authority of this Article, the Board of Transportation or the respective governing board which initiated the transportation corridor official map shall develop and adopt appropriate policies and procedures to govern the advanced acquisition of right-of-way and to assure that the advanced acquisition is in the best overall public interest.

(c) When a local government makes an advanced right-of-way acquisition of property within a transportation corridor official map for a street or highway that has been determined to be a State responsibility pursuant to the provisions of G.S. 136-66.2, the Department of Transportation shall reimburse the local government for the cost of any advanced right-of-way acquisition at the time the street or highway is constructed. The Department of Transportation shall have no responsibility to reimburse a municipality for any advanced right-of-way acquisition for a street or highway that has not been designated a State responsibility pursuant to the provisions of G.S. 136-66.2 prior to the initiation of the advanced acquisition by the city. The local government shall obtain the concurrence of the Department of Transportation in all instances of advanced acquisition.

(d) In exercising the authority granted by this section, a local government is authorized to expend its funds for the protection of rights-of-way shown on a duly adopted transportation corridor official map whether the right-of-way to be acquired is located inside or outside the municipal corporate limits.

Credits

Added by Laws 1987, c. 747, § 19. Amended by S.L. 1998-184, § 1, eff. Nov. 1, 1998; S.L. 2008-180, § 5, eff. Aug. 4, 2008; S.L. 2008-187, § 47.7, eff. Aug. 7, 2008.

West's North Carolina General Statutes Annotated
Chapter 136. Transportation
Article 2E. Transportation Corridor Official Map Act (Refs & Annos)

N.C.G.S.A. § 136-44.52

§ 136-44.52. Variance from transportation corridor official map

Currentness

(a) The Department of Transportation, the regional public transportation authority, the regional transportation authority, or the local government which initiated the transportation corridor official map shall establish procedures for considering petitions for variance from the requirements of G.S. 136-44.51.

(b) The procedure established by the State shall provide for written notice to the Mayor and Chairman of the Board of County Commissioners of any affected city or county, and for the hearing to be held in the county where the affected property is located.

(c) Local governments may provide for petitions for variances to be heard by the board of adjustment or other boards or commissions which can hear variances authorized by G.S. 160A-388. The procedures for boards of adjustment shall be followed except that no vote greater than a majority shall be required to grant a variance.

(c1) The procedure established by a regional public transportation authority or a regional transportation authority pursuant to subsection (a) of this section shall provide for a hearing de novo by the Department of Transportation for any petition for variance which is denied by the regional public transportation authority or the regional transportation authority. All hearings held by the Department of Transportation under this subsection shall be conducted in accordance with procedures established by the Department of Transportation pursuant to subsection (a) of this section.

(d) A variance may be granted upon a showing that:

(1) Even with the tax benefits authorized by this Article, no reasonable return may be earned from the land; and

(2) The requirements of G.S. 136-44.51 result in practical difficulties or unnecessary hardships.

Credits
Added by Laws 1987, c. 747, § 19. Amended by S.L. 1998-184, § 1, eff. Nov. 1, 1998; S.L. 2008-180, § 4, eff. Aug. 4, 2008.

N.C.G.S.A. § 136-44.52, NC ST § 136-44.52

23 C.F.R. § 710.503(c).

Code of Federal Regulations]
[Title 23, Volume 1]
[Revised as of April 1, 2009]
From the U.S. Government Printing Office via GPO Access
[CITE: 23CFR710.503]

[Page 377-378]

TITLE 23--HIGHWAYS

CHAPTER I--FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 710_RIGHT-OF-WAY AND REAL ESTATE--Table of Contents

Subpart E_Property Acquisition Alternatives

Sec. 710.503 Protective buying and hardship acquisition.

(a) General conditions. Prior to the STD obtaining final environmental approval, the STD may request FHWA agreement to provide reimbursement for advance acquisition of a particular parcel or a limited number of parcels, to prevent imminent development and increased costs on the preferred location (Protective Buying), or to alleviate hardship to a property owner or owners on the preferred location (Hardship Acquisition), provided the following conditions are met:

(1) The project is included in the currently approved STIP;

(2) The STD has complied with applicable public involvement requirements in 23 CFR parts 450 and 771;

(3) A determination has been completed for any property subject to the provisions of 23 U.S.C. 138; and

(4) Procedures of the Advisory Council on Historic Preservation are completed for properties subject to 16 U.S.C. 470(f) (historic properties).

(b) Protective buying. The STD must clearly demonstrate that development of the property is imminent and such development would limit future transportation choices. A significant increase in cost may be considered as an element justifying a protective purchase.

(c) Hardship acquisitions. The STD must accept and concur in a request for a hardship acquisition based on a property owner's written submission that:

(1) Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to others; and

(2) 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.

(d) Environmental decisions. Acquisition of property under this section shall not influence the environmental assessment of a project, including the decision relative to the need to construct the project or the selection of a specific location.

West's Tennessee Code Annotated
Title 54. Highways, Bridges and Ferries (Refs & Annos)
Chapter 18. Highway Planning (Refs & Annos)
Part 2. Plans for Street and Highway Systems

T. C. A. § 54-18-208

§ 54-18-208. Removal from official maps; time

Effective: August 14, 2008
Currentness

(a) The making or certifying of a map by the planning commission or the adoption or amendment of an official map by the legislative body shall not constitute the opening or establishment of any highway or the taking or acceptance of any land for highway purposes.

(b) Any highway placed on the official map shall be removed from the map unless the governing body or the department of transportation, as the case may be, has begun acquisition of right-of-way, begun the construction of the highway, or begun the widening or other planned improvement of the highway within the following time limits:

(1) In the case of federal interstate and defense highways, by the end of 1972;

(2) In the case of other state highways, a period of seven (7) years; or

(3) In the case of local highways, a period of three (3) years.

(c) Upon adoption of an official map, the advance acquisition of rights-of-way for those streets on the official map shall proceed as expeditiously as feasible.

Credits
Impl. am. by 1959 Pub.Acts, c. 9, § 3; 1965 Pub.Acts, c. 251, § 8; impl. am. by 1972 Pub.Acts, c. 829, § 7; 1981 Pub.Acts, c. 264, § 12.

Formerly § 54-2208; § 54-18-209.

T. C. A. § 54-18-208, TN ST § 54-18-208
Current through end of 2012 Second Reg. Sess.

End of Document

West's Tennessee Code Annotated
Title 54. Highways, Bridges and Ferries (Refs & Annos)
Chapter 18. Highway Planning (Refs & Annos)
Part 2. Plans for Street and Highway Systems

T. C. A. § 54-18-215

§ 54-18-215. Delay in granting building permits

Effective: August 14, 2008
Currentness

(a) Should the board find and by resolution declare that the construction of a building will substantially destroy the objectives of the official map, the board may delay the granting of a permit for a period not to exceed forty (40) days from the date of adoption of the resolution, during which time the board shall be given a further opportunity to negotiate with the applicant and attempt to reach agreement, to be specified in a permit, as to the location, area, height, character and other details of the proposed construction so that the objectives of the official map may be met.

(b) During this period, the proper highway officials may also negotiate for the purchase of the property or prepare for condemnation.

(c)(1) After the expiration of the forty (40) days, the board shall issue the permit unconditionally; or in the event the board refuses to issue the permit upon demand, the applicant may construct the building without the permit required by this part to ensure preservation of property rights.

(2) However, any building costing less than three thousand dollars ($3,000) shall receive a permit to become effective forty (40) days after receipt of the application by the board, and the hearing specified in § 54-18-213 shall not be held in connection with the applications for the permits.

Credits
1965 Pub.Acts, c. 251, § 13.

Formerly § 54-2215; § 54-19-115.

T. C. A. § 54-18-215, TN ST § 54-18-215
Current through end of 2012 Second Reg. Sess.

End of Document

Not Reported in F.Supp.2d, 2002 WL 1009725 (M.D.N.C.)
(Cite as: 2002 WL 1009725 (M.D.N.C.))

United States District Court, M.D. North Carolina.
NORTH CAROLINA ALLIANCE FOR TRANSPORTATION REFORM, INC.; and Friends of Forsyth County, an unincorporated association; Plaintiffs,
v.
UNITED STATES DEPARTMENT OF TRANSPORTATION; Rodney E. Slater, Secretary of United States Department of Transportation; Federal Highway Administration; Kenneth R. Wykle, Administrator, Federal Highway Administration; Nicholas L. Graf, Division Administrator, Federal Highway Administration; North Carolina Department of Transportation; and E. Norris Tolson, Secretary, North Carolina Department of Transportation; Defendants.
No. CIV.1:99-CV-00134.

Feb. 26, 2002.

ORDER

BULLOCK, District J.

*1 For the reasons stated in a memorandum opinion filed contemporaneously herewith, IT IS ORDERED that the court's previous order of dismissal, entered June 29, 1999, and amended by orders entered on April 3, 2000, and January 2, 2001, is AMENDED to provide that Defendants, without violating the terms of the court's previous orders may, upon successful negotiation of an acceptable purchase price, acquire under applicable federal and state hardship regulations and procedures the portion of the property of Harry and Brenda Harper, Mr. and Mrs. James Tally, and Lawrence Hicks, deceased, located in the previously proposed corridor of Project R2247. The court will DEFER a decision on the hardship application of James and Peggy Yale for a period of thirty (30) days.

IT IS FURTHER ORDERED that the court's previous orders, as noted above, are also AMENDED to provide that Defendants, without violating the term's of the court's previous orders, may, upon successful negotiation of an acceptable purchase price, acquire under applicable federal and state hardship regulations and procedures the portion of the property of Asbury G. and Louise Kiger, Richard Love, Helen and Patti Transou, Linda Foster, Thomas Wall, Douglas Norman, J. Ronald Logan, Mr. and Mrs. John Lee Shouse, Jr., and Mark and Robin Henley, located in the previously proposed corridor of Project R2247.

MEMORANDUM OPINION

This matter is before the court on a motion by Defendants North Carolina Department of Transportation ("NCDOT") and E. Norris Tolson [FN1] (hereinafter "State Defendants") to amend the order entered by this court on June 29, 1999, pursuant to Federal Rules of Civil Procedure 60(b)(5) and 65(b)(6). For the following reasons the motion will be granted in part and deferred in part for thirty days.

FN1. Plaintiffs named E. Norris Tolson, then Secretary of NCDOT, as a defendant in their complaint. Tolson resigned, and David McCoy was appointed as his successor. Subsequently, Lyndo Tippett succeeded McCoy.

BACKGROUND

This suit commenced on February 18, 1999, when Plaintiffs North Carolina Alliance for Transportation Reform, Inc., and Friends of Forsyth County ("Plaintiffs") filed a complaint seeking to enjoin the construction of a proposed beltway section around Winston-Salem, North Carolina. Plaintiffs alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the North Carolina Environmental Policy Act ("NCEPA"), N.C. Gen.Stat. § 113A-1 *et seq.* These allegations were based on the purportedly inadequate preparation of the final environmental impact statement ("FEIS") and improper approval of the record of decision ("ROD") for the beltway section.

Not Reported in F.Supp.2d, 2002 WL 1009725 (M.D.N.C.)
(Cite as: 2002 WL 1009725 (M.D.N.C.))

Shortly after commencement of the lawsuit, Defendants United States Department of Transportation and Federal Highway Administration revoked their approval of the beltway section, and on June 21, 1999, all parties jointly moved for dismissal. On June 29, 1999, this court issued an order of dismissal and prohibited Defendants from acquiring property as right-of-way for NCDOT Project R2247 ("the Project"), formerly called the "Western Section of the Winston-Salem Beltway," except for certain listed parcels.

FACTS

*2 On August 22, 2001, State Defendants contacted counsel for Plaintiffs concerning the hardship acquisition of sixteen properties located in the previously established corridor of the Project. On October 31, 2001, Plaintiffs notified State Defendants that they would agree to the acquisition of eight of the properties, oppose three, and could not consent to five of the acquisitions without provision of additional information. Specifically, Plaintiffs sought additional financial information about five property owners and information concerning the total number of parcels and residences that were in the corridor and the number of each that the State has acquired.

State Defendants responded that they would not provide the requested information. State Defendants explained that they were not providing the financial information because the five disputed requests for hardship acquisitions were based on medical reasons and that they did not have the information concerning the number of parcels and residences. Furthermore, State Defendants note that the federal regulations provide that acquisition of property under the hardship acquisition procedures "shall not influence the environmental assessment of a project, including the decision relative to the need to construct the project or the selection of a specific location." 23 C.F.R. § 710.503(d). Therefore, on December 20, 2001, State Defendants moved this court to amend the June 29, 1999, order pursuant to Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6).

State Defendants seek to acquire the eight properties to which Plaintiffs do not oppose acquisition and the five properties about which Plaintiffs requested more information.[FN2] The eight properties to which Plaintiffs do not oppose acquisition belong to: Asbury G. and Louise Kiger; Richard Love; Helen and Patti Transou; Linda Foster; Thomas Wall; Douglas Norman; J. Ronald Logan; and Mr. and Mrs. John Lee Shouse, Jr. The five properties about which Plaintiffs have requested more information belong to: Henry and Brenda Harper; Mr. and Mrs. James Tally; Mark and Robin Henley; Lawrence Hicks; [FN3] and James and Peggy Yale. Because Plaintiffs maintain that they cannot consent to the acquisition of these properties without additional information, Plaintiffs oppose the acquisition of four of these five properties.[FN4]

FN2. State Defendants do not seek to acquire the three properties to which Plaintiffs opposed acquisition in their letter dated October 31, 2001 (Hubbard Realty, Harris Triad Homes, Inc., and Bob and Beth Faircloth).

FN3. At the time Plaintiffs were reviewing Hicks' request, Hicks was alive. Hicks has subsequently died, and his executor is pursuing the hardship application.

FN4. Plaintiffs now consent to the acquisition of Mark and Robin Henley's property.

DISCUSSION

Federal Rule of Civil Procedure 60(b) provides in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b)(5) and 60(b)(6). The Fourth Circuit has indicated that *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), should govern with respect to the modification of a consent order designed to remedy ongoing wrongdoing and to ensure present and future compliance with federal law.[FN5] *Rufo* states that a party seeking modification has the burden of establishing that a significant change in

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circumstances warrants revision. *Id.* at 383. Changed factual circumstances may warrant modification of a consent decree if (1) the factual changes "make compliance with the decree substantially more onerous"; (2) "a decree proves to be unworkable because of unforeseen obstacles"; or (3) "enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384.

> FN5. *Rufo* concerned the modification of a consent decree; however, modification is the same regardless of whether the decree is the product of litigation or consent. As the Supreme Court noted in *Rufo,* a consent decree "is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo,* 502 U.S. at 378 (citation omitted).

*3 The Federal Highway Administration's hardship regulations provide:

The [State Transportation Department] must accept and concur in a request for a hardship acquisition based on a property owner's written submission that:

(1) Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to others; and

(2) 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.

23 C.F.R. § 710.503(c).

Harry and Brenda Harper presented a hardship application based upon medical hardship. Brenda Harper suffers from severe migraines and stress-related high blood pressure. The Harpers provided a letter from their doctor showing that the uncertainty of the sale of their home has exacerbated Mrs. Harper's condition and that she would likely improve if the State bought their home, thus allowing them to move. The Harpers' hardship application also included an opinion from a real estate broker that their home is not now marketable. Because the Harpers have documented a significant change in circumstances and a valid medical reason that creates an undue hardship and have established that the property is unmarketable, the court will amend the June 29, 1999, order and grant their hardship application.

Mr. and Mrs. James Tally presented a hardship application that indicates that they have made plans and a significant financial investment to move to a newer home for medical reasons. A letter from Dr. Thomas Hinson indicates that Mrs. Tally suffers from chronic persistent asthma and allergic rhinitis and that the Tally's current home is old and, for that reason, very susceptible to dust mites and mold infestation. Dr. Hinson believes moving to a newer home would benefit Mrs. Tally's health. The Tallys' hardship application also included an opinion from a realtor that their home is now unmarketable. The Tallys have documented a significant change in circumstances and a valid medical reason that create an undue hardship and have established that the property is unmarketable, and therefore the court will amend the June 29, 1999, order and grant the hardship application.

James and Peggy Yale submitted a hardship application based upon both medical and financial hardship. James Yale is sixty-nine years old and lives on a fixed income. The Yales care for a severely handicapped thirty-nine-year-old daughter who is confined to a wheelchair. Mr. Yale was scheduled for shoulder surgery on September 9, 2001, and the Yales need to hire someone to help care for their daughter. The Yales also need to replace a specially equipped van. Although the Yales care for their handicapped daughter, their application appears to be based upon only financial reasons because they fail to explain how a new home will benefit their daughter medically. Instead, the Yales state that the sale of their property will allow them to replace their specially equipped van and hire someone to care for their daughter while Mr. Yale recovers from shoulder surgery. The Yales provided financial information concerning their monthly expenses, but they did not provide information showing that they are suffering an undue financial hardship. Because the Yales failed to establish a medical hardship, the court will defer judgment on the hardship application for thirty (30) days, giving the Yales an opportunity to provide additional financial information.

[*4] Lawrence Hicks submitted a hardship application to NCDOT based upon medical hardship. Mr. Hicks has died since the request was made, and his executor has requested that the hardship application be processed to proceed with the settling of Hicks' estate. The original hardship application included an opinion of a real estate broker that the property was not marketable. State law requires an executor generally to collect the assets of the estate, pay claims against the estate, distribute the assets according to a will or law, and settle or "close out" the estate. *See generally* N.C. Gen.Stat. Chapter 28A (1999). Because the property is unmarketable and the executor's ability to "close out" the estate is dependent upon her ability to dispose of the property, the court will amend the June 29, 1999, order and grant the hardship application.

CONCLUSION

For the reasons set forth in this opinion, the court will grant Defendants' motion in part and defer in part for thirty days.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

M.D.N.C.,2002.
North Carolina Alliance For Transp. Reform, Inc. v. U.S. Dept. Transp.
Not Reported in F.Supp.2d, 2002 WL 1009725 (M.D.N.C.)

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2013 WL 1502627
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

HILLCREST PROPERTY, LLP, Plaintiff,
v.
PASCO COUNTY, Defendant.

No. 8:10–cv–819–T–23TBM. | April 12, 2013.

Attorneys and Law Firms

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Opinion

ORDER

STEVEN D. MERRYDAY, District Judge.

*1 Before 2025 Pasco County must build more and larger roads to accommodate the inevitable increase in automobile traffic. Preferring to avoid the payment of "just compensation" after acquiring the necessary land by eminent domain, Pasco County has hatched a novel and effective but constitutionally problematic idea, a most uncommon regulatory regime that is crowned by Pasco County's "Right of Way Preservation Ordinance."

The unremarkable part of the regime designates new "transportation corridors," which expand certain Pasco County highways. The specific instance contested in this action designates a new transportation corridor that widens State Road 52, an arterial east-west highway in Pasco County, and identifies the boundaries of State Road 52's future right-of-way. For most landowners, whose land is encroached by the transportation corridor but who have no plans to develop the land adjacent to the encroached land, no immediate consequence (and no constitutional jeopardy) occurs; Pasco County will take the expanded right-of-way—when needed—by eminent domain and will pay "just compensation" as determined by a jury in a Pasco County circuit court.

The remarkable part of the regime and the constitutional mischief appear in the instance of a landowner whose land is encroached by the new transportation corridor but who plans to develop the remaining land, which adjoins the encroachment. The Ordinance requires Pasco County to deny the landowner's development permit and to forbid development of the land adjoining the new transportation corridor unless the landowner "dedicates" (conveys in fee simple) to Pasco County—for free—the land within the new transportation corridor. In other words, to avoid the nettlesome payment of "just compensation," the Ordinance empowers Pasco County to purposefully leverage the permitting power to compel a landowner to dedicate land encroached by a transportation corridor. In Pasco County, if there is no free dedication, there is no permit.

As the Pasco County Attorney proudly declares, "The right of way preservation ordinance [ ] drafted and defended by this office (which is one of only a few in the state) saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages." (Doc. 112–2 at 3) This bully result is effected by threatening to deny every proposed new use of private land, from medical clinic to beauty parlor, from restaurant to bait shop, and by coercing everyone, great and small, rich and poor, popular and unpopular, unless the landowner completes the mandatory "voluntary" dedication of real estate.

This action asks whether a county ordinance can deny the issuance of a development permit pending a landowner's coerced conveyance to the county—for free—of the fee simple title to real estate both within a designated right-of-way and otherwise subject to eminent domain. Asserting an array of federal and state constitutional grounds, Hillcrest challenges the Ordinance. Guarding the multimillion-dollar, past and future trove from the Ordinance, Pasco County defends.

*2 Because the Ordinance's *modus operandi* is not yet common, neither party cites legal authority directly deciding the constitutionality of an identical ordinance. Nonetheless, the features of the Ordinance are striking (and, as the Pasco County Attorney confirms, startlingly effective) and constitutional examination is essential. If constitutional, the Ordinance undoubtedly will become quickly fashionable, as counties seize a singular opportunity to procure land for public use by the thrifty expedient of coerced conveyance rather than by the historically and constitutionally prescribed mechanism of

eminent domain (which is, viewed from a county's vantage, encumbered by the strictures of "due process" and "just compensation" and burdened by both the supervision of an independent judge and the informed discretion of a disinterested jury).

In a compelling report, the magistrate judge recommends finding the Ordinance unconstitutional and enjoining the Ordinance's enforcement. Agreeing with the magistrate judge's recommendation, this order largely adopts the report and the recommendation and adds analysis that, although viewing the law from a slightly different vantage, finds the Ordinance both coercive and confiscatory in nature and constitutionally offensive in both content and operation.

1. Background

1.1. The Ordinance

In accord with Florida's Local Government Comprehensive Planning and Land Development Regulation Act, Pasco County adopted a "comprehensive plan" to ensure adequate roadway to support development through 2025. Pasco County implements the comprehensive plan through maps, tables, and policies that identify the right-of-way necessary to build Pasco County's future transportation corridors, predominantly on privately owned land.

Pasco County adopted the Right of Way Preservation Ordinance in November, 2005.[1] The Ordinance targets landowners who own property encroached by the corridor and who aspire to build on the property adjoining the corridor. In exchange for a development permit, the Ordinance requires those landowners to agree to dedicate the corridor in fee simple to Pasco County. Under the Ordinance, Pasco County withholds the construction permit until the landowner dedicates the property "by recordation on the face of the plat, deed, grant of easement, or other method acceptable to the County." Code § 319.8(A); Code § 901.2(H). If the property owner declines the dedication, Pasco County declines the construction permit.

Once a landowner dedicates the land to Pasco County, the landowner may apply to Pasco County's Development Review Committee for permission to use his former land until Pasco County needs to build the road. The Ordinance provides a list of specific and temporary "interim uses," such as a produce stand or a bridal path for a residential zone or a boat storage yard or a ground to host "festivals, carnivals, community fairs, and the like" for a commercial zone. Code § 319.6(C)(1); Code § 901.2(F)(3). When and if Pasco County needs the land, the former landowner must remove any permitted, temporary use (for example, a lemonade stand, a Tilt-A-Whirl, or a putt-putt course).

1.1.1. The Waiver

*3 If expecting compensation for the conveyance, the landowner must apply to the Review Committee for a "waiver":

> Where the property owner believes that the amount of land required to be dedicated to the county under the [right-of-way dedication provision] exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site and expanded development site, or believes that any other county transportation-related exaction, dedication, condition or requirement ... is not roughly proportional to the transportation impacts of the proposed development site and expanded development site, the property owner may apply to the development review committee for a dedication waiver.

Code § 319.9(A); Code § 901.2(I)(1). The waiver application must contain the following:

a. Appraised value of the development site and expanded development site before the section 306 development approval or other development permit/order, with and without the land to be dedicated pursuant to section 318.8, taking into account any interim uses and density transfers.

b. Appraised value of the development site and expanded development site after the section 306 development approval or other development permit/order, with and without the land to be dedicated pursuant to section 318.8, taking into account any interim uses and density transfers.

c. Traffic impact study (TIS) showing the transportation impacts of the proposed development.

d. List of transportation mitigation provided or required to be provided by the development, including:

1) The appraised value of any land dedicated or to be dedicated in accordance with a. and b. above;

2) Certified cost estimates for all transportation improvements provided or required to be provided by the development;

3) Estimated transportation impact fees paid or due for the development pursuant to Ordinance No. 04–05, as amended; and

4) Any transportation mitigation or proportionate share payments required pursuant to section 402 of the land development code.

Code § 319.9(B)(2) (quotation consistent with the "old" numbering); Code § 901.2(I)(2)(b). The applicant must hire each expert and pay for each study, appraisal, report, and estimate required by the Ordinance.

The Review Committee reviews the application to:

> [D]etermine[ ] [whether] any portion of the land required to be dedicated ... exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site ... [and to] determine[ ] [whether] the transportation requirement is not roughly proportional to the transportation impacts of the proposed development site or expanded development site (the "excess dedication amount.")

Code § 319.9(C); Code § 901.2(I)(4). If the landowner, who exclusively bears the burden of proof, has proven to the Review Committee an "excess dedication," the Ordinance requires the Review Committee either to provide partial "compensation" or to waive the "excess dedication."[2] The Ordinance permits the Review Committee to compensate the owner (1) by paying what Pasco County's property appraiser considers 115% of the value of "the excess land required to be dedicated," (2) by granting impact fee credits, (3) by designing or constructing certain required transportation improvements, (4) by providing credit "for any transportation mitigation or proportionate share payments," or (5) by combining the above. Code § 319.9(D); Code § 901.2(I)(5). The landowner may appeal an unfavorable result to the Pasco County Board of County Commissioners but must exhaust the waiver provision before "filing any civil claim, action, or request challenging or seeking compensation for a dedication required by [the Ordinance]." Code § 319.9(F)(2); Code § 901.2(I)(7)(b).

1.1.2. The Variance

*4 Also, the landowner may apply to the Review Committee for a variance from "the strict requirements" of the waiver provision. Code § 316; Code § 901.2(J)(3). Stated simply, with a variance Pasco County can waive a waiver applicant's waiver requirement, such as the applicant's providing a traffic study at the applicant's expense. If the waiver requirement "causes a hardship," a landowner "shall be entitled to apply for a variance." Code § 319 .10(B); Code § 901.2(J)(2). The Review Committee can grant a variance if the landowner, again bearing the burden of proof, proves that the "strict application" of the waiver provision causes (1) an "unreasonable or unfair non-economic hardship[ ] or an inordinate burden not created by the variance applicant" or (2) a conflict with an "important" goal, objective, or policy of Pasco County's comprehensive plan or other land development regulation. Also, the Review Committee can grant a variance (1) if the variance provides a net economic benefit to Pasco County, (2) if the variance achieves "an innovative site or building design" that furthers the goals of Pasco County's comprehensive plan, or (3) the variance is necessary to comply with state or federal law. Code § 316.1(A); Code § 901.2(J)(3). If "the development review committee finds, based on the application submitted, and the substantial competent evidence presented, that the variance requested is the minimum necessary to alleviate or address" one of the following, the Review Committee "shall grant" the variance:

1. The strict application of the land development regulation creates an unreasonable or unfair non-economic hardship, or an inordinate burden, that was not created by the variance applicant;

2. The specific application of the land development regulation conflicts with an important goal, objective or policy of the comprehensive plan, or with the intent and purpose of another recently adopted land development regulation, that serves a greater public purpose;

3. The granting of the variance will provide a net economic benefit to the taxpayers of Pasco County, and is not in conflict with important goals, objectives and policies of the comprehensive plan;

4. The granting of the variance is necessary to achieve an innovative site or building design that furthers the goals, objectives and policies of the comprehensive plan;

5. The intent and purpose of the land development regulation, and related land development regulations and comprehensive plan provisions, is met or exceeded through an improved or alternate technology or design;

6. The granting of the variance is necessary to protect the public health, safety or welfare;

7. The variance is necessary to comply with state or federal law; or

8. The variance satisfies variance criteria set forth in the specific county land development regulation that is the basis for the variance request.[3]

Code § 316.1(A); Code § 901.2(J)(3).

1.2. Hillcrest's Land

*5 In April, 2001, Hillcrest purchased sixteen-and-a-half acres of undeveloped property zoned "commercial" and located northwest of the Old Pasco Road and State Road 52 intersection, just west of Interstate 75. In November, 2005, Pasco County enacted the Ordinance, which in conjunction with the maps and tables establishes a transportation corridor protruding fifty-feet into Hillcrest's property along the property's 1,400–foot, southern border with State Road 52.

Undertaking to develop a grocery-store-anchored shopping center, with the grocery store on the north side of the property and several smaller parcels on the south side of the property, Hillcrest in December, 2006, applied to the Review Committee for preliminary site-plan approval. The proposed plan failed to depict the corridor. In February, 2007, the Review Committee rejected Hillcrest's proposal and demanded that Hillcrest dedicate the fifty-foot corridor for future right-of-way. In March, 2007, Hillcrest revised the site plan and removed improvements within the fifty-foot corridor.

During a meeting the following month, Pasco County, Florida's Department of Transportation (FDOT), and Hillcrest discussed the second proposed site plan. According to Pasco County, the parties discussed an FDOT plan to widen State Road 52 to a point 140–feet north of the existing right-of-way. In total, Pasco County required a fifty-foot dedication from Hillcrest, and the FDOT required an additional ninety-foot setback on which Hillcrest could not build. Because the second proposed site plan depicted improvements inside the FDOT's desired ninety feet, the Review Committee rejected Hillcrest's second proposal.

Negotiation continued. In July, 2007, Hillcrest submitted a third proposed site plan with no improvement depicted inside the 140–foot future right-of-way. Hillcrest accompanied the proposed site plan with a written reservation of rights objecting to the dedication:

> [Hillcrest] has redesigned the site accordingly in this submission pursuant to an understanding that such redesign neither represents the applicant's willingness to provide such right of way without compensation or that any such condition requiring such right of way donation will not be subject to challenge should the county and [Hillcrest] fail to reach agreement on the acquisition of such right of way by Pasco County or others.

(Doc. 119–1, ¶ 13) During an August 23 meeting convened to discuss the third proposed site plan, Hillcrest's counsel stated that Hillcrest was "okay," "fine," and "in agreement" with a forty-foot dedication.[4] However, Hillcrest denies any agreement to surrender property at no cost and claims an expectation of compensation for the entire 140 feet. The managing member of Hillcrest explains:

> At the August 23, 2007, [ ]Committee hearing, the County approved Hillcrest's preliminary site plans showing the 140[-]foot dedication. As of August 23, 2007, it was still my understanding that the County was going to compensate Hillcrest based on the additional 140 feet, including severance damages, pursuant to the standing agreement between Hillcrest and the County, and that the County would deny the preliminary site plans if Hillcrest objected to the dedication requirement.

*6 (Doc. 118–1, ¶ 13) The Review Committee approved the third proposed site plan. The Review Committee's development order, which Hillcrest

signed on October 17, 2007, provides that "the developer shall convey at no cost to Pasco County 110 feet of right-of-way from the centerline of [State Road] 52." (Doc. 114–7 at 3–4) Although the development order permits a landowner to object within thirty days and to request an administrative appeal, Hillcrest requested no appeal.

During the next eight months, Pasco County denied at least three Hillcrest construction plans. In June, 2008, Pasco County conditionally approved a Hillcrest construction plan but demanded the dedication. Hillcrest executed the approval but stated, "Please be advised that our ... acceptance of these conditions is subject to ... reservation of any and all rights with respect to any and all exactions imposed under the conditions of approval." (Doc. 118–6 at 1) Before filing this action, Hillcrest neither applied for a dedication waiver or a variance nor pursued an administrative appeal or inverse condemnation action.[5] Pasco County commenced no condemnation proceeding. Hillcrest's property remains undeveloped.[6]

1.3. The Report and Recommendation

Hillcrest sues and asserts federal and state claims for relief, including violations of the right to due process, to equal protection, to access to the courts, and to a jury trial and other state claims for relief, including an illegal taking and a violation of "separation of powers." Hillcrest asserts no federal takings claim. Hillcrest's core argument invokes two United States Supreme Court cases, *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), that consider whether a government's requiring land in exchange for development approval violates the Fifth Amendment's Takings Clause, applied to the states through the Fourteenth Amendment. Aspiring to invalidate the Ordinance, Hillcrest argues that Pasco County uses the permit authority as leverage to compel a landowner's relinquishing the right to just compensation.

Although the summary judgment motions present for resolution fifteen claims for relief, the magistrate judge correctly recognizes that the Ordinance proves most susceptible to challenge as a substantive due process violation. Accordingly, the report and recommendation (Doc. 168) analyzes predominantly substantive due process. The magistrate judge concludes that the Ordinance fails the applicable substantive due process standard, a "rational relation to a legitimate government purpose." Despite the legitimate goal of accommodating future land use and traffic, the "means adopted by the County to accomplish the goal are an abuse of the County's **police** powers." (Doc. 168 at 26) The report states:

> In every instance brought within the purview of sections 319.8 and 319.10 of the Ordinance, landowners are compelled to surrender private property without compensation as a condition of development approval or permitting. The dedication provision is no mere regulation of land use but rather a calculated measure by the County to avoid the burdens and costs of eminent domain and take private property without just compensation. As constructed, the dedication requirement permits the County to leverage its **police** powers to extract private property without any individualized consideration of need and wholly without consideration of the matter of compensation when such works a taking.... [T]he scheme impermissibly tilts the playing field in favor of the County to the end that the County has saved millions of dollars since the scheme was implement [ed].... Here, the County has purposefully devised a land-use scheme which sanctions, indeed commands, in all instances within its purview and without individualized consideration, the dedication of such private property without compensation as a condition of development approval or permit. In doing so, the Ordinance commands that [certain] landowners be forced "to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole," the very thing the Takings Clause of the United States Constitution and the equivalent provision of the Florida Constitution are intended to prevent. By my consideration, such a scheme, being inconsistent with the Fifth and Fourteenth Amendments, violates due process.... The County cannot ... employ its **police** power to extort property from private landowners and avoid the obligations inherent in these constitutional provisions.

*7 (Doc. 168 at 26–27) Explaining the Ordinance's aggressive method of "accommodating future land use and traffic," the report observes that *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), "inform the due process analysis" but "do not set forth the applicable standard." (Doc. 168 at 25) The magistrate judge details the exaction process described in *Nollan* and *Dolan* and highlights the Ordinance's purposeful circumvention of eminent domain. Among other recommendations, the report endorses granting Hillcrest's motion for summary judgment on the alleged "facial" violations of due process.[7]

Each party objects (Docs. 170 and 171) to each adverse

recommendation. In response to the adverse ruling of a "facial" violation of due process, Pasco County argues (1) that, in some conceivable application, the Ordinance applies constitutionally, (2) that *Nollan* and *Dolan* "were 'taking' cases ..., not due process cases," (3) that *Nollan* and *Dolan* "were as-applied cases, not facial cases," (4) that *Nollan* and *Dolan* "involved *ad hoc* adjudicative exactions, rather than legislative generally-applicable exactions, such as the Ordinance here," (5) that *Dolan* "expressly declined to shift the burden to the government for legislative exactions, such as the Ordinance here," (6) that the waiver and variance procedure insulates the Ordinance from a successful facial challenge, (7) that the report's recommending summary judgment for Pasco County on the as-applied claim precludes summary judgment for Hillcrest on the facial claim, (8) that the applicable limitation bars the claim, and (9) that, even if the Ordinance facially violates due process, Eleventh Circuit law and Hillcrest's pre-trial statement preclude damages. Although some of the arguments require an elaboration of the report and recommendation and further explanation of the applicable law, none saves the Ordinance.

2. Discussion

2.1. Substantive Due Process[8]

2.1.1. The Ordinance "Applies"

Although a facial due-process challenge ripens upon the enactment of the Ordinance, an as-applied challenge ripens once the Ordinance has been finally applied to the property.[9] *Eide v. Sarasota County,* 908 F.2d 716, 725 & n. 14 (11th Cir.1990); *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) (adjudicating a facial due-process and a facial equal-protection challenge while refusing to consider an as-applied due process and an as-applied equal protection challenge). Pasco County argues that the as-applied substantive due process claim fails as "unripe." Pasco County relies on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), an opinion by Justice Blackmun that announced a stringent "ripeness" test (1) for a just compensation claim and (2) for a claim that a "regulation goes too far." *Williamson County* held that before either claim ripened (1) "the government entity charged with implementing the regulations [must] reach[ ] a final decision regarding the application of the regulations to the property at issue" and (2) the plaintiff must "seek compensation through the procedures the state has provided for doing so." 473 U.S. at 186, 194. Pasco County argues with considerable support that *Williamson County* requires Hillcrest to pursue a waiver or a variance, each of which Hillcrest declined.

*8 *Williamson County* 's "regulatory takings" claim originates from Justice Holmes's often quoted statement, " '[I]f regulation goes too far it will be recognized as a taking.' " 473 U.S. at 198 (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922)). But, *Williamson County* never "clarif[ied] whether 'regulatory takings' claims were properly cognizable under the Takings Clause or the Due Process Clause." *Lingle v. Chevron U.S.A.,* 544 U.S. 528, 541–42, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

After quoting the "goes too far" language, *Lingle* observes that "the rub, of course, has been—and remains—how to discern how far is 'too far.' " 544 U.S. at 538 *Lingle* identifies four distinct takings claims arising if the government (1) permanently and physically invades private property, (2) deprives an owner of all economically beneficial use of the private property, (3) fails to comply with the "regulatory taking factors" announced in *Penn Central Transp. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), or (4) takes land in exchange for development approval, as discussed in *Nollan* and *Dolan.* As *Lingle* confirms, the *Williamson County* "regulatory takings" claim—the claim that a "regulation goes too far"—raises a takings claim, not a due process claim. As the Eleventh Circuit recognizes in *Eide:*

> [T]he court cannot ascertain whether the regulation has gone "too far" until it can analyze the effect that the zoning decision has had on the value of the property. Thus, in *Williamson County,* the Supreme Court applied the finality prong of the ripeness analysis, just as it had for the just compensation claim. This rationale is not applicable to an as applied arbitrary and capricious due process claim. Such a claim does not have to establish that the regulation has gone "too far"; rather, a property owner's rights have been violated the moment the government acts in an arbitrary manner and (in an as applied challenge) that arbitrary

> action is applied to the owner's property.... This court in *Greenbriar* erroneously assumed it was controlled by *Williamson County,* and thus erroneously used the *Williamson County* analysis.

908 F.2d at 724 n. 13. Although finding that *Williamson County* does not apply to an "arbitrary and capricious" due process claim, *Eide* confirms a requirement similar to *Williamson County* 's "finality" requirement, that is, "the particular zoning decision being challenged must be finally applied to the property at issue." *Eide,* 908 F.2d at 725. "If the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made." 708 F.2d at 725. The point at which a "final decision" occurs depends on the remedy sought:

> We can conceive of an arbitrary and capricious due process claim in which the final decision requirement would be satisfied with a single arbitrary act. For example, if a landowner's initial application for commercial zoning had been rejected at a preliminary stage simply because the landowner was a redhead, the landowner's arbitrary and capricious due process claim challenging that action would be ripe. That decision can be immediately challenged because the arbitrary and capricious act has been applied to him. However, the remedy for the mere rejection of the redheaded landowner's application would not be an injunction requiring a grant of commercial zoning, but rather would be the overturning of the arbitrary decision, possibly an injunction against similar irrational decisions, and other remedies depending on the situation. The landowner could not prove the damages that Eide seeks—*i.e.* commercial zoning—without first claiming and proving a final decision by the local authority denying commercial zoning.

*9 *Eide,* 908 F.2d at 726. Hillcrest's as-applied due process claims seek, aside from the Ordinance's invalidation and attorneys' fees and costs, only damages "for having violated Hillcrest's due process rights." (Doc. 36 at 23) The as-applied due process claims seek neither an award of damages (other than nominal) nor an injunction ordering Pasco County to approve the construction plan. Neither a waiver nor a variance, each a procedure within the Ordinance, will exempt Hillcrest from the Ordinance (although a waiver or variance might exempt Hillcrest from the dedication requirement or another part of the Ordinance). Thus, Pasco County has reached an effectively final decision that the Ordinance applies to Hillcrest. For the successful as-applied due process claim, nominal damages are available.

2.1.2. A Timely Challenge

Pasco County argues that the applicable four-year limitation for a facial due process challenge begins when the law is enacted. This theory condones the government's delaying enforcement of a new law until expiration of the applicable limitation and forever insulating the unconstitutional law. Instead, a claim for relief accrues and the applicable limitation begins at the occurrence of the last element of the legal claim—usually, once an injury occurs.[10] Hillcrest's injury occurred the moment Pasco County subjected Hillcrest to the Ordinance. At the earliest, Hillcrest's claim accrued in December, 2006, when Hillcrest applied for site plan approval. (The claim probably accrued in February, 2007, when Pasco County first denied the site plan based on Hillcrest's failure to comply with the Ordinance.). Hillcrest sued on April 7, 2010, within the four-year limitation for a Section 1983 claim in Florida. *Chappell v. Rich,* 340 F.3d 1279, 1283 (11th Cir.2003) (citing *City of Hialeah v. Rojas,* 311 F.3d 1096, 1102 n. 2 (11th Cir.2002) ("Section 1983 claims are governed by the forum state's residual personal injury statute of limitation, which in Florida is four years.")). Hillcrest's substantive due process claims and Hillcrest's equal protection claims are neither premature nor barred.

2.1.3. "Informing" Due Process

Citing opinions from nearly every jurisdiction in the country, each party consistently conflates the Takings Clause with the Due Process Clause. The parties' conflation warrants a clarifying account of the pertinent

constitutional first principles. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), affirms a jurisprudential divide between the Takings Clause and the Due Process Clause. *Lingle* addresses *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), which held that government regulation of private property " 'effects a taking if [such regulation] does not substantially advance legitimate state interests.' " The *Agins* formulation, Justice O'Connor writes for a unanimous Court, "[H]as been [improperly] ensconced in ... Fifth Amendment takings jurisprudence" rather than properly limited to substantive due process jurisprudence. *Lingle*, 544 U.S. at 531–32. Unlike a takings inquiry, the substantive due process inquiry provides a "means-end" analysis and asks "whether a regulation of private property is effective in achieving some legitimate government purpose." 544 U.S. at 542. The substantive aspect of due process thus protects a citizen from an arbitrary, capricious, or irrational regulation that fails to serve a legitimate governmental objective. *Lingle*, 544 U.S. at 542; *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (observing that the Due Process Clause protects a citizen against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

***10** Rather than evaluating the effectiveness of a regulation in achieving a legitimate objective, the Takings Clause asks whether the government forces " 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Lingle*, 544 U.S. at 542 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). The Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.' " 544 U.S. at 543 (quoting *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)). If a land use decision serves a "public use," an interference with or seizure of real property may be constitutionally rectified by paying "just compensation." Conversely, if a land use decision either fails the "public use" requirement of the Takings Clause or is "so arbitrary as to violate due process," the constitutional injury is irremediable. *Lingle*, 544 U.S. at 543.

Lingle censures the "commingling of due process and takings" law, 544 U.S. at 541, and Pasco County (although consistently committing the "commingling" error) accuses the magistrate judge of violating *Lingle* 's command. Consequently, Pasco County objects to the magistrate judge's holding that the Takings Clause, as construed by *Nollan* and *Dolan*, "inform[s] the due process analysis" but "do[es] not set forth the applicable standard." (Doc. 168 at 25) Pasco County's objection misunderstands the magistrate judge's finding. Instead of finding that the Ordinance deprives a landowner of property without paying just compensation, the magistrate judge finds that the Ordinance leverages the **police** power to compel a landowner to relinquish rights guaranteed by the Takings Clause—a finding that the Ordinance fails to advance a legitimate governmental purpose. Although not "set[ting] forth the applicable standard," *Nollan* and *Dolan* are central to understanding the Ordinance's perverse scheme and *Nollan* and *Dolan* "inform the due process analysis."

2.1.4. Pasco County Wields the Police Power to Compel a Landowner's Surrendering Rights Guaranteed by the Takings Clause

Nollan and *Dolan* consider "unconstitutional conditions," a constitutional prohibition against government's employing the government's power in order to secure the relinquishment of a citizen's constitutional rights. In other words, even if enjoying absolute discretion to grant or deny a citizen a governmental accommodation, such as a development permit, a government cannot condition the receipt of the governmental accommodation on the relinquishment of a constitutional right. *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Bd. of Ed. of Township High Sch. Dist.* 205, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir.2004). The rule appears most often in decisions addressing rights guaranteed by the Free Speech Clause, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), and the Free Exercise Clause, *Hobbie v. Unemployment Appeals Commission of Fla.*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), but the rule appears also in decisions addressing rights guaranteed by the Search and Seizure Clause, *Bourgeois*, 387 F.3d at 1324, the Takings Clause, *Dolan*, 512 U.S. at 385, *Nollan*, 483 U.S. at 834, and the Due Process Clause. *Frost v. Railroad Commission*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926).

***11** For certain "exactions," certain "land-use decisions conditioning approval of development on the dedication of property to public use," *City of Monterey v. Del Monte*

Dunes at Monterey, 526 U.S. 687, 702, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), a limited exception applies to the general rule of unconstitutional conditions. *Lingle,* 544 U.S. at 547; *Dolan,* 512 U.S. at 385; *Nollan,* 483 U.S. at 834. The limited exception for exactions in accord with *Nollan* and *Dolan* recognizes that state and local government, exercising the **police** power, possess the authority to impose certain, limited conditions on land use.

In *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the California Coastal Commission established a "comprehensive program" to secure continuous public access laterally along Faria Beach "as the lots undergo development or redevelopment." A quarter of a mile south of Faria County Park and 1,800 feet north of another public beach, the Nollans leased—with an option to buy—a beachfront lot on which sat a 504–square–foot bungalow that the Nollans rented to travelers. The Nollans' westerly property line was the mean high water mark on the beach, and an eight-foot-high seawall separated the Nollans' beach property from the remainder of the Nollans' property.

The bungalow had fallen into disrepair, and the Nollans' option to purchase was conditioned on the Nollans' demolishing and replacing the bungalow. Attempting to build a three-bedroom home consistent with development in the beach-side neighborhood, the Nollans applied for a permit. The Coastal Commission staff recommended granting the permit on the condition that the Nollans dedicate an easement to enable the public to walk parallel to the ocean and pass laterally across the Nollans' beach property. The Nollans contested the dedication, but the Coastal Commission overruled the objection and granted the permit subject to the Nollans' recording the easement.

The Nollans appealed to the Ventura County Superior Court, which agreed with the Nollans that, absent evidence that the proposed development would have a direct adverse impact on public access to the beach, the Coastal Commission could not impose the condition. The superior court remanded to the Coastal Commission for an evidentiary hearing. After the hearing, the Coastal Commission affirmed the dedication and found that the new house would "increase blockage of the view of the ocean, thus contributing to the development of 'a wall of residential structures' that would prevent the public 'psychologically ... from realizing [that] a stretch of coastline exists nearby that they have every right to visit.' " 483 U.S. at 828–29. Additionally, the new house "would increase private use of the shorefront," which increase, along with neighboring development, "would cumulatively 'burden the public's ability to traverse to and along the shorefront.' " 483 U.S. at 829. The Coastal Commission required the Nollans to offset the burden by dedicating beach property to provide access from the northern public beaches to the southern public beach. The action reached the California Court of Appeal, which agreed with the Coastal Commission, and the Nollans appealed to the U.S. Supreme Court.

***12** A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the prohibition against unreasonable search and seizure of the citizen's automobile. The first step in identifying an "unconstitutional condition" is determining whether the target of the government's required relinquishment is a constitutional right. Thus, *Nollan* begins with the elemental premise that:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

483 U.S. at 831. But also, *Nollan* recognizes that, because "[g]overnment 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," *Pennsylvania Coal,* 260 U.S. at 413, a limited exception to the general rule of "unconstitutional conditions" applies to certain land use conditions. Thus, *Nollan* asks whether California's conditioning a development permit on the establishment of an easement triggers the limited land use exception or violates the Takings Clause.[11]

California argued that a "permit condition that serves the same legitimate **police** power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Nollan,* 483 U.S. at 836. The Supreme Court agrees but notes that the dedication of an easement to allow the public to stroll along a private beach from a public beach to another public beach "utterly fails" to decrease "blockage of the view of the ocean" from the street. In other words, "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the

prohibition ." 483 U.S. at 837. If failing to help mitigate the purported public hardship caused by the development, the permit condition becomes leverage and the purpose of the permit condition becomes "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation, [in other words,] 'an out-and-out plan of extortion.' " 483 U.S. at 837 (quoting *J.E.D. Associates v. Atkinson,* 121 N.H. 581, 432 A.2d 12, 14–15 (1981)). Because the acquisition of necessary right-of-way along State Road 52 directly assists 2025 transportation in Pasco County, Hillcrest's claim is not a *Nollan* claim (although *Nollan* establishes a generally applicable constitutional baseline).

Seven years later in *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the Supreme Court considered another challenge to an exaction. Oregon enacted a "comprehensive land use management program" that required each municipality to adopt new "comprehensive land use plans" to accomplish statewide planning goals. The City of Tigard adopted a "Community Development Code," which required landowners within the central business district to comply with a 15% open-space and landscaping requirement. After a transportation study identified traffic congestion as a problem in the central business district, the city adopted a plan for a bicycle pathway. Designed to encourage alternatives to a short automobile trip, the plan required a landowner to dedicate land "where provided for in the [bicycle] pathway plan." 512 U.S. at 378. The city adopted a "Master Drainage Plan" that suggested channel excavation and other improvements to the Fanno Creek Basin area next to Dolan's property.

***13** Dolan owned a 1.67–acre parcel accommodating a 9,700 square-foot plumbing and electrical supply store and a gravel parking lot. The creek flowed through the southwestern corner of the parcel and along the western border, and a part of Dolan's property sat within a part of the city's "greenway system." Seeking to double the size of the store and to pave a thirty-nine-space parking lot, Dolan applied for a permit. The city granted the permit on condition that Dolan dedicate "sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a [bicycle] pathway within the floodplain in accordance with the adopted [bicycle] plan." 512 U.S. at 379–80. The city required Dolan to dedicate roughly 10% of the property but permitted Dolan to use the dedicated property to satisfy the 15% open space and landscaping requirement.

Dolan requested a variance, for which the city required Dolan to prove to the city that "the literal interpretation of the applicable zoning provisions would cause 'an undue or unnecessary hardship' unless the variance is granted." 512 U.S. at 380. Dolan argued that her redevelopment would not conflict with the policy underlying the comprehensive plan. The city denied the variance and (1) found that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a [bicycle] pathway adjacent to this development for their transportation and recreational needs," (2) observed that "the site plan has provided for bicycle parking in a rack in front of the proposed building and '[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed," and (3) concluded that the bicycle pathway " 'could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.' " 512 U.S. at 381–82. The city noted also that the floodplain dedication would be "reasonably related" to Dolan's request to increase the impervious surface on the site. After the Land Use Board of Appeals denied the appeal and the Oregon Court of Appeals affirmed. Dolan appealed to the Oregon Supreme Court, which affirmed.

Dolan begins with the premise that, had the city taken private property without paying just compensation, the taking would violate the Takings Clause. "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." 512 U.S. at 384. Dolan explains that, if a *Nollan* "essential nexus" exists, the Supreme Court "must decide the required degree of connection between the exactions and the projected impact of the proposed development," a question not considered in *Nollan* because "the connection [did] not meet even the loosest standards." *Dolan,* 512 U.S. at 386. *Dolan* agrees with the city (1) that limiting development of impervious surface along Fanno Creek helps prevent flooding along Fanno Creek and (2) that building a bicycle pathway in the central business district mitigates traffic congestion. The city in *Dolan,* like Pasco County in the present instance, faced no *Nollan* problem.

***14** *Dolan* next turns to whether the extent of the exaction bears the "required relationship to the projected impact of [Dolan's] proposed development." 512 U.S. at 388. After surveying cases from several states that employ a different standard to determine the "required relationship," *Dolan* settles on "rough proportionality" and emphasizes that the burden of proof necessarily rests on the government:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

512 U.S. at 391. *Dolan* observes that, even without the dedication, the city already required 15% open space and that, even without the dedication, the undeveloped floodplain would nearly satisfy the 15% requirement. "But the city demanded more," *Dolan* says, "[the city] not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system" and "has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." 512 U.S. at 393. As opposed to a simple use restriction, the dedication, "eviscerate[s]" Dolan's right to exclude others from her property, and the city never explains how "recreational visitors trampling along the floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek." 512 U.S. at 393.

Turning to the bicycle path, *Dolan* agrees that the redevelopment will increase traffic in the central business district and that dedications for public avenues, such as streets and sidewalks, "are generally reasonable exactions to avoid excessive congestion from a proposed property use." 512 U.S. at 395. Fatally, however, the city offered no specific facts to demonstrate "that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the [bicycle] pathway easement." 512 U.S. at 395. *Dolan* emphasizes that "no precise mathematical calculation is required, but the city must make some effort to quantify its findings." 512 U.S. at 395. *Dolan* reverses the Oregon Supreme Court.

Maintaining the entire burden of proof on the government, *Nollan* and *Dolan* confirm that, rather than conferring a power on the government, the Takings Clause confirms a right in the citizen. A government's power to effect a limited exaction is a necessary but limited exception to the constitutional directive that no private property shall "be taken for public use, without paying just compensation." *Nollan* ensures that land taken by an exaction mitigates a public hardship to which the development contributes. *Nollan* never reaches the issue of the amount of land exacted. *Nollan* finds that an easement along the beach behind the Nollans' house fails to advance the public's viewing the beach from the street in front of the Nollans' house, regardless of how much or how little beach California exacts from the Nollans. *Dolan* ensures that a government can exact no more land than necessary to mitigate the development's contribution to the public hardship. The government—and not the landowner—bears the burden of both proving a "rough proportionality" and "quantify[ing] its findings." The government's failure to satisfy each of these requirements violates the Takings Clause. If taking an amount of land in excess of the amount that the government has proven necessary to mitigate the development's contribution to the public hardship, the government must proceed as it always has—through condemnation, in which the government bears the burden of proof and a disinterested fact-finder determines "just compensation."

> ***15** In rejecting petitioner's request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner's property would conflict with its adopted policy of providing a continuous pathway system. But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between petitioner's development and added traffic is shown.

Dolan, 512 U.S. at 395 n. 10.

Under the Takings Clause the infirmity of the Ordinance is clear. As the report and recommendation details, the Ordinance's scheme to require the landowner to prove the absence of a "rough proportionality"—rather than Pasco County's bearing the burden to prove a "rough proportionality"—conflicts irreconcilably with *Dolan.* Without Pasco County's "quantify[ing] the findings," the permit condition—an uncompensated, fee simple dedication of property—will never comply with the Takings Clause.

The Ordinance empowers Pasco County to take an amount of land in excess of the amount that Pasco County, "but for" the Ordinance, would bear the burden of proving necessary to mitigate Hillcrest's addition to traffic congestion. Instead of proceeding through eminent domain, in which the government proves a public need and a disinterested fact-finder determines "just

compensation," the Ordinance requires Pasco County to prove nothing and empowers Pasco County to determine the "just compensation," if any, Pasco County will pay. *Nollan*, 483 U.S. at 841–42 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.").

As *Nollan* observes, an exaction that fails to strictly comply with the requirements of the Takings Clause abets the state's holding for ransom a citizen's right to build on his own property. Unless the landowner conveys to the government valuable land for free, the property remains forever undeveloped. As *Nollan* observes, a perverse exaction accomplishes an "out-and-out plan of extortion."[12] 483 U.S. at 837. Consequently, if a landowner refuses the Ordinance's demand for a dedication, the property remains undeveloped; if a landowner yields to the Ordinance's demand, the extortion succeeds.[13]

As Pasco County argues and as *Lingle* confirms, an exaction athwart *Nollan* and *Dolan* results in an uncompensated taking and not a deprivation of due process. But the Ordinance presents a different situation: by legislative fiat, Pasco County uses a development permit to compel a landowner either to convey valuable land for free or to submit to a regime castigated by *Dolan*. In other words, Pasco County wields the **police** power to compel a landowner's abandoning rights guaranteed by the Takings Clause.

The magistrate judge correctly finds that *Nollan* and *Dolan* "inform the due process analysis" but "do not set forth the applicable standard" (Doc. 168 at 25); the magistrate judge correctly finds that Pasco County improperly uses the **police** power; and the magistrate judge correctly finds that the Ordinance fails to rationally relate to a legitimate governmental purpose. But the Ordinance affronts substantive due process for additional reasons.

2.1.5. Pasco County Wields the Police Power to Avoid Eminent Domain

*16 Since the 1985 amendment of the Local Government Comprehensive Planning and Land Development Regulation Act, Florida courts have adjudicated the constitutional propriety of "thoroughfare maps." The Supreme Court of Florida invalidated the statutorily prescribed execution of a thoroughfare map in *Joint Ventures, Inc. v. Dep't of Transportation*, 563 So.2d 622 (Fla.1990), and upheld a thoroughfare map in *Palm Beach County v. Wright*, 641 So.2d 50 (Fla.1994).

In *Joint Ventures*, the plaintiff owned 8.3 acres of vacant land adjacent to Dale Mabry Highway in Tampa. The plaintiff contracted to sell the property contingent on the buyer's obtaining the necessary development permit. The FDOT determined that expansion of the highway required 6.49 acres of the plaintiff's land for storm water drainage. Accordingly, under Section 337.241, Florida Statutes, the FDOT recorded a map of reservation that prevented the issuance of a development permit. The statute required that a development permit "shall not be issued for a period of 5 years from the date of recording such map. The 5–year period may be extended for an additional 5–year period [by the same recording method]." 563 So.2d at 623.

In the district court of appeal, the plaintiff had argued that the statute's moratorium "amounted to a taking because the statute deprived [the owner of a] substantial beneficial use of [the] property." 563 So.2d at 624. The FDOT responded that, in a valid exercise of the **police** power, the statute "regulates" rather than "takes." The district court of appeal upheld the statute because the plaintiff possessed a remedy in inverse condemnation.[14] The district court of appeal certified the question "whether [the statute's subsections] are unconstitutional in that they provide for an impermissible taking of property without just compensation and deny equal protection and due process in failing to provide an adequate remedy." 563 So.2d at 623. The Supreme Court of Florida clarified:

> [W]e do not deal with a claim for compensation, but with a constitutional challenge to the statutory mechanism. Our inquiry requires that we determine whether the statute is an appropriate regulation under the **police** power, as DOT asserts, or whether the statute is merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain.
>
> 563 So.2d at 625.

The FDOT argued that the statute "is a permissible regulatory exercise of the state's **police** power because it was necessary for various economic reasons." 563 So.2d at 625. During discovery, the legislative staff admitted that the statute sought to reduce the cost of a prospective property acquisition (rather than to prevent an injurious use of private property). Although the thrifty accomplishment of a legitimate objective is a proper governmental purpose, thrifty accomplishment of a legitimate objective by the circumvention of the

constitutional guarantees attendant to eminent domain is neither a legitimate objective nor a proper governmental purpose:

> *17 For example, without a development moratorium, land acquisition costs could become financially infeasible. If landowners were permitted to build in a transportation corridor during the period of FDOT's preacquisition planning, the cost of acquisition might be increased. Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive [eminent domain] protections of chapters 73 and 74.

563 So.2d at 625. *Joint Ventures* characterizes the purpose and effect of the statute as "freezing" property and compares the "freezing" to Florida's "consistently prohibited" and deliberate depressing of land value in anticipation of eminent domain. 563 So.2d at 626 (citing cases). *Joint Ventures* holds that each map of reservation violates due process, and *Joint Ventures* "effectively eliminat[es] the development restrictions created by the maps." *Tampa–Hillsborough County Expressway Authority v. A.G. W.S. Corp.*, 640 So.2d 54 (1994) (confirming *Joint Ventures'* due process holding and concluding that each landowner with property inside the boundary of an invalidated map of reservation must prove *ad hoc* that the map effected an inverse condemnation).

On a certified question from the district court of appeal, *Palm Beach County v. Wright*, 641 So.2d 50 (Fla.1994), considers the "facial" propriety of a county thoroughfare map both designating corridors for future roadway and forbidding land use that would impede future construction of the road. Palm Beach County's Comprehensive Plan forbade "land use activity ... within any roadway designated on the thoroughfare map that would impede future construction of the roadway." 641 So.2d at 51. The plaintiffs argued that, by forbidding land use within the corridor, Palm Beach County's thoroughfare map operates identically to the map in *Joint Ventures*. **Palm Beach County responded by arguing that, unlike the map of reservation in *Joint Ventures*, Palm Beach County's map "is an unrecorded long-range planning tool tied to a comprehensive plan that outlines general roadway corridors and does not on its face delineate the exact routes of future roadways." 641 So.2d at 52.**

Wright equates the map with a set-back requirement, a valid exercise of the **police** power accomplished without providing just compensation. ***Wright* finds (1) that the map is not recorded, like the maps of reservation in *Joint Ventures*, (2) that the road locations shown on the map are subject to change, and (3) that, unlike the FDOT in *Joint Ventures*, Palm Beach County "is a permitting authority which has the flexibility to ameliorate some of the hardships."** 641 So.2d at 53. *Wright* emphasizes that the map in *Joint Ventures* served the sole purpose of "freez[ing] property so as to depress land values in anticipation of eminent domain proceedings" and, by contrast, the Palm Beach map "serves as an invaluable tool for planning purposes." *Wright*, 641 So.2d at 53–54.

***18** In *Joint Ventures* and *Wright*, the property remains the landowner's. In *Joint Ventures* and *Wright*, the challenged provisions halt development on property targeted for prospective condemnation. In *Joint Ventures* and *Wright*, the government acquires the property through eminent domain if the government needs the property and if the parties or a jury determines just compensation. **But in *Joint Ventures*, the legislature imposed the moratorium and recorded the encumbrance on the property in order to depress the value in anticipation of eminent domain. By intentionally depressing the land value, the government impermissibly used the police power to impair the constitutional right to "just compensation."**

Pasco County's misuse of the **police** power in the Ordinance exceeds the misuse in *Wright* and even the misuse in *Joint Ventures*. Rather than imposing a mere development moratorium, the Ordinance requires the corridor's immediate conveyance at no cost. Rather than unconstitutionally depressing land value in anticipation of eminent domain, the Pasco County Ordinance avoids eminent domain altogether and diverts any rebellious landowner to an in-house review in which the landowner bears the burden of proof.

Pasco County leverages permit approval not only to build a low-cost (or no cost), comfortable, and bulging land bank but to accumulate land that may never be used. Nothing in the Ordinance requires Pasco County to build a road on the confiscated property, nothing in the Ordinance prevents Pasco County's use of the confiscated property for some other purpose, and nothing in the Ordinance requires Pasco County to return to the landowner any unused property. If the present corridor plans collapse or change, Pasco County might sell

Hillcrest's property (in which case Pasco County undoubtedly would demand from the buyer at least "just compensation").

Each of the Ordinance's several purported objectives—including "to coordinate the full development of roads," "to promote orderly growth," "to maintain the integrity of the corridor for transportation," to ensure "an adequate transportation network," and "to aid in the harmonious, orderly, and beneficial development of the county"—is a bona fide, legitimate governmental objective.[15] But the legitimate aims of government are readily and properly subject to accomplishment within the present constitutional and statutory arrangement, detailed in Chapters 73 and 74, Florida Statutes, and in the thoroughfare maps such as those in *Wright,* as well as set-back lines and reasonable permit restrictions.[16] Pasco County's wielding the **police** power to avoid eminent domain stands athwart established principles of due process.

2.1.6. Pasco County Wields the Police Power to Obtain a Bulk Discount

An inverse condemnation remedy exists for each landowner subjected to the Ordinance. But a "property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is 'taken' through formal condemnation proceedings." *Joint Ventures,* 563 So.2d at 627; *accord United States v. Clarke,* 445 U.S. 253, 255–59, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) (Rehnquist, J.) (highlighting procedural and economic distinctions between a condemnation and an inverse condemnation). Without invalidation of the Ordinance as an impermissible use of the **police** power, each landowner defying the Ordinance must proceed in inverse condemnation, without the procedural protection of condemnation, without the appointment of an appraiser, without the submission of testimony, without the right to attorneys' fees, and without the government's depositing in the court registry twice the property's appraised value. *Joint Ventures,* 563 So.2d at 627 (citing *State Road Department v. Forehand,* 56 So.2d 901 (Fla.1952)); *see also Clarke,* 445 U.S. at 255–59.

*19 **So long as the Ordinance persists, Pasco County methodically undercuts constitutional "just compensation" and realizes a steep discount below "just compensation" in the cost of acquiring right-of-way for a transportation corridor.** Pasco County's method is plain. If a landowner never aspires to develop land adjoining a transportation corridor, Pasco County pays just compensation through eminent domain instituted when the land is needed. But, to landowners who aspire to develop land adjoining a corridor and who submit to the Ordinance—those who yield to the Ordinance's demand for a dedication of land for free—Pasco County pays nothing. The Pasco County Attorney reports reliably and publicly that for Pasco County's right-of-way acquisition after enactment of the Ordinance the aggregate discount below just compensation is already measurable in millions of dollars—millions of dollars below constitutionally guaranteed just compensation.[17]

In sum, the Ordinance discriminates based on economic aspiration. Against the class of landowners who never attempt to develop, Pasco County will acquire land by eminent domain, beginning when and if Pasco County needs the land. A landowner without need of a permit enjoys the protection of condemnation and receives the "just compensation" guaranteed by the Constitution. A landowner who aspires to develop property and who aspires to a permit for a grocery store, a doctor's office, an apartment building, or the like faces an immediate confiscation of land. For these landowners, a last but forlorn hope for just compensation is in Pasco County's prolix, opaque, and overbearing Ordinance. Further, these landowners' just compensation is an elusive contingency, held for ransom by a committee methodically acquiring property at a steep, aggregate discount. "[M]erely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain," *Joint Ventures,* 563 So.2d at 625, the Ordinance improperly uses the **police** power and fails to advance a legitimate governmental purpose (taking by eminent domain is a legitimate governmental purpose; extorting landowners is not).

2.2. A Rational Classification[18]

Because neither the complaint nor the papers include allegations or facts that Hillcrest was treated differently owing to membership in a suspect class or owing to exercise of a fundamental right, rational basis review applies. Under the highly deferential standard, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bd. of Trustees the of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Thus, a classification fails rational basis review only if "the facts preclude[ ] any plausible inference" that a legitimate basis underlies the difference in treatment. *Nordlinger v. Hahn,* 505 U.S. 1, 16, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

*20 Hillcrest accuses the Ordinance of arbitrarily treating differently a landowner whose property is overlapped by a corridor from a landowner whose property is not overlapped by a corridor. According to the complaint, the discrimination is irrational because "development of [the latter] properties may contribute equally or more to the traffic problems necessitating the widening of the roads [as the development of the former properties]." (Doc. 36, ¶ 111) But a development along State Road 52 causes more traffic congestion on State Road 52 than an identically sized development not along State Road 52.[19] Hillcrest identifies no equal protection violation.

2.3. A Few Perfunctory Objections[20]

The magistrate judge recommends denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on the federal "access to courts" claim. Hillcrest objects; cites a footnote in *Christopher v. Harbury,* 536 U.S. 403, 415 n. 12, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002); and argues that the Ordinance impairs the "right of access to courts ... guaranteed under the United States Constitution by an amalgam of the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection and Due Process Clauses." (Doc. 112 at 35) Whatever the merits of the "amalgam" in the usual instance (or under state law), such as a prisonlitigation action, *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), or an action challenging a filing fee, *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), Hillcrest fails to articulate an impediment created by the Ordinance that frustrates Hillcrest's access to federal court.

Next, the magistrate judge recommends denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on the claim that the Ordinance violates Hillcrest's right to a jury trial. Hillcrest asserts that the Ordinance violates the federal right to a jury trial by "effectively suspend[ing] the right to jury trial in federal court for as long as it takes to complete the dedication waiver process." (Doc. 112 at 38) Again failing to articulate the merits of the claim to a level susceptible of understanding (most administrative procedures "effectively suspend" a jury trial), Hillcrest relies on *Armster v. U.S. Dist. Ct. for the C.D. Cal.,* 792 F.2d 1423 (9th Cir.1986), a decision addressing the Central District of California's suspending all civil jury-trials for three-and-a-half months. *Armster* is unhelpful.

2.4. Other Claims for Relief[21]

Section 1367(c) of Title 28 of the United States Code grants the district court discretion to decline to exercise supplemental jurisdiction if "(1) the claim raises a novel or complex issue of state law ... [or] (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *See Utopia Provider Sys. v. Pro–Med Clinical Sys.,* 596 F.3d 1313, 1328–29 (11th Cir.2010); *Parker v. Scrap Metal Processors,* 468 F.3d 733, 742–44 (11th Cir.2006). The remaining claims include (1) in Count I an as-applied "takings" claim under the Florida Constitution, (2) in Count IV an as-applied due process claim under the Florida Constitution, (3) in Count V an as-applied equal protection claim under the Florida Constitution, (4) in Count VI an as-applied "temporary takings" claim under the Florida Constitution, (5) in Count IX a facial due process claim under the Florida Constitution, (6) in Count X a facial equal protection claim under the Florida Constitution, (7) in Count XII a facial "access to courts" claim under the Florida Constitution, (8) in Count XIII a facial "separation of powers" claim under the Florida Constitution, and (9) in Count XIV a facial "right to a jury trial" claim under the Florida Constitution. Resolution of the remaining claims would require a federal court's uncomfortable and unnecessary examination of the Florida Constitution and the structure of Florida's government. Additionally, on August 22, 2011, Hillcrest sued the FDOT in state court for inverse condemnation. *Hillcrest Property v. Florida,* 51–2011–A–003825 (staying action in favor of this action on December 14, 2012). With Hillcrest's property disputed in each action, the jurisdictional splitting of claims invites a duplication of judicial effort, an affront to comity, and an inconsistent result.

3. Conclusion

*21 Pasco County has enacted an ordinance that effects what, in more plain-spoken times, an informed observer would call a "land grab," the manifest purpose of which is to evade the constitutional requirement for "just compensation," that is, to grab land for free. Viewed more microscopically, Pasco County's Ordinance designs to accost a citizen as the citizen approaches the government to apply for a development permit, designs to withhold from a citizen the development permit unless the citizen yields to an extortionate demand to relinquish the constitutional right of "just compensation," and designs first and foremost to accumulate—for free—land for which a citizen would otherwise receive just compensation.

Aware undoubtedly of the brazenness of the Ordinance, Pasco County has garnished the Ordinance, has disguised the Ordinance, has planted in the Ordinance a distraction, using the familiar phrase "roughly proportional" or "rough proportionality," words intended to evoke the soothing reassurance of the Supreme Court's decision in *Dolan,* words intended to deploy aggressively the foggy notion that if the words "roughly proportional" appear in a scheme to regulate land, the scheme is constitutional. Not so.

The parties laboriously briefed in this action an array of theories. Both the magistrate judge and I have examined, exhaustively and exhaustingly, the contending theories, briefed and unbriefed. The magistrate judge has opined formidably. Accepting the magistrate judge's report for the most part but viewing the law in part from a slightly different vantage, I contribute some additional analysis and accept the magistrate judge's conclusion. Another judge might find the magistrate judge's opinion or this opinion inexact in this or that particular of constitutional law. Nonetheless, this Ordinance is an unmistakable, abusive and coercive misapplication of governmental power, perpetrated to cynically evade the Constitution. The Ordinance cannot stand, whether for the precise reasons stated here or for a related reason.

The report and recommendation (Doc. 168) is **ADOPTED IN PART.** To the extent inconsistent with this order, the parties' objections (Docs. 170 and 171) are **OVERRULED.** Under 28 U.S.C. § 1367(c) (1) and (4), supplemental jurisdiction is **DECLINED** over Counts I, IV, V, VI, IX, X, XII, XIII, and XIV. Section 1367(d) tolls any applicable limitation for thirty days. *Jinks v. Richland County,* 538 U.S. 456, 459, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). Pasco County's motion for summary judgment (Doc. 111) and Hillcrest's motion for summary judgment (Doc. 112) are **GRANTED IN PART AND DENIED IN PART** as follows:

• Count II (due process; as-applied; United States Constitution): Pasco County's motion for summary judgment is **DENIED.**

• Count III (equal protection; as-applied; United States Constitution): Pasco County's motion for summary judgment is **GRANTED.**

• Count VII (due process; facial; United States Constitution): Hillcrest's motion for summary judgment is **GRANTED.** Pasco County's motion for summary judgment is **DENIED.**

*22 • Count VIII (equal protection; facial; United States Constitution): Hillcrest's motion for summary judgment is **DENIED.** Pasco County's motion for summary judgment is **GRANTED.**

• Count XV (access to courts; facial; United States Constitution): Hillcrest's motion for summary judgment is **DENIED.** Pasco County's motion for summary judgment is **GRANTED.**

• Count XVI (right to a jury trial; facial; United States Constitution): Hillcrest's motion for summary judgment is **DENIED.** Pasco County's motion for summary judgment is **GRANTED.**

To discuss the form of the forthcoming judgment and to discuss other current issues, a hearing and a status conference will occur on **APRIL 25, 2013, at 2 p.m.,** in Courtroom 15A of the United States Courthouse in Tampa, Florida.

ORDERED.

Footnotes

1 Pasco County codified the Ordinance at Section 319 of the Pasco County Land Development Code. During this action, Pasco County adopted Ordinance 11–15, which moved the Ordinance without material amendment to Section 901.2 of the Code. For clarity, both the old and the new numbers are cited in this order.

2 The Ordinance suggests that the Review Committee could "waive" the dedication and allow the landowner to keep the land, but the prospect of waiving the "excess dedication" appears, at least, doubtful and, more likely, entirely illusory. Across a local expanse of right-of-way, highway boundaries are typically smooth and parallel.

3 The Ordinance is no model of clarity, but a complete, guided excursion into the Ordinance's compositional mystery would expand this order unacceptably. Some highlights include:

> The Ordinance's primary operative provision, Section 319.8(A), requiring dedication when the County approves the construction plan:
>
> ... Dedication shall be by recordation on the face of the plat, deed, grant of easement, or other method acceptable to the county. All dedications shall occur at record plat, construction plan approval where a record plat is not required, or within 90 days of the county's request, whichever occurs first ....

> The interim use definition, Section 319.4(D), describing "dedication" as a means of "conveyance" and allowing an interim use until "conveyance":
>
> Interim use shall mean a use of the land in the transportation corridor prior to the date of conveyance of such land to the county for right-ofway, whether such conveyance is by dedication, acquisition, or other means.
>
> Another interim use provision, Section 319.6(A), stating that a property owner may (if approved by the Review Committee) employ an interim use until "dedicat[ion]":
>
> ... The purpose of this section is to allow certain uses for a limited period of time within portions of a development site that are located within a transportation corridor in order to permit the property owner to make economic use of the property until such time as the land within the transportation corridor is to be dedicated to or acquired by the county....
>
> And another interim use provision, Section 319.6(B)(2)(a), identifying when a property owner must remove an "interim use"—at the "termination date" not at "dedication":
>
> The applicant agrees to discontinue and remove, at the applicant's sole expense, the interim uses no later than the beginning of the first fiscal year in which monies for acquisition of right-of-way within the affected transportation corridor are first programmed by either the county, in the county's five-year capital improvement plan or capital improvement element, or the state department of transportation in the state department of transportation's five-year transportation improvement program (the 'termination date'). This agreement shall be evidenced by an affidavit which shall state that the interim uses shall be discontinued no later than the termination date. Such affidavit shall be recorded against the development site in the public records of the clerk of the circuit court of the county, and a copy of the recorded affidavit shall be provided to the county prior to the issuance of the first building permit within the development site....
>
> And this one, Section 319.10(B), just for fun:
>
> Where the provisions of this section 319 cause a hardship, a property owner shall be entitled to apply for a variance in accordance with the provisions of section 316 of this Code. Notwithstanding the foregoing, the procedures set forth in 319.9 shall be the county's exclusive administrative remedy for challenging a dedication required by 319.8 or other transportation requirement as not being roughly proportional to the transportation impacts of a development; provided, however, the procedures and appeal provisions set forth in the TIS resolution shall continue to apply to disputes or challenges relating to TIS or mitigation requirements of the TIS resolution, including the modifications to the TIS resolution for dedication waivers set forth in this Code, unless the development review committee or board of county commissioners determine that the procedures set forth in section 319 .9 are a more appropriate remedy. In addition, all remedies, rights, and obligations set forth in F.S. chs. 163.380; Rules 9J–2 and 9J–5, Florida Administrative Code; sections 402 and 618 of the land development code, and the county Transportation Impact Fee Ordinance (Ordinance No. 04–05 as amended) shall continue to apply, unless the development review committee or board of county commissioners determine that the procedures set forth in section 319.9 are a more appropriate remedy.

The report and recommendation construes (Doc. 168 at 10) the Ordinance as requiring removal of the interim use at the "termination date" not at "recordation." No party objects to the magistrate judge's interpretation, and Hillcrest asserts no "vagueness" challenge.

4 Pasco County suggests (Doc. 111 at 10 n. 11) that Hillcrest's counsel's math "was off" and that counsel meant fifty feet.

5 On August 22, 2011, Hillcrest sued the FDOT for inverse condemnation. On December 14, 2012, the Circuit Court for Pasco County stayed the action in favor of this action. *Hillcrest Property v. Florida,* 51–2011–A–003825.

6 According to Hillcrest, for two-and-a-half years the government agencies and Hillcrest negotiated compensation and severance damages and exchanged several oral offers for compensation. According to Hillcrest, a cash shortage rendered Pasco County unable to provide compensation consistent with the estimate of Pasco County's appraisers.

7 In particular, the report recommends:

- Denying Pasco County's motion for summary judgment on Count I (taking; as-applied; Florida Constitution);
- Granting Pasco County's motion for summary judgment on Count II (due process; as-applied; United States Constitution);
- Denying Pasco County's motion for summary judgment on Count III (equal protection; as-applied; United States Constitution);
- Granting Pasco County's motion for summary judgment on Count IV (due process; as-applied; Florida Constitution);
- Granting Pasco County's motion for summary judgment on Count V (equal protection; as-applied; Florida Constitution);
- Denying Pasco County's motion for summary judgment on Count VI (temporary taking; as-applied; Florida Constitution);
- Granting Hillcrest's motion for summary judgment on Count VII (due process; facial; United States Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count VIII (equal protection; facial; United States Constitution);
- Granting Hillcrest's motion for summary judgment on Count IX (due process; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count X (equal protection; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XII (access to courts; facial; Florida Constitution);

- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XIII (separation of powers; facial and as-applied; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment Count XIV (right to a jury trial; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XV (access to courts; facial; United States Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XVI (right to a jury trial; facial; United States Constitution).

8 Count II (as-applied substantive due process claim under the U.S. Constitution); Count VII (facial substantive due process claim under the United States Constitution).

9 The "ripeness" analysis governs the equal protection challenge also. *Eide v. Sarasota County*, 908 F.2d 716, 724–25 (11th Cir.1990).

10 However, in a facial takings challenge, the actionable injury occurs, the claim accrues, and the limitation period begins immediately upon the effectiveness of the statute or ordinance. Hillcrest neither pursues a federal just compensation claim nor argues that the passage of the Ordinance caused an injury.

11 Justice Brennan's dissent (in which Justice Marshall joined) and most opinions and academic articles published after *Nollan*, use the term "governmental benefit" or "governmental privilege" to describe a building permit (or the item or action the government "permits" the citizen to accomplish in exchange for confiscating the property). The phrase is subtly misleading and pernicious. As *Nollan* observes: "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' " 483 U.S. at 833 n. 2.

12 Reifying this uncomfortable analogy, the Hobbs Act, 18 U.S.C. § 1951, defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Black's Law Dictionary* 623 (8th ed.2004) defines "extortion" as "[t]he offense committed by a public official who illegally obtains property under the color of office; esp., an official's collection of an unlawful fee."

13 This point defeats Pasco County's brazen argument that Hillcrest "waived" a legal challenge by at one point "agreeing" to the dedication.

14 "Inverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) (Rehnquist, J.) (quoting D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971)).

15 Pasco County lifts each objective directly from the enabling statute:

> "Transportation corridor management" means the coordination of the planning of designated future transportation corridors with land use planning within and adjacent to the corridor to promote orderly growth, to meet the concurrency requirements of this chapter, and to maintain the integrity of the corridor for transportation purposes.
> Fla. Stat. § 163.3164(47).

16 Pasco County has never said why an immediate public "dead zone" (as opposed to a future, private "dead zone") is required to ensure "an adequate transportation network," when and if Pasco County one day expands the road.

17 Pasco County unpersuasively argues that the waiver and variance procedures save the Ordinance from a facial challenge because in some conceivable application—for example, if Pasco County grants a waiver or variance—the Ordinance can apply constitutionally. But as explained above, neither the waiver nor the variance rectifies the aggregate discount achieved by the Ordinance, neither the waiver nor the variance properly places the burden on Pasco County, and neither the waiver nor the variance contains a cognizable and enforceable standard that removes the decision from the caprice of Pasco County.

Dolan recognizes that "roughly proportional" suggests an amorphous, imprecise standard. 512 U.S. at 391 ("No precise mathematical calculation is required."). Therefore, *Dolan* places the burden on the government to establish "rough proportionality" to an impartial jury or judge. Instead, the waiver procedure requires the landowner to establish the absence of "rough proportionality" and to prove the absence to the partial and land-starved County.

Requiring the landowner's establishing that the "variance requested is the minimum necessary to alleviate or address" one of the enumerated criteria quoted above, the variance procedure permits the Review Committee nearly unlimited discretion to grant or deny a variance. The Ordinance nowhere requires the Review Committee to modify the variance but instead requires denial if the Review Committee can perceive a hypothetical variance less burdensome on Pasco County. The "minimum necessary" standard leaves the variance decision, like the waiver decision, to the whim of the Review Committee.

Next

[18] Count III (as-applied equal protection claim under the U.S. Constitution); Count VIII (facial equal protection claim under the U .S. Constitution).

[19] Although advancing other arguments, Hillcrest alleges in the complaint no other discriminatory classification. Pasco County properly and successfully objects. (Doc. 116 at 8) Even absent an objection, the other equal protection arguments would fail.

[20] Count XV (facial "access to courts" claim under the U.S. Constitution); Count XVI (facial "right to a jury trial" claim under the U.S. Constitution).

[21] Count I (as-applied "taking" claim under the Florida Constitution); Count IV (as-applied due process claim under the Florida Constitution); Count V (as-applied equal protection claim under the Florida Constitution); Count VI (as-applied "temporary taking" claim under the Florida Constitution); Count IX (facial due process claim under the Florida Constitution); Count X (facial equal protection claim under the Florida Constitution); Count XII (facial "access to courts" claim under the Florida Constitution); Count XIII (facial "separation of powers" claim under the Florida Constitution); Count XIV (facial "right to a jury trial" claim under the Florida Constitution).

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