STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Rule 2.1 Exceptional Cases

Everett Kirby, et al, 11-CVS-7119,
Harris Triad Homes, Inc., 11-CVS-7120,
Michael Hendrix, Executor for the
Estate of Frances Hendrix, 11-CVS-8170,
Darren Engelkemier, 11-CVS-8171,
Ian Hutagalung, 11-C VS-8172,
Sylvia Maendl, 11-CVS-8173,
David Stept, 11-CVS-8174,
James Nelson, et al, 11-CVS-8338,
Republic Properties, LLC, 12-CVS.-2998,
(Group 1 Plaintiffs)

et al

V.

NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION,
Defendant.

DEFENDANT'S COMBINED BRIEF IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Department of Transportation, "NCDOT," submits this brief in support of its motion for summary judgment filed on February 11, 2013, and in opposition to Plaintiffs' motion for summary judgment filed on January 3, 2013.

NATURE OF THE CASE

Plaintiffs' inverse condemnation and declaratory judgment claims are premised on several misconceptions that run counter to well-established North Carolina law and the undisputed facts:

1. They were harmed by NCDOT's protected corridor maps filed in 1997 and 2008 for the proposed Winston-Salem Northern

Beltway, when in fact maps showing essentially the same routes were already published and known to the public during the environmental permitting process. Highway "lines on a map" cannot give rise to a taking or injury.

2. Merely impairing the market value of property or an owner's expected return on investment is a taking. However, Plaintiffs must show a deprivation of "all practical use" and "all reasonable value" to constitute a regulatory taking.

3. They have been harmed by the protected corridor improvement restrictions of § 136-44.51, when in fact they admit in their complaints and depositions they do not seek building permits or subdivision approvals, i.e., the restrictions have not harmed them.

4. The protected corridor restrictions have impaired Plaintiffs' ability to use their properties, when in fact all of them complain about being in the "path" of a planned highway, not the three-year restrictions on use.

5. They are entitled to advance acquisition of their properties prior to NCDOT beginning the statutory condemnation process. If a property owner were allowed to dictate when a condemning authority must acquire property, then such a result would render meaningless the statutory condemnation procedures established for NCDOT and other

public and private condemning authorities.

6. Plaintiffs Kirby, Hendrix, Engelkemier, Hutagalung, Maendl, Stept, and Republic have been subject to the Map Act and protected corridor for over "14 years," when in fact they have been subject to the protected corridor map in the Eastern Loop for a little over four years, since 2008.

It is important to remember that each Plaintiff must prove a taking with regards to his own property. Plaintiffs' attempt to "broad-brush" the facts and apply them to a particular piece of property does not answer the legal question before this court: was the particular property deprived of "all practical use and all reasonable value." *Beroth Oil Co. v. N.C. DOT*, __ N.C.App. __, 725 S.E.2d 651, 664 (2012)(*pet. disc. rev. pending*).

Plaintiffs allege regulatory, not physical, takings premised on NCDOT filing protected corridor maps on October 6, 1997 (Western Loop) and November 26, 2008 (Eastern Loop). Harris Cmplt. ¶ 6-7. The subject maps are mere lines on paper and do not represent what is actually on the ground. Plaintiffs' rights to receive just compensation and damages for the areas and interests taken when the maps transform into a physical highway are preserved under N.C. Gen. Stat. §§ 136-103, 136-112 (2013).

In the interim, Plaintiffs can use their properties as they always have. If they want to make new improvements, the

statutory mechanisms under § 136-44.51 are available under the Map Act for that purpose. But as described below, Plaintiffs do not seek building permits or to subdivide their properties. They have not been harmed by the hallmark provision of the Map Act, the three-year restriction on new improvements.

STATEMENT OF THE FACTS

For organizational purposes, Defendant's Statement of the Facts is contained in Appendix A, which is incorporated by reference and attached herein.

STATEMENT OF THE CASE

The above-named cases (Group 1 plaintiffs) were designated as exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. The court ordered, with the parties' consent, that these nine cases would be litigated in advance of the other Plaintiffs' cases (Groups 2, 3) which have nearly identical causes of actions. Litigation of Groups 2 and 3 are stayed pending appellate resolution of these nine cases, pursuant to the DSO.

Plaintiffs' complaints were filed with the Forsyth County Superior Court in 2011, except for Republic Properties, LLC, which was filed on 4/27/2012. The complaints alleged the same five claims for relief arising out of the North Carolina Transportation Corridor Official Map Act, N.C.G.S. § 136-44.50,

et seq. (2011)(hereinafter, "Map Act")[1]: a taking through inverse condemnation, pursuant to N.C. Gen. Stat. § 136-111; a taking under the Fifth Amendment of the United States Constitution, as applied to Defendant through the Fourteenth Amendment; violation of Plaintiffs' Equal Protection rights under the Fourteenth Amendment of the United States Constitution; a taking under the North Carolina Constitution, N.C. Const. art. I, § 19, Law of the Land; in the alternative, a claim for declaratory relief, pursuant to N.C. Gen. Stat. § 1-253, for a declaration that the NCDOT Hardship Program, and the Map Act, §§ 136-44.50, 136-44.51, 136-44.52 and 136-44.53 are unconstitutional and invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners.

Defendants timely answered each complaint, asserting various affirmative defenses and moved to dismiss Plaintiffs' claims pursuant to Rules 12(b)(1), (2) and (6) on the grounds that Plaintiffs failed to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C.G.S. § 136-111, lack of standing and ripeness, statutes of limitations and repose, and failure to exhaust

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[1]The Map Act was amended by S.L. 2011-242, which takes effect on December 1, 2011, and applies to transportation corridor maps filed on or after this date. References in Defendant's brief are to pre-amendment versions as may be applicable to the facts in this matter.

administrative remedies.

On January 8, 2013, this court entered an order on Defendant's motion, dismissing with prejudice the taking claims under the North Carolina Constitution and Fifth Amendment of the United States Constitution, and the Equal Protection claims. Plaintiffs' remaining claims before this court are the inverse condemnation claim, under N.C. Gen. Stat. § 136-111, and the claim for declaratory judgment challenging the constitutionality of NCDOT's Hardship Program and the Map Act.

STANDARD OF REVIEW

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). A party who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828 (1995). The propriety of summary judgment in a declaratory judgment action is governed by the same considerations applicable to any other action and therefore may be entered when there is no issue of material fact and a party is entitled to prevail as a matter of law. *Blades v.*

City of Raleigh, 280 N.C. 531, 187 S.E. 2d 35 (1972).

"A defendant may meet this burden by (1) proving that an essential element of the plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim." *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), reversed on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

"In passing upon a motion for summary judgment, all materials filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the summary judgment and that party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from that material." *James v. Clark*, 118 N.C. App. at 181, 454 S.E.2d at 828.

"Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000).

Only evidence admissible at trial may be considered during a summary judgment hearing. *Frank H. Conner Co. v. Spanish Inns*

Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785, 1978. Affidavits based on hearsay or irrelevant material should not be considered. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970); *Williamson v. Bullington*, 139 N.C. App. 571, 534 S.E.2d 254 (2000), aff'd, 353 N.C. 363, 544 S.E.2d 221 (2001). Statements not based on personal knowledge and stating facts that would be inadmissible in evidence should be struck. *Strickland v. Doe*, 156 N.C. App. 292, 577 S.E.2d 124 (2003), *cert. denied*, 357 N.C. 169, 581 S.E.2d 447 (2003).

Plaintiffs have the burden to show that they have standing to bring a claim and invoke the court's subject matter jurisdiction. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005). Standing contains three elements: (1) an injury in fact (2) that is fairly traceable to the challenged action of the defendant; and (3) the likelihood (not speculation) that the injury will be redressed by a favorable decision. *Id.* Plaintiff must prove an injury in fact in light of the applicable statutes or case law. *Id.* at 391, 617 S.E.2d at 310. Where plaintiff fails to show standing to sue, the complaint should be dismissed. *Andrews v. Alamance County*, 132 N.C. App. 811, 815, 513 S.E.2d 349, 351 (1999).

ARGUMENT

I. Plaintiffs' Actions are Time-Barred

NCDOT is entitled to judgment as a matter of law because

the undisputed facts show that Plaintiffs' claims are time barred by either the applicable statutes of limitations or statute of repose.

Plaintiffs' are alleging a regulatory taking of their properties as a result of NCDOT filing protected corridor maps in 1997 and 2008. Harris Cmplt. ¶¶ 51, 53; Hutagalung Cmplt. ¶¶ 3, 53. Plaintiffs do not allege NCDOT construction activities have created a taking. Though NCDOT's various maps and plans refer to the Winston-Salem Northern Beltway "project," the design features shown in the maps have not been constructed, with one minor exception noted below. In fact, the maps themselves state that "the design and right of way limits are preliminary and are subject to change during the development of final plans." Pl.'s 30 (b)(6) Dep. Ex. 4A.

Plaintiffs have the burden to show that their actions were filed within the statutory period. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 304 S.E. 2d 164 (1983). An action for inverse condemnation under § 136-111 is the exclusive remedy when it is alleged that NCDOT has taken property without filing a complaint and declaration of taking. N.C. Gen. Stat. § 136-111 (2013). The action must be filed within two years after the alleged taking, or within two years after the completion of the project, whichever occurs later. Id.

However, where plaintiffs cannot prove when the actual

taking was, they must prove that their claim was filed within 24 months of the "completion of the project involving the taking." *McAdoo v. Greensboro*, 91 N.C. App. 570, 572, 372 S.E.2d 742, 743 (1988)(applying 24-month statute of limitations for inverse condemnation under Ch. 40A). Though a larger highway project may be designated as a "project," the limitations period accrues from the completion of the individual section of the project that gives rise to the claim. *Id.* at 572, 372 S.E.2d at 743-744 (court must focus on section of "project" related to plaintiff's alleged injury).

Declaratory judgment actions challenging the constitutionality of a statute are subject to the three-year statute of limitations. N.C. Gen. Stat. § 1-52(2) (2013), 1-52(5)(2013); *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003)(cause of action challenging ordinance and **statute accrues when the statute is passed** and is not tolled by continuing ill effects from the **original violation** - alleged takings involve a "single harm, measurable and compensable when the statute is passed"); *Woodring v. Sweiter*, 180 N.C. App. 362, 377, 637 S.E.2d 269, 281 (2006)(statute of limitations for trespass was not tolled by encroachment of waterline because latter was a "continuing" not a "recurring" trespass); statutes of limitations for facial takings claims accrue upon enactment of the statute. *Levald,*

Inc. v. City of Palm Desert, 998 F.2d 680, 688 (C.A.9 (Cal.) 1993)(enactment of the statute is "a single harm, measurable and compensable when the statute is passed.")

In contrast, a "recurring" trespass was recognized by the North Carolina Supreme Court where the defendant's underground storage tanks continued to leak gasoline onto the plaintiff's property for several years. *Wilson v. McLeod Oil Company,* 327 N.C. 491, 511, 398 S.E.2d 586, 596 (1990). The plaintiffs therein did not file suit for more than three years following the discovery of the initial injury. The Supreme Court held that the plaintiffs were limited to recovery for damages incurred in the three years next preceding the filing of their action. *Id. at 513,* 398 S.E.2d 586, 597.

In *Wilson,* the ten year statute of repose contained in § 1-52(16) operated to bar any action against those defendants who had sold the contaminated property more than ten years prior to the filing of the action by the plaintiffs. *Id.* at 512-13, 398 S.E.2d at 597. This statute applies to actions involving injury to real property, and absolutely bars the filing of any action more than ten years after the last act giving rise to alleged injury.

Pursuant to § 1-52 (16), a plaintiff's cause of action for damages to real property "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent

or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue *more than 10 years* from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16) (2013)(emphasis added).

The Western Loop Plaintiffs were required to file their inverse condemnation actions no later than 1999 to satisfy the 24-month requirement in § 136-111 - two years from the filing of the protected corridor maps in 1997. The "project" giving rise to Plaintiffs' inverse claim is the filing of the protected corridor maps, not physical construction activities. Plaintiffs allege in their complaints and Memoranda of Action that the ***taking began*** when NCDOT recorded the protected corridor maps on October 6, 1997 (Western Loop) and November 26, 2008 (Eastern Loop), which is when the maps were recorded and restrictions of § 136-44.51 triggered. Harris Cmplt. ¶§ 6, 7, 51, 53; Hutagalung Cmplt. ¶¶ 3, 53; Kirby Cmplt. ¶ 5, 6, 46.

Indeed, Plaintiffs attribute their damages to actions that ***predate and are unrelated to*** NCDOT's filing of the protected corridor maps in 1997 and 2008, such as newsletters and workshops mandated by the NEPA Public Involvement process, surveyors placing stakes in the ground, and the real estate market crash of 2007-2008:

1. Harris Dep. p. 28: "No, sir. The damage started in 1991, if

you'll read the top of this one permit." Also Dep. p. 138.

2. Nelson Dep. p. 51, 73: his property's value was in 1996 when a surveyor drove stakes into his property showing the centerline of the planned Beltway.

3. Maendl Dep. p. 49, 70: property's value first sustained loss in 2007 due to real estate market slump.

4. Kirby Dep. p. 36, 40-42, 67; Dep. p. Ex. 7: Property first sustained loss in value in 2004 due to NCDOT's plans to construct the Eastern Loop after NCDOT sent him newsletters and notices about the planned alternative routes.

5. Hendrix Dep. p. 55-56: NCDOT violated his and his mother's rights by preventing the use of the property ***prior to*** NCDOT filing it's protected corridor map in 2008; family knew since 1993 that planned highway would likely affect the property. Dep. Pp. 25-26.

6. McInnis Dep. p. 44-45, 60. Property's value was damaged and rendered "unmarketable and economically useless" when NCDOT sent him letter dated March 9, 2006, and option contract for advance acquisition; he is "clueless" as to which map NCDOT may have filed in November 2008. Dep. p. 58.

Though Plaintiffs argue that the limitations period is tolled because the entire Northern Beltway "project" has not been completed, this argument has no merit because the "project" giving rise to Plaintiffs' cause of action was the recording of the protected corridor maps. It was a planning phase of the "project," which must be considered separate from any future construction activities contemplated under the project "completion" section of § 136-111. Thus, the court's focus must be on when the maps were recorded and those acts "completed," not when construction began or was completed.

The three-year statute of limitation applies to Plaintiffs'

declaratory judgment claims. Plaintiffs have not alleged any compensable act committed by NCDOT that occurred within the three years prior to the filing of their complaints. None of the Plaintiffs (except Harris) filed their complaints with the court within three years from the recording of the Eastern Loop map in 2008. The filing of the protected corridor maps constitute single, discrete acts by NCDOT, rather than recurring acts that might toll the statute of limitations.

Regardless, Western Loop Plaintiffs' claims were barred in 2007 because, under § 1-52(16), they were required to file their claims within ten years from the recording of the 1997 protected corridor map, which was the "last act or omission of the defendant giving rise to the cause of action." Thus, for the reasons stated, Plaintiffs' claims are time barred.

II. Plaintiffs' Claims Fail As A Matter of Law

Even if the claims are not time barred, the inverse condemnation and declaratory judgment claims alleging takings fail because they are based upon NCDOT's **pre-condemnation planning activities** and run headlong into the long-established North Carolina legal doctrine that a **"threat to take"** property and **"lines on a map"** cannot constitute takings of property rights justifying payment of compensation.

As stated previously, Plaintiffs contend that their

injuries resulted from planning, surveying, and mapping activities **that predate the filing of the corridor maps.** Allowing recovery for such actions would expose state and local governments and planning authorities to unbridled liability every time they published, adopted, filed or recorded maps or plans showing proposed right-of-way boundaries of future improvements such as highways, buildings, parks, hospitals. Such an outcome would destroy the government's ability to design, plan, obtain environmental permitting, and construct its infrastructure.

A taking does not occur by **mere threats of condemnation, making preliminary surveys or placing right-of-way stakes** in a person's yard. *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 484-485, 57 S.E.2d 817, 819-820 (1950). In *Penn*, plaintiffs alleged they were entitled to initiate inverse condemnation proceedings and recover damages where a municipal corporation with condemning authority planned to construct a toll road across plaintiff's property but had not yet started formal condemnation proceedings. The defendant performed preliminary surveys and staked out the route which went across plaintiffs' property. *Id.* at 485, 57 S.E.2d at 820. Affirming the trial court's dismissal of the complaint, the North Carolina Supreme Court held that **"[a] threat to take, and preliminary surveys [and staking of the proposed right-of-way], G.S. 40-3, are**

insufficient to constitute a taking on which a cause of action for a taking would arise in favor of the owner of the land." *Id.* The court stated that plaintiffs **"jumped the gun" in attempting to "chart the course"** and force the commission to **start condemnation proceedings when it was not ready.** *Id.* at 484, 57 S.E.2d at 819.

The principal that mapping and planning cannot be takings was upheld in *Browning v. N.C. State Hwy. Comm'n*, 263 N.C. 130, 135-36, 139 S.E. 2d 227, 230-31 (1964)(holding that the state's attempt to condemn property by posting a highway map at the court house did not transfer title to the State).

> It is the general rule that a mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected. Thus, the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof.

Id. (emphasis added); *See also* Martin v. U.S., 240 F.2d 326, 327, 330 (4th Cir. 1957)(highway commission could not legally take title to private property merely by recording and registering a highway map with the register of deeds office, even though the map showed the private property as being acquired by the State).

Even if a property owner relies to his financial detriment

on the publication of a map showing a future highway, no taking can occur. In *Morvan v. City of Charlotte*, No. COA02-1343 (N.C. Ct. App. Nov. 18, 2003) (unpublished), the City of Charlotte published a map showing a future road's right-of-way, which bisected plaintiff's property. In reliance on the map, plaintiff purchased additional property to avoid the proposed road and relocated its business activities. The city subsequently decided not to build the road over plaintiff's property. Though plaintiff relied on the city's intent to condemn the property to escape the lease terms, the court affirmed dismissal of the complaint and held that "the preparation of maps or even the adoption of a plan [which may never be carried out] is not a taking or damaging of the property affected so as to constitute a condemnation in any form." *Id.*, citing *Tucker v. Charter Medical Corp.*, 60 N.C. App. 665, 671, 299 S.E.2d 800, 804 (1983)(city's proposed plans to build a street, and rejection of plaintiff's site plan due to the conflict with the proposed street did not constitute a "functional" taking).

There is no guarantee that NCDOT will acquire all of the property shown in the protected corridor maps. Ivey Dep. p. 131. The corridor maps are preliminary plans and are not construction plans. Ivey Dep. p. 128-29. NCDOT cannot perform project-wide right-of-way acquisitions until it gets authorization, and develops official right-of-way plans showing the areas and

interests NCDOT needs to acquire. NCDOT has not prepared any right-of-way plans depicting Plaintiffs properties. Ivey Dep. p. 132-33. As referenced previously, the corridor plans are preliminary in nature and not to be used for construction.

Plaintiffs herein are complaining about maps that show "potential" right-of-way acquisition lines for the Northern Beltway; NCDOT's intent and threat to condemn their properties and the "delay" in doing so; the recording of proposed highway maps at the courthouse; and the uncertainty and public announcements relating to the intent to condemn property. Even if such actions result in financial loss, they are not compensable. See *6214 S. Blvd. Holdings, LLC.*, COA05-1477 (N.C. Ct. App. July 18, 2006) (unpublished) (plaintiff's inverse condemnation claim properly dismissed where city's **public announcement**, planning and preparation of a light rail system did not constitute "a substantial interference with elemental rights growing out of the ownership of the property," even though plaintiff may have lost tenants due to the project and threat of condemnation).

Plaintiffs' experts herein testified during deposition that a developer's decision to purchase property within the path of the proposed Northern Beltway is ***unrelated*** to the protected corridor's three-year building permit restrictions, and any impact on a plaintiff's property use predated the filing of the

protected corridor maps. Charles H. Fulk, Plaintiffs' tendered expert as a real estate broker, testified:

> ·1. Q.· You don't even get to the point of how much
> ·2· ·the **DOT restrictions** would impact a buyer's decision
> ·3· ·because they are shied away just for the mere fact
> ·4· ·of the property being within the **path of a future**
> ·5· ·**highway**?
> ·6· **A.· Correct.· That's it.**· I wish there was a
> ·7· ·simple, you know, 60 percent off stamp that you
> ·8· ·could put on these and we move them, but that whole
> ·9· ·uncertainty is the problem.

Fulk Dep. p. 70. Due to the "stigma" (i.e., threat) of the Northern Beltway coming through, potential developers don't want to "touch" properties within the corridor, regardless of the restrictions. Dep. p. 52, 62, 85. Months after his November 2012 deposition, Fulk contradicts himself in his affidavit for the summary judgment hearing by testifying that Sheetz had no interest in purchasing a site within the protected corridor because of the three-year restrictions. Fulk Aff. p. 2. In contrast, Fulk acknowledged that Sheetz shied away from corridor property due to the threat of the highway, not the three-year restrictions. Faulk Dep. p. 37. In fact, **Fulk does not understand how the temporary three-year restrictions or NCDOT's variance program function.** Dep. p. 88. Fulk thinks Kirby's ability to use his property was impaired in 2004, **four years before NCDOT filed the protected corridor map** for the Eastern Loop. Dep. p. 89.

Plaintiffs designated as an expert Roger Aubrey Linville, a real estate broker, who testified that he had no opinion on the impact NCDOT's three-year restrictions might have on properties in the Northern Beltway. Linville, Dep. p. 102-103, 116. His opinions on economic return were based solely on properties being located within the "path" of the proposed Northern Beltway, **not the restrictions**. Linville Dep. p. 74, 102. Fulk and Linville's opinions are based on the notion that developers shy away from properties within the Eastern Loop because of the mere threat of the future Beltway. The three-year restrictions on development play virtually no role, if any.

Plaintiffs have tendered Dr. Patrick McMullen, a statistics professor, as an expert witness. McMullen is of the opinion that there are fewer sales of properties near and inside the Northern Beltway. (McMullen Dep. p. 21) McMullen has no professional experience in real estate and does not know what the term "market value" means. He admitted that his opinion in this matter has nothing to do with valuation of real estate. (McMullen Dep. Pp. 29-30) However, in his recent affidavit, McMullen states the following: "My analysis also supports the conclusion that BUT for the Beltway, the properties in the Beltway would have experienced the same statistical instance of qualified transfers as those properties outside the Beltway." (McMullen Aff. ¶ 10)

McMullen contradicts his deposition testimony, and is not competent to testify as to causation in decreased sales of properties. N.C.G.S. §1A-1, Rule 56(e)(2013); §8C-1, Rule 702(a)(2013). By his own admissions, he is not qualified to render an opinion regarding the cause of the decline in the real estate market nearer to the proposed Beltway. Nor does McMullen's proffered testimony shed any light on the impact the three-year restriction on new improvements have on the number of sales. McMullen's affidavit should be struck and his opinion disregarded because he lacks qualifications to testify on the cause of a drop in real estate sales.

Plaintiffs' case is **not about the protected corridor's three-year restrictions on new improvements.** Their case hinges on the "threat" that the Northern Beltway may be built and the various maps published over the years showing the proposed route. Plaintiffs admit they **"do[] not want or require a building permit or subdivision."** Republic Cmplt. ¶ 53.

If NCDOT's protected corridor maps can be considered takings by mere virtue of them showing proposed highway boundaries over properties, then maps and plans generated by NCDOT, FHWA, the city and county that were published prior to 1997 (Western Loop) and 2008 (Eastern Loop) are also fair game for litigation. NCDOT and other agencies are required under federal and state environmental law to create and publish to the

public maps and plans depicting potential highway routes, i.e., "alternatives," and major design features. 23 C.F.R §§ 771.111, 771.123, 771.125. These plans and maps show proposed highway lines over public and private property. EIS maps must be displayed at public hearings and are posted on NCDOT's websites and mailed to property owners within the project area. Aff. Pair p. 3.

From 1997 to 2013, NCDOT was required to complete **over 53** Environmental Impact Statements ("EIS") on various highway projects statewide. The NEPA process requires NCDOT to openly publicize possible highway routes through the Public Involvement process. Aff. Pair p. 5; Aff. Joyner, p. 5. The NEPA Public Involvement process is mandated under federal law and regulations and is entirely separate from North Carolina's Map Act. 23 C.F.R Part 771.111.

To hold that the protected corridor maps are regulatory takings merely because they openly communicated to the public the proposed path of the Northern Beltway would be akin to holding that **federally mandated planning activities** during the EIS process are also takings. Such a result would throw the EIS and NEPA permitting processes into turmoil. Thus, to the extent Plaintiffs are claiming damages to properties as a result of NCDOT's filing and publicizing its protected corridor maps, these claims must be denied and judgment entered in favor of

NCDOT as a matter of law.

III. There Has Been No Deprivation of "All Practical Use" and "All Reasonable Value" As a Result of Map Act's Restrictions

Even if Plaintiffs' claims survive to this point, they cannot forecast competent evidence to show there is a genuine issue as to a material fact to satisfy the *ends-means* test. As this court has noted and the North Carolina Court of Appeals unanimously held in *Beroth Oil*, Plaintiffs must satisfy the "means" element of the "ends-means" test to prove their inverse condemnation claim. "[P]laintiffs must demonstrate (1) they have been **deprived of all practical use** of their property and (2) the property has been **deprived of all reasonable value** in order to prove their property has been taken." *Beroth Oil Co. v. N.C. DOT*, __ N.C.App. __, 725 S.E.2d 651, 664 (2012)(pet. disc. rev. pending)(emphasis added); citing *Weeks v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 225, 388 S.E.2d 228, 234 (1990).

The courts do not engage in a highest and best use analysis. The test is "**not what particular development of the property will be most economically beneficial** to plaintiff, but instead, whether plaintiff has been deprived of **all practical**

use and reasonable value of the property." *King by & Through Warren v. North Carolina Dep't of Env't., Health & Natural Resources*, 125 N.C. App. 379, 386, 481 S.E.2d 330, 334 (1997)(applying the practical use part of the ends-means test). It is important to note that each Plaintiff must show that his property has been deprived of **"all"** practical use as a result of the Map Act and NCDOT's alleged actions.

As described below, there should be no question that Plaintiffs retain practical uses of their properties - 10 of the subject properties are currently being used as legal residences. Plaintiffs have the burden to show that an inverse taking has occurred. *Penn v. Carolina,* 231 N.C. 481, 484, 57 S.E. 2d 817, 819. "Not every act or happening injurious to a landowner, his property or his use of his property is compensable." *Twitty v. State*, 85 N.C. App. 42, 53, 354 S.E.2d 296, 303 (1987). Just because the state performs an act that impairs the market value of private property does not *ipso facto* mean a compensable taking has occurred. *Adams Outdoor Advertising v. North Carolina Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666-67 (1993)(allegations of loss of rental income due to NCDOT planting trees in front of billboards and obstructing view was not a taking).

What constitutes a regulatory taking is often mixed with the question of whether the act is an exercise of the police

power or eminent domain. *Barnes v. North Carolina State Highway Com.*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-738 (1962)(construction of median strips are police power actions and not compensable takings); *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180(1980)(change in traffic patterns is valid police power and not compensable); *Wofford v. Highway Commission,* 263 N.C. 677, 140 S.E.2d 376, *cert. denied*, 382 U.S. 822 (1965)(action properly dismissed where closing of state road leaving owners on a cul de sac was valid police power and not a taking).

In regulatory takings cases, the court must focus on the "the parcel as a whole" when considering the impact of the land-use regulation. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341, 152 L. Ed. 2d 517, 538 (2002)(rejecting argument that a temporary 32-month moratoria on residential development constituted a per se taking where the "regulation that affects only a portion of the parcel -- whether limited by time, use, or space -- does not deprive the owner of all economically beneficial use.").

A. Practical Uses Remain

People are living on most of Plaintiffs' properties and paying rent to Plaintiffs as well. (Def. SOF, Apx. A). These facts alone should defeat the notion that Plaintiffs have been deprived of **"all practical use"** of their properties. Plaintiffs

have failed to meet their burden to show a deprivation of "all practical use" of their properties.

Four of the Plaintiffs, "California Plaintiffs," (Engelkeimer, Hutagalung, Maendl, Stept) are absentee landlords and purchased their properties in 2006[2] all the while knowing they were in the path of the proposed Eastern Loop of the Northern Beltway. They learned of this after attending a real estate investment seminar ("ICG" seminar) in California. (Def. SOF Apx. A p. 8) A map of the proposed Northern Beltway was displayed at the ICG seminar and sales representatives pitched the idea of buying properties in the Oak Hill Place subdivision with the expectation that NCDOT would pay fair market values in five years at the time of condemnation. (Def. SOF Apx. A p. 9)

The California Plaintiffs' reckless investment schemes failed not because of NCDOT, but due to the national real estate market crash of 2007/2008, and over-leveraging themselves with 100% financing, adjustable rate loans, and balloon payments. (Def. SOF Apx. A p. 8-14). Plaintiffs took a gamble by purchasing properties located within the path of the planned Eastern Loop based on unrealistic expectations and their property values would continually increase over a five-year period and NCDOT would buy them out according to a schedule pitched to them at the ICG seminar. (Def. SOF, Apx. p. 8). Even

[2]Two years prior to the recording of the 2008 Eastern Loop protected corridor map.

Plaintiffs' own expert witness, Roger Linville, thinks that knowingly buying property in the path of a future highway is an unreasonable investment decision. Linville Dep. p. 64. In addition, all of the California Plaintiffs have been earning rental income on their properties since 2006. (Def. SOF Apx. A p. 8-14).

Regarding the Harris properties, Ben Harris attributes his damages to events that predate the 1997 filing of the protected corridor map for the Western Loop. He is adamant that his damages began in 1991 after the city typed on top of his building permits for his McGregor Park lots a notice warning him that the properties were within the path of the proposed Northern Beltway and subject to future condemnation. (Def. SOF, Apx. p. 18-19). He DOES NOT attribute his property damages to the filing of the protected corridor map in 1997:

> 18 ·Q.· ·And what impact do you think DOT reporting [sic]
> 19· the corridor map in 1997, some years later, had on
> 20· your ability to sell the properties?
> 21· ·A.· ·They **had already taken away my ability to**
> **22· sell the properties**.· But when the value really
> 23· started going downhill was when they started
> 24· tearing the houses down and moving them and putting
> 25· up the no trespassing signs on the houses that they
>
> . . .
>
> ·1· had torn down and --
> ·2· Q.· ·Okay.· So the -- **DOT's filing of the map,**
> **·3· the corridor map in 1997, did that have any -- make**
> **·4· any difference on the value of your houses or was the**
> **·5· damage already done?**

·6· · · ·A.· ·The damage was already done.

Harris Dep. p. 139-40; (Def. SOF Apx. A p. 26)

Since renting his five McGregor Park properties in the early 1990s, Harris has earned over $1.2 Million in gross rental income ($60,000 a year x 20 years). Harris paid off the original construction loans for the five properties in 1994. Obviously Harris' properties' have some reasonable value if BB&T was willing to loan him $425,000 and $525,000 in 2002 and 2006 using the properties as collateral. (Def. SOF, Apx. p. 22-23); Dep. p. 238.

Kirby has been operating a professional Labrador dog training center on his property for the past 22 years. (Def. SOF, Apx. p. 14) Plaintiff Republic had tenants living on its property but asked them to leave. (Def. SOF, Apx. p. 17) Though two of the Plaintiffs have unoccupied properties that are suitable for development, Hendrix and Republic, NCDOT has not denied them the ability to develop their land. Regardless, Plaintiffs admit that they do not seek building permits or to subdivide their properties. Pl. Cmplts. ¶ 53, 57.

The Nelsons live in a house on one of their tracts and earn income from the other tract by renting it to a cell tower company. Nelson Dep. p. 41. Even Mr. Nelson acknowledged that he is using his property for at least **one practical use**, i.e., his

domicile. (Def. SOF, Apx. p. 24); Dep. p. 90. In addition, the tract of land where the cell tower is located can be used under the Unified Development Ordinance for additional uses such as a church or manufactured homes. Aff. Hunt, p. 3.

Regarding the Kirby, Hendrix and Republic properties, all of these properties are suitable for development both inside and outside the protected corridor. Plaintiffs' tracts of land inside and outside the protected corridor must be viewed as a whole in a taking analysis. Tahoe-Sierra, 535 U.S. at 341, 152 L. Ed. 2d at 538. The Plaintiffs could develop the land inside the corridor if they merely followed the provisions of § 136-44.51 and allowed the three-year sunset provisions to trigger. But none of them chose to do that.

To argue that the three-year restrictions on new improvements have destroyed their abilities to develop and use the properties ignores the plan language of the statute: it expires in three years if they submit an application for a permit or subdivision. N.C. Gen. Stat. § 136-44.51 (2011). These Plaintiffs could easily have overcome the restrictions of § 136-44.51 by merely submitting applications for building permits or subdivisions, which they did not do. None of them were denied permits or subdivision approvals by NCDOT.

In fact, Harris was not prevented from rebuilding his house after a fire in 2000, or from making other repairs to his five

rentals. Dep. p. 69-70, 85, 108. Plaintiffs make circular and confusing arguments on this point. In one part of their complaints, they claim a regulatory taking occurred partly due to the improvement restrictions, but they later admit that they ***"do[] not want or require a building permit or subdivision."*** Cmplts. ¶¶ 53, 57. (emphasis added).

The Kirbys have been operating their business for the past 22 years, and have been leasing it to a professional dog trainer for the past eight years. The trainer lives on the property. (Def. SOF, Apx. p. 14) The Kirbys have the option of developing the property outside the protected corridor into single-family lots if they so desire.

According to NCDOT's tendered experts, Judith Hunt, a certified planner who worked for the Winston-Salem Forsyth County City-County planning department for over 30 years, and George Stanziale, a landscape architect with over 37 years of experience in designing real estate developments, the Kirby property can be developed outside the protected corridor to accommodate about 20 single-family lots with a rezoning. Areas inside the corridor can be developed in accordance with the UDO if Kirbys submitted the appropriate permits to the city-county planning office and allowed the three-year improvement restrictions under § 136-44.51 to expire. Aff. Hunt, p. 3, Ex. B; Aff. Stanziale, p. 4.

Regarding the Hendrix property,[3] the corner parcel along Old Hollow Road lies mostly outside the protected corridor and can be developed for commercial use under the UDO, if rezoned. Other tracts can be developed for multi-family use, whether inside or outside the corridor. All of these uses are physically possible and legally permissible with the appropriate permits. Aff. Hunt, p. 3, Ex. B; Aff. Stanziale, p. 5. Part of the Hendrix property was previously used for a dwelling and can be used for the same purpose again because it is zoned RS-9. Hendrix Dep. p. 22-23; Aff. Stanziale, p. 5.

Hendrix testified that NCDOT took away his mother's rights to use the property prior to NCDOT recording the protected corridor map in 2008. During that time period, the estate listed the fair market value of the subject property at $1,857,000 in its 2007 inventory. The estate was closed on January 14, 2008. (Def. SOF, Apx. p. 15-6) Hendrix effectively admits that the property retained significant value during the period in which Hendrix alleges damages.

The Republic property retains multiple uses both inside and outside the protected corridor. It is zoned single-family residential and is suitable for development located outside the protected corridor, or on the entire parcel. Aff. Hunt, p. 3, Ex. B; Aff. Stanziale, p. 6. Mr. McInnis acknowledged this fact

[3] Hendrix' claim should be dismissed because he is not the real party in interest and that the estate has been closed since 2008. N.C. R. Civ. P. 17.

when he had a site rendering drafted showing residential lots on almost the entire parcel. Dep. p. 52, 54, Ex. 2. He estimates that such rendering would cost about $10,000 if done by a private firm. (Def. SOF, Apx. p. 17), Dep. p. 78.

McInnis attributes the depreciation in value of his property to events unrelated to NCDOT recording of the Eastern Loop protected corridor map in 2008. In fact, he is "clueless" as to which map NCDOT filed in November 2008. (Def. SOF, Apx. p. 17); Dep. p. 58. Nor does he know if NCDOT owns or rents property near his. Dep. p. 59, 88.

McInnis is an experienced real estate developer and his companies have other properties in the path of NCDOT highway projects. In 2006, through his company, he purchased the subject property that is directly in the path of the planned Eastern Loop. This is two years *after* property owners, like the Kirbys, were attending public workshops and receiving NCDOT mailings telling them about the planned route of the project. Dep. p. 36, 40-42, 67; Dep. p. Ex. 7. Certainly, the people who sold the property to McInnis were on notice of the planned Beltway because they were likely receiving mailings from NCDOT.

B. North Carolina Decisions Applying "Means" Test Do Not Support Plaintiffs' Claims

Regulatory takings claims involving land-use restrictions must overcome an extremely high hurdle to succeed. "A taking

does not occur simply because government action deprives an owner of previously available property rights." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130, 57 L. Ed. 2d 631, 652 (1978). "[T]he mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid. *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville* 308 N.C. 255, 265, 302 S.E.2d 204, 210 - 211 (1983). "Not every act or happening injurious to a landowner, his property or his use of his property is compensable." *Twitty v. State*, 85 N.C. App. 42, 53, 354 S.E.2d 296, 303 (1987).

North Carolina appellate courts have applied the ends-means test numerous times in both zoning and non-zoning cases. In *Weeks* (non-zoning case), the property owner applied for a major development permit to construct a 900-foot pier leading from his waterfront property to deeper water in Bogue Sound. *Weeks*, 97 N.C. App. at 217, 388 S.E.2d at 229. Plaintiff argued that denial of his permit request was a taking because it restricted the practical use of his property - he needed the long pier to access at least 3 1/2 feet of water to moor his sailboat. *Id.* at 219, 388 S.E.2d at 230. Examining the property interest at issue, the Court of Appeals noted that plaintiff possessed a

qualified riparian right of access to navigable waters that was appurtenant to his land. *Id.* at 218, 388 S.E.2d at 230. The court applied the "all practical use" prong of the ends-means test and affirmed summary judgment against plaintiff. [4] The court held that plaintiff retained some practical use of the shallow tidal waters, including "many recreational uses" such as use by smaller boats, fishing, scalloping and clamming - plaintiff also retained "current use" of his principal estate. *Id.* at 226, 388 S.E.2d at 235. The court noted that merely because the defendant's actions restricted plaintiff's use of his property "to some degree and prohibits him from developing it as he may wish is immaterial." *Id.* 97 N.C. App. at 226, 388 S.E.2d at 234 (emphasis added).

In *King* (a non-zoning case), plaintiff's major development and environmental permit applications were denied where she proposed constructing a bulkhead and road on her Topsail Island property to accommodate a future subdivision. *King*, 125 N.C. App. at 381, 481 S.E.2d at 331. Plaintiff argued that the defendants' actions denied her all reasonable use of the property, thereby constituting a taking. *Id.* at 382, 481 S.E.2d at 332. The court affirmed summary judgment for defendants, holding that plaintiffs failed to prove a taking and that she

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[4] In reviewing administrative appeals under N.C. Gen. Stat. § 113A-123(b), e.g., major development CAMA permits, courts apply the deprivation of "all practical use" analysis to determine if a regulatory taking has occurred.

was deprived of all "all practical use and reasonable value of the property," where six out of eight acres could be subdivided without restriction, and the wetland area could be developed if houses were built on pilings. *Id.* at 384, 481 S.E.2d at 333. The Court of Appeals focused on the ability to use the entire tract of land, not just the area within the restricted area.

In *Responsible Citizens* (a zoning case), plaintiffs alleged that land-use restrictions created by the city's flood-hazard ordinance was an unlawful exercise of the city's police power, a taking and violated their equal protection rights. Responsible Citizens, 308 N.C. at 256, 302 S.E.2d at 206. The ordinance applied only to new construction and substantial improvements, but did not affect current use. *Id.* at 264, 302 S.E.2d at 210.

The court applied the ends-means test and held, inter alia, that the restrictions on use were "conditional affirmative duties" and did not "affect in any way the **current use** of each plaintiff's property; each plaintiff thus continues to have a **'practical'** use for his property of "reasonable value." *Id.* at 264-265, 302 S.E.2d at 210 (emphasis added); see also *Finch v. City of Durham,* 325 N.C. 352, 355, 360, 384 S.E.2d 8, 10, 26 (1989)(applying ends-means test, court held city's rezoning of property from O-I to R-10 did not deprive plaintiff of all practical use and reasonable value where the property could be put to other uses, such as for a church, day care center, or

athletic park, despite plaintiff's evidence of a decrease in value from $550,000 as developable land to $25,000 as vacant).

The undisputed facts show that seven of the Plaintiffs are currently using their properties in a productive manner that is consistent with local zoning and land use regulations: California Plaintiffs and Harris (residential rentals), Nelson (domicile and cell tower), and Kirby (dog training center and mobile home). Plaintiffs Hendrix, Kirby, and Republic properties have land that is suitable for development and could have easily overcome the improvement restrictions of § 136-44.51 had they tried, which they did not. (Def. SOF Apx. A)

Indeed, in 2010, the Engelkemiers attempted to refinance their property and obtained an appraisal that indicated the market value at $147,000. The appraisal used comparable sales of properties located inside the Eastern Loop's protected corridor. Engelkemiers bought their property for $207,710 in 2006 at the height of the real estate bubble. (Def. SOF Apx. A p. 13). The fact that they retain 70 percent of the value of their property after the real estate market crash is undisputed evidence that they retain reasonable value in the property, regardless of whether the drop was due to the protected corridor map's restrictions, the threat of a future highway, or outside factors.

Because Plaintiffs have failed to forecast competent

evidence to prove they have been deprived of all practical use and all reasonable value of their properties, Defendant's motion for summary judgment should be granted, and Plaintiffs' denied.

IV. The Declaratory Judgment Claims Fail Because There Is No Genuine Controversy and Therefore No Jurisdiction

Plaintiffs' remaining claims are for declaratory relief under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, challenging the constitutionality of NCDOT's Hardship Program and the Map Act. Plaintiffs **make as-applied and facial challenges**. Harris Cmplt. ¶ 69.

Initially, a declaratory judgment for a regulatory taking "as applied" to Plaintiffs is redundant and unnecessary because whether a taking has occurred as to Plaintiffs' properties should be determined under the inverse condemnation proceeding. The same ends-means test is applied under either scenario. *Finch*, 325 N.C. 352, 367, 384 S.E.2d 8, 17. "An as applied regulatory taking claim, on the other hand, asserts that the application of a statute or ordinance to a particular parcel of property constitutes an uncompensated taking of that property." AMLZONING § 16:3. Judge Lindsay Davis noted this principle in his April 19, 2011, order in *Beroth Oil*, where he dismissed plaintiffs' declaratory judgment claims for a taking on an "as-applied" theory.

A. No Genuine Controversy

The validity of a statute can only be challenged under the Declaratory Judgment Act "only when some specific provision(s) thereof is challenged by a person who is *directly and adversely affected* thereby." *Barbour v. Little,* 37 N.C. App. 686, 690-691, 247 S.E.2d 252, 255 (1978)(emphasis added). Existence of a genuine controversy is a jurisdictional necessity. *Id.* Plaintiffs must show that a genuine controversy exists that is cognizable under the Declaratory Judgment Act by proving that he has been "directly and adversely affected" by the specific statute he challenges. *Id.* at 690-691, 247 S.E.2d at 255. "The existence of such a genuine controversy is a jurisdictional necessity." *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949).

"The general rule is that 'a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute." *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 484, 539 S.E.2d 380, 381 (2000). Plaintiff must allege and prove that "he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance." *Templeton v. Town of Boone*, 208 N.C. App. 50, 56 S.E.2d 709, 713-714 (2010)(plaintiff lacked standing to challenge ordinance amendment on as-applied basis).

When considering the constitutionality of a statute, the courts must analyze the challenged parts separately. Under the principle of severability, courts must not consider the constitutionality of a particular provision if it is not "necessarily involved in the litigation before the court, and [] that provision may be severed from the provisions which are necessarily before the court." 16 Am. Jur. 2d, Constitutional Law §§ 181-182.

B. Mere Lines on A Map

Plaintiffs' challenge to **§ 136-44.50** is not cognizable because the statute authorizes NCDOT to adopt and record corridor maps showing proposed highway lines over their properties. This is the "mapping" element of the Map Act allowing NCDOT to identify the boundaries of the corridor and list the names of those property owners who may be affected by the corridor's temporary land-use restrictions. § 136-44.50(a), (a1). North Carolina courts have long held that "lines on a map" and mere planning do not constitute compensable takings and are not subject to a determination under the Declaratory Judgment Act. *Barbour v. Little*, 37 N.C. App. at 690-691, 247 S.E.2d at 255. In *Barbour*, plaintiffs filed a declaratory judgment action seeking to invalidate certain statutes that allowed state agencies to designate private properties as potential right-of-way for the creation of the planned Eno River State Park. *Id.* at

686, 247 S.E.2d at 252. The Court of Appeals unanimously held that the state's map depicting proposed rights-of-way for a future park did not constitute a taking of plaintiffs' rights.

"Cleary the inclusion of a particular tract of land within a plan at any stage of its development, **including after its 'adoption' by the [state] does not constitute a taking of that land.**" *Id.* at 691, 247 S.E.2d at 255; *see also Duke Power Co. v. Herndon*, 26 N.C. App. 724, 728, 217 S.E.2d 82, 85 (1975)(entering private property by a condemning authority to conduct **preliminary surveys** is not a taking); *6214 S. Blvd. Holdings, LLC.*, COA05-1477 (N.C. Ct. App. July 18, 2006)(unpublished)(city's **public announcement**, planning and preparation of a light rail system did not constitute a taking).

Though Plaintiffs argue that recording the protected corridor maps and notices distinguish their situation from the *Barbour* and *Penn v. Carolina* line of cases, merely recording a map at the courthouse showing highway lines over private properties does not rise to the level of a taking. *Browning,* 263 N.C. 130, 135-36, 139 S.E. 2d 227, 230-31. Defendant acknowledges that one purpose of recording the maps and notices is to give the public notice of the proposed highway and improvement restrictions. Aff. Leggett, p. 2. However, the *Penn v. Carolina* and *Browning* line of cases clearly hold that notifying the public of a proposed highway and publishing maps

are not tantamount to a taking.

Recording the maps and notices do not affect the marketability of title to these properties. David Wallace is a title attorney who has performed thousands of title examinations for properties in the Winston-Salem area over the past 30 years. He is designated as one of NCDOT's expert witnesses. Wallace is of the opinion that NCDOT's recording of the protected corridor maps and notices do not create a "cloud on title" or encumbrance on plaintiffs' properties. Aff. Wallace, p. 2-3. Nor are they in the "chain of title," though they are cross-indexed in the land records at the registered of deeds office. Aff. Wallace, p. 2. Recordation of the maps and notices would not prevent the issuance of title insurance on these properties. Aff. Wallace, p. 3. Recording the maps and notices gives notice to the public, among other things, of the proposed highway and protected corridor's restrictions on future improvements. Aff. Wallace, p. 3. Thus, challenges to NCDOT's recording of the maps and notices are not legally recognized injuries under § 1-253.

C. Restrictions on Use and Variances

Plaintiffs also challenge **§ 136-44.51**, which addresses the three-year restrictions on building permits and subdivision requests, and **§ 136-44.52**, which addresses variances from the restrictions. However, Plaintiffs admitted in their complaints that **they do not seek building permits or to subdivide their**

properties. Pl. Cmplts. ¶ 53, 57. It is undisputed that none of them applied for building permits or subdivision plats **nor have they been denied** permits by NCDOT. The City is responsible for forwarding building permit applications and variance requests to NCDOT. Ivey Dep. p. 65-68. The City sent less than 10 building permit *inquires* to NCDOT - these were not actual permit applications and they were never "denied." Dep. p. 68. It is also undisputed that **none of the Plaintiffs applied for variances** to have their properties removed from the protected corridor's restrictions. The City forwarded less than 10 variance requests to NCDOT. Several of them were approved by NCDOT, two of which involved remodeling a garage and constructing a shed. Ivey Dep. p. 65-67.

Though Plaintiffs argue that it would have been futile to follow the statutory process and officially apply to the City and NCDOT for building permits, subdivisions or variances, it is mere speculation on what the City or NCDOT would have approved or denied. In *Andrews v. Alamance County*, 132 N.C. App. 811, 815, 513 S.E.2d 349, 351 (1999), plaintiff filed a declaratory judgment action seeking to invalidate the county's new manufactured home ordinance establishing minimum lot sizes. The Court of Appeals held that plaintiff lacked standing where, inter alia, she never attempted to file a subdivision plat with the county, or take any steps to begin the development of her

property; nor did she apply for a permit or been denied one. 132 N.C. App. at 811, 513 S.E.2d at 351. "Any challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted. *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1041 (1992) (Blackmun, J., dissenting).

Plaintiffs' attempt to declare §§ 136-44.51 and 136-44.52 as unconstitutional as applied to them is premature and not ripe because **the statutes were never enforced against them.** They were not denied relief under these statutes and failed to exhaust their administrative remedies. They lack standing to seek declarations on these points. Even if the statutes were enforced against them and their permit requests were denied, a three-year moratorium on new improvements within the Northern Beltway does not constitute a per se regulatory taking. *Tahoe-Sierra,* 535 U.S. at 341, 152 L. Ed. 2d at 538.

D. Hardship Acquisitions

Plaintiffs' challenge to § 136-44.53 must also fail. It is undisputed that the following Plaintiffs were **NOT denied** Hardship acquisition requests: Kirby, Hendrix,[5] Engelkemier, Hutagalung, Maendl, Stept, Nelson, and Republic. These Plaintiffs lack standing to challenge this statute on an as-applied basis because the declaratory judgment claims are not

[5]Frances Hendrix applied, was initially denied, but later approved, though the parties could not agree upon an acquisition price.

ripe. No genuine controversy exists because they have not been "directly and adversely affected" by this statute. Though Harris was denied a Hardship request by NCDOT in 2011, that denial was based upon a rational basis, as described below. Plaintiffs have not shown legally recognized controversies to support as-applied constitutional challenges and this court lacks jurisdiction over those claims.

E. NCDOT's Denial of Harris' Request Is Not The Basis For A Constitutional Claim

NCDOT's denial of Plaintiff Harris' Hardship request meets the rational basis test. Neither Harris nor other property owners have fundamental rights to advance acquisitions of their properties. Their rights to just compensation are **preserved for a jury trial** once NCDOT files formal condemnation proceedings according to the statutory process. N.C. Gen. Stat. §§ 136-103, 136-112 (measure of damages for total and partial takings); *Dep't of Transp. v. Rowe*, 353 N.C. 671, 680, 549 S.E.2d 203, 210 (2001)(statute allowing calculation of general benefits in condemnation award triggered only rational-basis scrutiny for equal protection claim where no suspect classification and owner's right to indemnification at jury trial was not impaired). The Court of Appeals flatly rejected plaintiffs' theory in *Beroth Oil* that NCDOT was exercising its powers of eminent domain and impacting fundamental rights under the

advance acquisition programs.

> While NCDOT possesses eminent domain power, it has not yet exercised that power. NCDOT's acquisition of properties through its Hardship Program is not an exercise of eminent domain power, but rather an attempt to mitigate the negative impact of the Map Act's restrictions on some of the affected property owners.n10

Beroth, __ N.C.App. __, 725 S.E.2d at 662.[6] The court was well aware of Plaintiffs' various arguments about NCDOT's acquisitions and even noted the Vienna Baptist Church purchase for $1.6 Million by NCDOT. Id.

Plaintiffs have a high hurdle to overcome in proving they are entitled to a declaration that a statute violates equal protection safeguards when neither a suspect class nor fundamental right is at issue. *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 485, 539 S.E.2d 380, 382 (2000)(classification was rationally related to legitimate government purpose). The State may "classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law." *Guthrie v. Taylor*, 279 N.C. 703, 713, 185 S.E.2d 193, 201 (1971). To prevail in an

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[6] Plaintiffs attempt to twist the meaning behind a letter written on March 3, 2006, by Assistant Attorney General Douglas W. Corkhill that is irrelevant to whether a taking has occurred regarding the subject plaintiffs. The AG letter merely explained to a landowner's attorney that NCDOT is exempt from paying homeowner association dues when it acquires title to property, whether the "property was purchased voluntarily or title was acquired by eminent domain . . . " Pl. Br. p. 28.

equal protection claim, a plaintiff "must first demonstrate that [it] has been treated differently from others with whom [it] is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005).

Classifications will be upheld if they "bear some rational relationship to a conceivable legitimate government interest." *Texfi Industries, Inc. v. Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). "[S]tatutes or administrative actions are seldom struck down under" under the rational basis analysis. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 820 (4th Cir. Md. 1995). Equal Protection is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). If there are **"plausible reasons"** for the difference in treatment, then the court's inquiry must end. *FCC v. Beach Communications*, 508 U.S. 307, 313-314 (1993).

Mere deviation from past practice is insufficient to make out an equal protection violation when no suspect classification or fundamental right is at issue. *Sowers v. Powhatan County*, 347 Fed. Appx. 898, 902 (4th Cir. Va. 2009)(unpublished)(holding that initial denial of rezoning application did not violate Equal Protection where plaintiff failed to "negate every

conceivable rational basis for the Board's differential treatment").

Harris' Hardship request was submitted to NCDOT's right-of-way branch on or about June 23, 2010, and eventually forwarded to Jon Nance, PE, NCDOT's Deputy Chief Engineer. Aff. Nance p. 2. After consulting with other NCDOT staff and reviewing the Hardship program criteria and federal rules, Nance denied Harris' request in a letter dated April 26, 2011. Aff. Nance. p. 2; Pl's SJ Ex. 103. There are several "plausible reasons" justifying the denial.

Harris' financial situation is stable, to say the least. It is undisputed that he and his corporation own at least nine residential properties, and have been earning continual rental income from the McGregor Park ones for over 20 years. The income tax returns he provided to NCDOT did not tell his entire financial story. The returns showed $44,055 in rent from three properties he did not want NCDOT to purchase. He did not disclose to NCDOT that he was receiving approximately $60,000 in annual rent from the McGregor Park properties. In total, Ben Harris' corporately held properties earned approximately $110,000 in annual gross income. Harris' financial situation was stable enough to allow him to construct a new house in 2009 in Rural Hall and qualify for loans of $425,000 and $525,000 in 2002 and 2006. (Def. SOF Apx. A p. 22-23). Plaintiffs attempt

to show unconstitutional conduct due to NCDOT's inability to produce complete files for every single Hardship request that was approved since 1997. But this court is not required to engage in second-guessing every single Hardship acquisition that was approved since 1997. The test is whether "conceivable" and "plausible" reasons exist for Harris' denial. Because such reasons exist, there is no dispute as to a material fact and judgment should be entered for NCDOT.

V. Plaintiffs' Facial Challenge Also Fails

Plaintiffs also argue that the Map Act and Hardship Programs are facially invalid as they effect takings. "As the name implies, a facial regulatory taking claim asserts that a statute or ordinance, by its words alone, amounts to a regulatory taking of property. A facial claim alleges that the regulation, in all of its applications, is unconstitutional." AMLZONING § 16:3.

The government enjoys a "presumption that a particular exercise of the police power is valid and constitutional," and "the burden is on the property owner to show otherwise." *A-S-P Associates*, 298 N.C. At at 226, 258 S.E.2d at 456. Plaintiff has the burden to prove that that statute is "clearly, positively, and unmistakably" unconstitutional or that it cannot be upheld on any reasonable ground. *Guilford County Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C.App. 506, 511, 430 S.E.2d

681, 684 (1993). Further, "[w]here a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne County Citizens Assn. v. Wayne Co. Bd. of Comrs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991).

If it is fairly debatable that an ordinance is unreasonable, arbitrary, or unequal in its exercise, then the court should not substitute its judgment for the legislature, which is charged with protecting the public health, safety, morals, or general welfare. *A-S-P Associates*, at 214, 258 S.E.2d at 449. Plaintiffs must overcome the heavy presumption that the Map Act is rationally related to a "conceivable legitimate government interest."

To prove a substantive due process violation, Plaintiff must show: "(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. N.C. 2002). "Substantive due process protections run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate

rectification by any post-deprivation state remedies." *Rucker v. Harford County*, 946 F.2d 278, 281 (4th. Cir. 1991)(emphasis added).

There should be no legitimate question that NCDOT's police powers include the design, construction, and maintenance of the State's system of highways. N.C. Gen. Stat. § 136-18 et seq. (2013); *Barnes v. North Carolina State Highway Com.*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-738 (1962)(construction of median strips); *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180(1980)(designing traffic pattern changes); *Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E.2d 376, *cert. denied*, 382 U.S. 822 (1965)(closing a state road).

The Map Act's goals, i.e., "ends," fall squarely within NCDOT's police powers in designing and planning for future urban loops such as the Northern Beltway. Corridor protection merely restricts "new improvements" to properties for a three-year period. It does not permanently "freeze" development. The restrictions are removed three years from the submittal of a building permit or subdivision request. N.C. Gen. Stat. § 136-44.51 (b) (2011).

Establishing corridor protection limits development within a preferred highway alignment that has already gone through extensive environmental screening, and in most cases, obtained NEPA approval. Corridor protection minimizes the number of

property owners who will have to be relocated once the project is authorized for right-of-way acquisition and construction, and it reduces future right-of-way acquisition costs, which can often represent the single largest expenditure for a transportation project, especially in growing urbanized areas where transportation improvement needs are the greatest. Aff. Leggett, p. 2; Aff. Trogdon p. 3.

Though Plaintiffs point solely to the idea of "saving taxpayers money" to the detriment of a few property owners, Plaintiffs conveniently ignore the other goals of corridor protection. Without corridor protection for urban loops in metropolitan areas like the Winston-Salem area, unrestricted development could jeopardize routes that have already received environmental permitting approval. NCDOT uses the Map Act as a **"planning tool"** to assist in the design and construction of the State's highways. Aff. Leggett p. 2.

If a potential transportation route is overtaken by development, roadways may need to be relocated into more environmentally sensitive areas, possibly increasing adverse impacts on the environment and make it infeasible to improve important parts of the State's transportation system. Aff. Leggett p. 2; Aff. Trogdon p. 3.

Though Plaintiffs cite to out-of-state cases in support of

their facial taking argument, many of these cases were cited in 2011 to the Court of Appeals by Plaintiffs in *Beroth Oil* and rejected. Regardless, Plaintiffs' cases are distinguishable on their facts and statutes at issue. For example, in *Joint Ventures, Inc. v. DOT,* 563 So. 2d 622 (Fla. 1990), the court did not hold that a statute allowing the state to record maps of reservation prohibiting development within the highway reservation area was a per se taking. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994). The statutory development restrictions at issue in the Florida cases were starkly different from § 136-44.51 in that the former allowed the state to prohibit new construction for up to 10 years. § 337.241 (2)(b) Fla. Stat. (1987). Nor did the Florida statute have variance and hardship purchase mechanisms, unlike the Map Act. In addition, the Map Act's restrictions under § 136-44.51 are automatically removed from the property three years after submittal of permit request. N.C. Gen. Stat. § 136-44.51.

In *Textron, Inc. v. Wood*, 167 Conn. 334, 355 A.2d 307 (1974), the highway department planned and mapped a proposed highway that would pass through plaintiff's facility. Department officials told plaintiff its property would be acquired in 1967 as shown in proposed highway maps. The department sent plaintiffs a formal notice that their property would be taken

and they must vacate the premises because right-of-way acquisition would begin soon. The department repeatedly stated its intent to file formal condemnation proceedings for the subject property, and eventually did so in 1973. *Id.* at 338-39, 355 A.2d at 311. NCDOT has not told Plaintiffs they had to vacate their properties on a date certain and formal condemnation proceedings would start soon.

In *Richmond Elks Hall Asso. v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1329-30 (1977), defendant specifically designated plaintiff's property for acquisition by city ordinance, but failed to abide by the ordinance and two-year acquisition schedule; defendant caused plaintiff's basement to flood in the interim, and the loss of commercial tenants and inability to obtain commercial loans. *Id.* at 1331.

Here, an ordinance or statute was not enacted that specifically designated Plaintiffs' properties for condemnation pursuant to a time certain. In fact, NCDOT has not prepared right-of-way acquisitions maps for the project segments designating Plaintiffs' properties for acquisition. These plans are necessary prior to NCDOT going forward with project acquisitions. Ivey Dep. p. 132-33. Nor did NCDOT cause any type of physical injury to Plaintiffs' properties, the loss of tenants, or severe limitation of the properties' current use (i.e., commercial rentals).

In *Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin.*, 388 Md. 500, 505, 880 A.2d 307, 309 (2005), the court interpreted Maryland law and held that the plaintiff may pursue pre-condemnation damages in an inverse condemnation action where the defendant gave ***statutory notice*** of its intent to condemn plaintiff's property and **sent letters** to that effect and offered to give plaintiff *relocation assistance*. *Id.* at 506, 880 A.2d 310. NCDOT has not sent Plaintiffs' letters that is would start formal condemnation proceedings under § 136-103 of their particular properties.

Plaintiffs' other out-of-state are equally irrelevant and non-controlling. Regarding § 136-44.51's three-year restrictions on new improvements, the United States Supreme Court already rejected the argument that a temporary 32-month moratoria on development was per se facially unconstitutional. *Tahoe-Sierra*, 535 U.S. at 314, 343, 152 L. Ed. 2d at 517, 553.

Because the Map Act is rationally related to the legitimate government interest of designing and constructing the State's highway systems, Plaintiffs cannot overcome the presumption that the Map Act is constitutional on its face and their facial claims fail.

CONCLUSION

Thus, because there is no genuine dispute as to a material fact that Plaintiffs retain some practical use of their

properties and NCDOT's actions and the Map Act bear rational relationships to conceivable legitimate state interests, NCDOT's motion for summary judgment should be granted as a matter of law and Plaintiffs' motions denied.

Respectfully submitted this the 18th day of February 2013.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT'S COMBINED BRIEF IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was this day served upon opposing counsel by electronic means and UPS overnight delivery at the addresses below:

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This the 18th day of February 2013.

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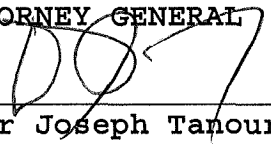

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APPENDIX A

NCDOT'S STATEMENT OF FACTS

The Proposed Winston-Salem Northern Beltway

The proposed Northern Beltway spans approximately 34 miles and includes the Western Loop, R-2247, from U.S. 158 north to U.S. 52 in western Forsyth County, and the Eastern Loop, U-2579 and U-2579A, from U.S. 52 to U.S. 311 in eastern Forsyth County. *NCDOT Alliance for Transp. Reform, Inc. v. United States NCDOT*, 713 F. Supp. 2d 491, 498-99 (M.D.N.C. 2010); Aff. Lambert, p. 3, project map.

The proposed Northern Beltway has been in the planning stages for decades. Maps and plans adopted by the city and county in their long-range and comprehensive transportation plans have shown proposed routes since at least the 1960s. The current planned route was published in city and county comprehensive transportation plan maps in 1997 and again in 2012. Aff. Ivey, p. 2-3.

In 1989, the North Carolina legislature created the North Carolina Highway Trust Fund in designated urban areas, including Winston-Salem, around which urban highway loops would be constructed. N.C. Gen. Stat. §§ 136-176, 136-180 (2012). Funding for urban loops, such as the Northern Beltway, is accomplished using both state and Federal-Aid funds. Currently, there are 10 designated urban loops in North Carolina. Under existing funding sources, NCDOT realizes only about $150 Million to spend on all of these urban loops. Within these 10 loops are 25 individual loop projects in and around designated cities that compete for the same state funds. The total estimated cost to build all 25 loop projects is $8 Billion. Aff. Trogdon, p. 4.

Environmental Permitting Process - NEPA

Because NCDOT wanted to maintain eligibility to receive federal funding to build the Northern Beltway, it was required to comply with the National Environmental Polices Act of 1969, "NEPA," which sets a national policy of protecting and promoting environmental quality and required NCDOT to "consider detailed information concerning significant environmental impacts and to guarantee that the relevant information will be made available to the public." *N.C. Alliance for Transp. Reform, Inc.*, 713 F. Supp. 2d 491, 500-501; *see* 42 U.S.C.S. §§ 4321, 4331(a). The NEPA provisions are implemented through 23 C.F.R §§ 771.101 -

771.139, under which NCDOT was required to prepare Environmental Impact Statements ("EIS") that evaluated the social, economic and environmental impacts of the proposed Northern Beltway. 23 C.F.R §§ 771.105, 771.127. The State Environmental Policy Act ("SEPA") is found in N.C. Gen. Stat. § 113A-1 et seq.

Under the NEPA process, NCDOT was required to prepare draft and final EIS documents for both the Western and Eastern Loop projects. The draft EIS evaluated "reasonable alternative[s]" for the Northern Beltway, which included possible highway routes, i.e., alignments. 23 C.F.R § 771.123; Aff. Pair, p. 2. The draft EIS and maps showing the "reasonable alternative" routes for the Western Loop was published in 1992. Aff. Pair, Ex. A. The final EIS identified the "preferred alternatives" for the project. 23 C.F.R § 771.125.

In September 1995, the draft EIS for the Eastern Loop was completed. In March 1996, NCDOT's final EIS for the Western Loop was completed. In May 1996, the preferred alternative for the Eastern Loop was selected and the Federal Highway Administration, "FHWA," approved the EIS by issuing its Record of Decision, "ROD," giving NCDOT authorization to proceed with project-wide right-of-way acquisitions and construction. NCDOT was not allowed to proceed with project-wide right-of-way acquisition until it obtained a ROD. Aff. Pair, p. 3, Ex. A; 23 C.F.R §§ 771.113, 771.127.

As required by NEPA's Public Involvement rules, NCDOT openly communicated to the citizens of Forsyth County the project's purpose and need, potential highway routes (alternatives), **major design features, the relocation assistance program and right-of-way acquisition process**. The public was given opportunities to voice concerns at various public workshops held throughout the county. NCDOT communicated the proposed plans and maps of the Northern Beltway's routes to property owners through mailings, publishing notices in the newspapers, and holding public workshops. Aff. Pair, p. 2; Aff. Joyner, p. 3. Ex. A; 23 C.F.R Part 771.111.

Federal Injunction Causes 11-Year Delay

From 1996 to 1999, NCDOT was authorized by FHWA to acquire right-of-way in the Western Loop on a project-wide scale. Aff. Pridemore, p. 9. However, in 1999, a federal lawsuit filed by property owners challenged NCDOT's EIS and the ROD, and sought to enjoin project-wide right-of-way acquisitions, construction and other irrevocable actions related to the project. *N.C.*

Alliance for Transp. Reform, Inc., Friends of Forsyth, v. United States DOT, 151 F. Supp. 2d 661, 670 (M.D.N.C. 2001); *Alliance for Transp. Reform, Inc., Friends of Forsyth, v. United States DOT,* 713 F. Supp. 2d 491, 497 (M.D.N.C. *2010).*

As a result of the *Friends of Forsyth* suit, the federal court issued in 1999 an injunction, "Order of Dismissal," enjoining federal and state defendants from, *inter alia,* taking any "irrevocable actions relating to construction, right-of-way acquisitions, or negotiations for right-of-way acquisitions, in furtherance of the" project until a new environmental analysis and documentation process were been completed. *N.C. Alliance for Transp. Reform, Inc.*, 713 F. Supp. 2d at 499.

The Order required NCDOT to redo the EIS documents and combine the analyses for the Western Loop with the Eastern Loop. The Order allowed NCDOT to perform a limited number of advance acquisitions only if the *Friends of Forsyth* plaintiffs consented to the acquisition and the court approved same. NCDOT completed the new EIS, which was approved by the FHWA in February 2008.

In August 2008, the *Friends of Forsyth* plaintiff filed a second suit, challenging the new EIS and ROD. *N.C. Alliance for Transp. Reform, Inc.*, 713 F. Supp. 2d at 500. In May 2010, the federal actions were dismissed and the court's injunctions were lifted. *Id.* at 527. Later that year, NCDOT's advance acquisitions, unrestricted by the court's order, were restarted.

From 1999 to May 2010, NCDOT was prohibited by the federal court from acquiring right-of-way on a project-wide scale and starting construction on the Western Loop. Aff. Pair, p. 4. In late 2010, NCDOT began right-of-way acquisition on one of the segments in the Eastern Loop, U-2579B. Aff. Pridemore, p. 10; Ivey Dep. p. 78.

The Map Act - Background - § 136-44.50

The Map Act contains five separate statutes. N.C. Gen. Stat. § 136-44.50 - 54. (201). Under § 136-44.50, NCDOT and local governments are authorized to adopt protected corridors and must record the corridor maps with the register of deeds office. Prior to adoption and recording the map, certain public notice procedures must be met. Recording the corridor map is a prerequisite before NCDOT may impose the temporary restrictions on making new improvements to properties. Maps can be amended or deleted. § 136-44.50 (a) (e) (2011).

On October 6, 1997, NCDOT recorded with the Forsyth County Register of Deeds Office the protected corridor map for the Western Loop of the Northern Beltway, listing those properties within the Western Loop that are subject to the Map Act. 30(b)(6) Depo. Ex. 4A. On November 26, 2008, NCDOT recorded the protected corridor map for the Eastern Loop. Depo. 30(b)(6), Ex. 4A. Notices of adoption of the maps were also recorded.

NCDOT established the protected corridors over the Western (1997) and Eastern (2008) Loops to protect the "preferred alternative" routes that were developed in the NEPA process. Corridor protection is separate from the NEPA process. Aff. Leggett, p. 2.
Protected corridors allow NCDOT to: preserve the ability to build a road in a location that has the least impact on the natural and human environments and has already gone through some degree of environmental analysis; minimize the number of businesses, homeowners, and renters who will have to be relocated once the project is authorized; protects the planned highway alignment by limiting future development, which has the added benefit of reducing future right-of-way acquisition costs. Aff. Leggett p. 2; Aff. Trogdon p. 3.

Restrictions - § 136-44.51

Upon recording the corridor maps, the Map Act creates a three-year **restriction** on new improvements that can be made to properties located within the corridor. Though § 136-44.51 states that no building permit or subdivision plat approval shall be granted to properties within the corridor, there are several important exceptions. N.C. Gen. Stat. § 136-44.51 (a)(2011).

First, the restriction on building permits does not apply to buildings or structures that existed prior to the filing of the corridor maps if the size of the building or structure is not increased and the occupancy type is not changed. § 136-44.51 (a) (2011). Second, the corridor's **temporary restrictions** on building permits and subdivisions are lifted, i.e. **sunset, three years** from when the property owner first submits the request to the local government. § 136-44.51 (b) (2011).

According to Chris Murphy, Interim Director of the City of Winston-Salem/Forsyth County Inspections Department, 203 building permit applications were submitted to the city/county for property located in the Western Loop since 1997, and 184 were approved. His office received 94 building permit

applications for the Eastern Loop since November 1, 2008, and approved 84. Murphy Dep. p. 1-2. Five of the permits involved mobile homes. Hunt Dep. p. 21.

None of the Plaintiffs were denied building permits by NCDOT.

Variances - § 136-44.52

Under § 136-44.52, a property owner may petition NCDOT for a **variance** to be exempt from the building permit and subdivision plat restrictions. N.C. Gen. Stat. § 136-44.52; 19A N.C.A.C. 2B.0317 (2011). The request may be granted if no reasonable return may be earned from the land; and the restrictions of § 136-44.51 result in practical difficulties or unnecessary hardships. N.C. Gen. Stat. § 136-44.52 (d) (2011). If a variance request is denied by NCDOT, an owner may appeal the matter. 19A N.C.A.C. 2B.0317 (2011).

None of the Plaintiffs applied to NCDOT for a variance.

Advance Acquisitions - § 136-44.53

Under this section, an owner of property depicted within the corridor map has the right to petition NCDOT, or the filer of the map, for acquisition of his property due to an imposed hardship. N.C. Gen. Stat. § 136-44.53 (2011). An advance or "early" acquisition is an "acquisition of real property by State or local governments in advance of Federal authorization or agreement" to acquire rights-of-way on a project or segment-wide basis. 23 C.F.R. § 710.105 (2011). NCDOT's decision to acquire properties in advance of receiving project-wide right-of-way authorization from FHWA is discretionary. N.C. Gen. Stat. § 136-44.53 (2011).

> [NCDOT] ***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.

N.C. Gen. Stat. § 136-44.53 (2011)(emphasis added)

The process is initiated by the property owner, who must

request in writing an early acquisition and document a hardship. N.C. Gen. Stat. § 136-44.53; 23 CFR §§ 710.503. Participating in the advance acquisition program is voluntary and occurs only after both sides have negotiated a mutually agreeable purchase price. These purchases do not involve a "taking" of property or filing of condemnation lawsuits. All decisions by NCDOT on whether to purchase the parcel shall be final and binding. N.C. Gen. Stat. § 136-44.53 (a).

If the parcel is determined to be eligible for a hardship acquisition and is not acquired **within three years** from the **finding**, then the corridor map restrictions for that particular parcel **are removed**. N.C. Gen. Stat. § 136-44.53 (a) (2011).

Federal regulations authorize NCDOT to engage in advance acquisition of real property based on "program or project considerations" for corridor preservation, access management, and other purposes. 23 CFR § 710.501 (2011). Prior to NCDOT receiving final environmental approval for a project, NCDOT may request from FHWA reimbursement for advance acquisition of a particular parcel or a limited number of parcels "to prevent imminent development" or to "alleviate hardship to a property owner" on the preferred project location. 23 C.F.R. § 710.503 (a)(2012). FHWA reimbursement for a hardship acquisition may be granted if, *inter alia,* the property owner:

> 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
>
> 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 CFR § 710.503 (c)(1), (2) (2011).

NCDOT and its right-of-way staff use the NCDOT **Right-of-Way Manual** as a guide in carrying out their duties, which include, among other things, making contact and negotiating with property owners with regards to advance and project-wide acquisitions. The manual was approved by the FHWA and its procedures based on federal regulations. Aff. Pridemore, p. 3-4.

Chapter 3 of the manual addresses regular and advance acquisitions, including those under the Hardship and Protective Purchase programs. Aff. Pridemore, p. 3-4.

NCDOT has made advance acquisitions of properties for right-of-way purposes in the Northern Beltway under the programs, which are voluntary on the part of the owner. Owners have the responsibility to contact NCDOT and provide documentation supporting a Hardship request based on health, safety or financial reasons. Aff. Pridemore, p. 3-4. Though the request must include documentation that the owner is unable 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, NCDOT does not agree or disagree with the opinions expressed in these "realtor" letters. Aff. Pridemore, p. 4.

NCDOT merely receives these letters because the federal regulations and the FHWA require that this documentation be obtained in order to get federal approval for the acquisition and receive federal reimbursement for the acquisition costs. The opinions expressed in these letters are not the opinions of NCDOT. Aff. Pridemore, p. 4.

If NCDOT an owner's Hardship request is approved by the right-of-way manager, then funding approval must be obtained, an appraisal of the property performed, and an offer extended by a right-of-way agent to the owner based upon the appraised fair market value of the proposed acquisition. Aff. Joines, p. 3-4.

NCDOT's negotiation procedures are contained in Chapter 10 of the right-of-way manual and are based on federal regulations. The manual and federal regulations do not require NCDOT to engage in a back-and-forth trading of purchase offers and counteroffers. Aff. Joines, p. 4. The purchase offers are based on the fair market estimates contained within the appraisal. However, NCDOT is authorized to extend offers above the appraised amounts depending on the circumstances, as outlined in the right-of-way manual. Aff. Joines, p. 4.

NCDOT hires private appraisers licensed in North Carolina to provide independent opinions on the fair market values of properties. Welbourn, Dep. p. 23, 86. NCDOT instructs the appraisers to be fair to both the property owner and the taxpayers of North Carolina when estimating property values. Dep. p. 25, 77. NCDOT does not guide the appraisers in the value estimates. Dep. p. 87. The valuation date for advance acquisitions is the date the appraiser inspects the property. Dep. p. 25, 94. The estimated values of any improvements made to a property are not necessarily reflected on a dollar-for-dollar

basis in the appraisals due to normal wear and tear on a property, e.g., depreciation. Dep. p. 92.

However, appraisers do not penalize homeowners for doing typical maintenance. Dep. p. 30. NCDOT has "review appraisers" on staff who review the independent appraisals to make sure they comply with federal and state regulations. Dep. p. 87. Though appraisals refer to the word "take," the term refers to the hypothetical acquisition date needed to determine before and after values. Dep. p. 88.

NCDOT appraisals do not exclude any contributing values of improvements made to properties merely because they are located within a protected corridor. Such improvement values are subject to the normal depreciation process. Dep. p. 94.

Appraisals - § 136-44.54

Under this section, NCDOT's advance acquisition appraisals are prohibited from reflecting any increase or decrease in market values of properties that may be influenced by the highway project, e.g., Northern Beltway. This is known as the "project influence" rule. Welbourn Dep. p. 88. NCDOT's appraisals estimate the value of a property based on the fair market values of properties located outside the highway corridor. Dep. p. 88, 89.

Eastern Loop Plaintiffs - 2008 Map

The properties owned by the following plaintiffs are subject to the restrictions of the protected corridor map recorded by NCDOT on November 26, 2008, to the extent the parcels fall within the corridor's boundaries.[1]

The California Plaintiffs

Four of the Eastern Loop Plaintiffs are residents of California, all of whom own single-family homes in the Oak Hill Place subdivision in Winston-Salem. As described herein, each of these plaintiffs purchased their property in 2006 after attending a real estate investment seminar in California sponsored by a group known as "ICG" (the "ICG Seminar"). At this seminar, ICG representatives essentially told these

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[1] [1]The following properties are located within the Eastern Loop of the Northern Beltway and subject to the NCDOT protected corridor map recorded on November 26, 2008: Maendl, Hutagalung, Engelkemier, Stept, Hendrix, Republic, Kirby. Aff. Lambert p. 3; protected corridor maps.

plaintiffs that they could purchase the properties for rental income for three to five years, and then recoup their investment (and potentially earn a profit) when the Department of Transportation condemned the properties within three to five years. Over 100 people attended the seminar.

Maendl

Plaintiff Sylvia Maendl is a real estate investor and has been purchasing properties since 1999. Maendl Dep. p. 20. She purchased a single-family house and property at 4147 Fiddlers Way Court in Oak Hill Place in August 2006 for $215,690, after attending the ICG Seminar. Dep. p. 14, 28.

ICG representatives pitched the idea of buying property within the path of the future Northern Beltway. Based on representations made at the seminar and her future property manager, she expected NCDOT to condemn the property in five years and pay her a fair market price. Dep. p. 11, 16, 17, 37. She first learned about the Northern Beltway project at the ICG seminar. Dep. pp. 14, 21. ICG representatives told Maendl and attendees that the "County" planned to build the beltway and would exercise eminent domain and buy their properties within five years at fair market value. Dep. p. 15-16.

Maendl has lived in California for most of her life and never resided in North Carolina. Maendl Dep. p. 8. She visited the property in August 2006 prior to buying it, and again in 2009. Dep. p. 12-13. She signed a disclosure statement at closing indicating that she knew that the Northern Beltway was planned to impact her property. Dep. p. 23.

Maendl testified that her property first sustained a loss in market value in 2007 when the real estate market began to slump. Dep. p. 49, 70. She has been renting her property to the same tenant since 2006, charging $14,100 a year, or $1,175 a month. Dep. p. 54, Ex. 1, Pl's Ints. Ans. No. 11. In October 2008, she lowered the rent to $1,075 to entice the tenant to sign a new lease. Dep. p. 61. Maendl currently receives $1,175 a month in rent from her tenant. Dep. p. 58.

Maendl purchased the property by obtaining two mortgages, totaling 100 percent financing: a 30-year fixed/adjustable rate loan at 6.75 percent for the first five years for $172,552; and a loan from the builder/seller for $43,138 to cover the 20-percent down payment. Dep. p. 36, 38. The current mortgage holders are Wells-Fargo and Fidelity Capital. Dep. p. 46. The

balance on the Wells-Fargo loan is approximately $167,000; she has not paid down the $43,138 loan to the builder. Dep. p. 46.

Maendl inquired about refinancing her property in 2008 and 2009 but was declined because she lacked equity in the house due to the real estate market crash. She did not tell the lender about NCDOT's plans to build the Northern Beltway. Dep. p. 35-33.

She has not tried to obtain any permits to make repairs for her property. Dep. p. 50. she does not desire to make any improvements to the property. Dep. p. 57. Maendl does not know which properties owned by NCDOT in the Oak Hill neighborhood may be in disrepair. Dep. p. 29. She has not tried to sell her property. Dep. p. 30. She has not applied for a NCDOT Hardship acquisition and knew little about it until after filing her suit. Dep. p. 66. She is in good health and has no medical conditions that may affect her daily functioning. Dep. p. 10.

Maendl knows Plaintiffs Hutagalung, Engelkeimer, and Stept, who all attended the ICG seminar and purchased property in the Oak Hill neighborhood with the expectation that NCDOT would condemn the properties in five years. Dep. p. 19.

Hutagalung

Hutagalung, a telecommunications engineer, invests in real estate "on the side." Dep. p. 30. He lives in California and attended the ICG Seminar in 2006. Dep. p. 43. He purchased his subject property, 4120 Fiddlers Way Court in Oak Hill Place, for $215,000 later that year after learning about the property at the ICG Seminar. Dep. p. 8, 64. The developer that built Oak Hill Place told Hutagalung and other attendees at the seminar that the properties would be good investments because they would generate rental income while owners waited for NCDOT to acquire the properties at fair market value in three to five years. Dep. p. 44, 48. Hutagalung saw a map of the planned Northern Beltway and knew that the highway was planned to go through Oak Hill Place prior to buying the subject property. Dep. p. 50, 68.

In purchasing the property, Hutagalung relied in part on forecasts by ICG in a "pro forma" that he would receive $1,400 in monthly rent annually over five years, and could sell the property for $287,718 in year five (33 percent above the purchase price) earning a pretax cash flow of $67,570. Dep. p. 62, 65-66, Ex. 5. The "pro forma" predicted that the real estate market would appreciate at an annual rate of six percent. Dep.

p. 67.

Hutagalung has been charging between $1,031 and $1,250 a month in rent since 2006, and has charged $1,250 a month for the past two years. Dep. p. 48, 55. He has used the property as a rental since he purchased it in 2006, and it has been occupied for all except one to two months in 2012, when Hutagalung needed to make some repairs between tenants. Dep. pp. 72-75. Hutagalung had no need to obtain a building permit to make these repairs. Dep. p. 72.

When Hutagalung purchased the property, he obtained a "fixed/adjustable rate" 30-year mortgage with an initial rate of 7.25%, which changed to 2.25% above the Index Rate after five years. Dep. p. 57, Ex. 1 (deed of trust rider). He has not tried to refinance his mortgage. Dep. p. 58, 82, and has no idea as to the value of his property. Dep. p. 59. He has not attempted to sell the property. Dep. p. 59. He does not know which properties in the area went into foreclosure or were short sales. Dep. p. 61. The value of his property first started to decline in the summer of 2008. Dep. p. 71.

Hutagalung also owned four single-family rental properties in Mobile, Alabama, but did short-sales on two of them and let the other two go into foreclosure. Dep. p. 34, 71. None of his investments have made a profit. Dep. p. 82.

Hutagalung does not know which properties NCDOT owns in Oak Hill. Dep. p. 77. He has never applied for a Hardship acquisition, as he thought he would not qualify. Dep. p. 78.

Stept

Stept is the principal architect in a firm that focuses on real estate development. Dep. p. 42. Like Maendl, Stept knew his property was in the planned path of the Northern Beltway when he bought it in 2006. Dep. p. 44. He lives in California and attended the ICG Seminar in 2006. He purchased his subject property at 4184 Acorn Lane in Oak Hill Place for $207,000 based on ICG's representations that it would be condemned by NCDOT in the next three to five years. Stept Dep. p. 5, 20-21, 24, 41, 44, 60. He has never visited the property. Dep. p. 66.

Prior to buying the property, Stept engaged in some research on the Internet and printed out copies of NCDOT's public hearing handouts titled "Winston-Salem Northern Beltway Combined Environmental Document" showing the preferred

alternative route of the project. Dep. p. 74, Ex. 4. ICG handed out sales brochures and displayed a map showing property addresses in Oak Hill Place. Dep. p. 22-23.

Stept expected to rent the property for three to five years and then have NCDOT condemn the property and pay him fair market value. Dep. p. 24-25, 77. He had no expectations on how much profit he could make due to the condemnation. Dep. p. 60. ICG led him to expect that he could earn between $1,300 and $1,400 in monthly rent. Dep. p. 62. Stept owns other rental properties across the country, including a house in Nevada that he bought around 2005 and receives about $900 a month in rent. That property is also currently subject to a mortgage. Dep. p. 57.

Stept has not tried to sell his property. Dep. p. 27. He has been earning rental income on the property since 2006. Dep. p. 28. He has been charging $1,095 in monthly rent for the past few years. Dep. p. 32-33. In 2007, the property was vacant for two and one-half months. Dep. p. 32. From 2008 to 2012, he has had the same tenant with no vacancies. Dep. p. 35.

Stept financed the purchase of the property by executing a note and deed of trust, which are currently held by Wells Fargo. Dep. p. 34. He has paid and satisfied the twenty percent (20%) down payment loan to the seller, Lockheed Winston, also known as Keystone Builders. Dep. p. 36. He has not tried to refinance his other loan. Dep. p. 49. He does not have an opinion as to the market value of his property. Dep. p. 27

Stept does not know which properties NCDOT rents in Oak Hill Place. Dep. p. 63. He is not aware of any NCDOT properties that are not being properly maintained. Dep. p. 66. NCDOT has not prevented Stept from using his property as a rental. Dep. p. 48. He has not needed to obtain any building permits for the property over the years. Dep. p. 50. Stept never applied for a Hardship acquisition because he thought he would not qualify, based on what a non NCDOT person told him. Dep. p. 69. In 2011, he and his wife reported $200,000 in joint income on their tax returns. Dep. p. 72.

Engelkemier

Plaintiffs Darren and Melissa Engelkemier are California residents, who also attended the ICG Seminar in April, 2006. In June of that year, they purchased a single-family home located at 4155 Fiddlers Way Court in Oak Hill Place for $207,710. Dep. p. 11-12, 27. Darren is a mechanical engineer with a degree from

Stanford and has been investing in real estate since 2004. Dep. p. 24-25. Keystone Development representatives at the seminar also told the Engelkemiers that NCDOT would most likely purchase their property after five years. In their opinion, having NCDOT as a future buyer created an investment safety net for them. Dep. p. 16-17, 30. They expected NCDOT to buy their property for at least market value. Dep. p. 28.

The Engelkemiers financed the purchase of the property with a "fixed/adjustable rate" mortgage from Citibank for $166,000 at 6.25%, with a rate adjustment in five years. Dep. p. 27, 48. They are charging $1,250 in monthly rent, and have had the same tenant since 2006 with no vacancies, although they have had to file three summary ejectment actions for non-payment of rent. Dep. p. 21-22.

In 2008, the Engelkemiers contacted NCDOT and inquired about a Hardship acquisition. They did not request a Hardship acquisition because they thought they would not qualify, based on information NCDOT mailed to them. Dep. p. 36-37, 39. They were concerned about their five-year balloon payment coming due in 2011 for their second mortgage, which they later paid off. Dep. p. 41. In late 2011 they contacted NCDOT again about a Hardship acquisition and decided not to apply. Dep. p. 63. They have never been denied a Hardship request. Dep. p. 65.

In 2010, the Engelkemiers applied to refinance their property. Dep. p. 43. They were denied because the 2010 appraisal stated: "Note the NCDOT has plans for a Northern Beltway project . . . current plans seem to go near or through this neighborhood." Dep. p. 44, Ex. 4. In arriving at a fair market value of the Engelkemiers' property, the appraiser relied on sales of other comparable properties located within the Northern Beltway area. The indicated market value shown in the appraisal is $147,000. Dep. p. 45, Ex. 4.

The Engelkemiers' 2006 appraisal for the property did not note the existence of the proposed Northern Beltway project. Dep. p. 47. Darren Engelkemier does not know which houses in Oak Hill NCDOT owns. Dep. p. 52. He does not have an opinion on how much his property value has diminished. Dep. p. 60. The Engelkemiers have not been denied any building permits to make repairs to their house. Dep. p. 61. The Engelkemiers have not listed nor attempted to list their property for sale. Dep. p. 64. Melissa Engelkemier visited the property in 2006. Dep. p. 65. NCDOT employees were very "matter of fact" and showed no ill will toward Engelkemiers in their dealings. Dep. p. 66.

Kirby

The Kirbys' property consists of about 41 acres and is located at 4000 High Point Road in Forsyth County. Dep. p. 11. They have been operating a successful dog kennel and dog training center ("Kirby Labradors") on the property for 22 years and earning income from the business. Everett Kirby Dep. p. 46. The kennel is licensed with the state. Dep. p. 100. Several buildings are on the property. Dep. p. 101.

Mrs. Kirby enjoys taking care of the puppies in the kennel. Dep. p. 17. The kennels started out as a hobby but turned into a business for the Kirbys. Martha Kirby Dep. p. 18. They do not want to get out of the dog kennel business. Dep. p. 18. Mrs. Kirby would like to see the dog training operations continue on the property. Dep. p. 19.

They have been leasing part of the property for the last eight years to a professional dog trainer who lives in a mobile home on the property and pays Kirbys $21,500 in rent. Dep. p. 47, 91, 101-102. They also sell dogs from the property. Dep. p. 93.

Mr. Kirby believes his property first sustained a loss in market value in 2004 due to the proposed Northern Beltway. Dep. p. 69.
He first learned of NCDOT's plans to construct the Eastern Loop in 2004 after receiving newsletters and notices from NCDOT about the planned alternative routes, and attending public workshops. Dep. p. 36, 40-42, 67; Dep. p. Ex. 7.

Mr. Kirby is retired from manufacturing and used to develop real estate. Dep. p. 25. He and his son attempted to get a permit from the county to develop the property in the late 1990s or early 2000 but was told it cannot be developed. Dep. p. 48. He gave up the possibility of developing the property after that. Dep. p. 48.

In addition to the dog training center, the Kirbys' son and grandchildren use the property for recreational purposes, such as hunting, fishing, shooting weapons and riding four-wheelers. Dep. p. 20-21. Kirbys have restored a 100-year old tobacco barn on the property and made many repairs to the buildings over the years. Dep. p. 114.

The Kirbys never applied to NCDOT for a Hardship acquisition. Dep. p. 106. He has not applied for a variance. Dep. p. 104. He does not know if NCDOT owns or rents any property near his. Dep. p. 112. Nor does he know if NCDOT demolished any houses near him. Dep. p. 113.

Michael Hendrix, as Personal Representative of Frances Hendrix

Frances Hendrix owned property in Forsyth County at 605 and 613 Old Hollow Road, at the intersection of old Hollow and Germanton Road, Winston-Salem. Pl. Cmplt. ¶ 7. Two single-family dwellings were on the property, which have since been demolished. Dep. p. 22-23, 52, Exhibit 6. Frances died in 2007. Her son and sole heir, Michael Hendrix, was appointed the personal representative for the estate. Michael filed an inventory for decedent's estate with the court on December 19, 2007, estimating the fair market value for the Hendrix tracts at $1,857,000. Dep. p. Ex. 3, 5. The estate was closed on January 14, 2008, with the filing of a final accounting. Hendrix Dep. P. 50, Ex. 5. The inventory lists the subject property, except for the block 2248, Lot 003 tract shown as $26,000 in value. Dep. p. 50.

In 1998, Frances Hendrix entered into an option contract with a developer (Granite) to build a shopping center on about seven acres at the corner of Germanton and Old Hollow Roads. The city council denied the developer's rezoning and subdivision requests and the developer backed out of the contract. Dep. p. 19-20.

In 1999, Frances sent a letter to NCDOT requesting a Hardship acquisition of property. In May 2003, Michael sent a letter to NCDOT requesting on behalf of his mother that NCDOT purchase Frances' property under the Hardship program. On September 22, 2003, NCDOT sent a letter to Michael Hendrix stating that the Hardship request could not be approved because NCDOT's final right of way acquisition needs for the Eastern Loop had not been determined, and the final environmental impact statement for the Eastern Loop had not been issued and the FHWA had not issued its Record of Decision. Aff. Pridemore p. 11.

Subsequent to 2003, NCDOT reconsidered and approved Mrs. Hendrix' request. In 2006, NCDOT obtained an independent appraisal for the proposed acquisition of ***13 acres*** of the property. The appraisal estimated the just compensation to be $480,700, based upon the fair market value of the property immediately before and after the proposed acquisition date. In

2007, NCDOT right of way agent Kristina Bar provided a written offer to Michael Hendrix for $480,700. Mr. Hendrix rejected the offer on behalf of his mother. The written offer also proposed purchasing the entire 23.5 acres for $530,700, which is about $22,500 per acre. Mr. Hendrix also rejected this offer. Aff. Pridemore p. 11.

Michael Hendrix believes that NCDOT violated his and his mother's rights by preventing the use of the property ***prior to*** NCDOT filing it's protected corridor map in 2008. Dep. p. 55-66. ***He testified in his deposition that his family had known since 1993 that the planned highway would likely affect the property. Dep. Pp. 25-26.***

Michael Hendrix did not list the property for sale on MLS or a commercial listing service. Dep. p. 61. He has not applied for building permits or been denied one by NCDOT for the subject property. Dep. p. 62. ***Despite what he alleged in his complaint, Hendrix had no actual knowledge of the prices NCDOT was paying for other nearby properties, nor was he aware for what amount NCDOT leased its properties. Dep. Pp. 43-44, 46-47.***

In December 2010, Michael Hendrix filed the subject lawsuit as personal representative for his mother's estate. In 2012, Michael Hendrix applied to NCDOT for a Hardship acquisition on his own behalf and submitted his mother's medical records in support of his Hardship request. Aff. Pridemore p. 11.

Republic Properties

Thomas M. McInnis is an auctioneer, experienced real estate developer and broker, and managing member of Republic. He researched the property prior to purchase. McInnis Dep. p. 5, 19; 21, 33. McInnis has developed land throughout North Carolina for 35 years. Dep. p. 23. One of his companies, Iron Horse, Inc., specializes in the sale of real estate and personal property using accelerated marketing methods. Dep. p. 33.

In 2005 Republic Properties, LLC, purchased the subject property, containing approximately 188 acres, for $775,000. The property is located adjacent to White Rock Road in Forsyth County. Pl. Cmplt. ¶ 7; McInnis Dep. p. 17, 44. The property has access to White Rock Road, Sandusky Street and Northwest Drive. Dep. p. 35. The path of the proposed Northern Beltway extends through the middle of the property, leaving untouched two tracts on either side. Aff. Supp. Lambert. Ex. A; McInnis Dep. Ex. 2. McInnis is unaware ("clueless") as to which map NCDOT may have

filed in November 2008. Dep. p. 58.

He does not know if NCDOT owns or rents property in the vicinity of Republic's property. Dep. p. 59, 88. He lets a neighbor graze cattle on the property. Dep. p. 50. Tenants were renting a house on the property until McInnis asked them to leave in 2006. Dep. p. 82.

McInnis had a site rendering for potential development drafted, depicting residential lots on the entire property, except for the area southwest of White Rock Road. Dep. p. 52, 54, Ex. 2. McInnis estimates that such rendering would cost about $10,000 if done by a private firm. Dep. p. 78.

In or about 2006, McInnis' assistant may have contacted the local planning office to inquire about developing the property, but no one from Republic submitted a building permit or subdivision application. Dep. p. 41. McInnis does not remember contacting the planning office or NCDOT regarding any attempt to develop the property. Dep. p. 43.

NCDOT, through its right of way agent Shan Williams, proposed to McInnis in 2007 to purchase most of the property, 183.92 acres, under NCDOT's Protective Purchase advance acquisition program for $1,011,600, based upon an appraisal. Williams' Dep. p. 7, 22; McInnis Dep. p. 11, 14. NCDOT gave McInnis a proposed option contract. Dep. p. Ex. 3. The proposal did not involve condemnation. McInnis Dep. p. 14.

McInnis rejected the offer. Williams told McInnis that if he did not accept the offer, he would have to wait until the formal eminent domain process begins. McInnis Dep. p. 74-75. McInnis dealt with right of way agents previously and sold property to NCDOT under the advance acquisition program on several occasions, including once in Richmond County in about 2004. Dep. p. 24-26.

McInnis thinks the property's value was damaged and rendered "unmarketable and economically useless" when NCDOT sent him letter dated March 9, 2006, and option contract offering to purchase the property under the "Advance Protective Purchase" program. Dep. p. 44-45, 60. Neither the letter nor the proposed option contract refer to formal condemnation proceedings being initiated. Dep. Ex. 3, p. RH00180.

In McInnis' mind, this situation created a taking because authorization to extend the offer would have been included in

the Board of Transportation minutes, which is public information. Dep. p. 61, 73. He believed that once he got the letter and proposed option contract, he could not develop the property. Dep. p. 69. According to McInnis, there were no other actions by NCDOT that significantly impacted the value of the Republic property. Dep. p. 73.

Prior to NCDOT sending him the offer letter, he considered the highest and best use of the property to be for residential development, starter homes. Dep. p. 65. McInnis has not attempted to mortgage the property or use it as collateral, nor has investigated other uses to which the property can be put other than a residential subdivision. Dep. pp. 81, 84-85.

McInnis is not aware that the protected corridor improvement restrictions under the Map Act sunset three years after submittal to the local planning authority for subdivision approval. Dep. p. 87. He has no knowledge regarding NCDOT's variance program except for what he reads in the newspapers. Dep. p. 86. No one on behalf of Republic has attempted to sell the property. Dep. p. 87. McInnis has no knowledge of NCDOT's Hardship program and never applied for an acquisition under that program. Dep. p. 88

Western Loop Plaintiffs - 1997 Map

The properties owned by plaintiffs Harris Triad Homes, Inc., and Nelsons are subject to the protected corridor map recorded on October 6, 1997, to the extent those parcels fall within the boundaries of the corridor.[2]

Harris Triad Homes, Inc.

Ben Harris is the sole owner of plaintiff Harris Triad Homes, Inc. Harris Dep. p. 9. He was a speculative "spec" home builder and purchased 15 vacant lots in the McGregor Park subdivision in 1991. Harris Dep. p. 22. Harris believes that the damages to his property values started in 1991 when he applied for building permits with the city. The city approved the permits but wrote in the top margin that "the applicant is advised that this lot is within the proposed northern beltway corridor, it is subject to being purchased in whole or in part for this purpose." Dep. p. 28-29.

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[2] [2]Aff. Lambert p. 3; protected corridor maps.

He first became aware that NCDOT might build a highway over his properties on October 22, 1991. Dep. p. 28. He continued to build houses on the lots to earn income to pay off his mortgages. Dep. p. 29. Harris financed the purchase of the lots and construction of the houses with interest only notes/loans from Hubbard Realty. Dep. p. 51. The notes were paid off in late 1994. Harris Dep. p. 52.

Harris sold six of the improved lots at five to six percent below market value, which he attributes to the threat of the Northern Beltway being built over the properties. He made the buyers aware of the coming Northern Beltway by posting newspaper articles that discussed the beltway project. Harris Dep. p. 30-33. Harris agrees that the market value of his properties was impaired years before NCDOT filed the protected corridor map for the Western Loop in 1997s. Harris Dep. p. 34.

According to Harris, it was "common knowledge" long before 1997 that the Northern Beltway might be built over McGregor Park because NCDOT was holding meetings and showing people where the proposed beltway would go. Harris Dep. p. 34. The market value of his properties was impaired years before the filing of NCDOT's protected corridor map in 1997. Harris Dep. p. 34.

Harris wanted to get out of the home building business because the "stress was killing me" (Dep. p. 215) and due to the downturn in the economy, which started in 2007. Dep. p. 42.

As of 2012, Harris was renting five houses in McGregor Park. In 2000, one of Harris' tenants accidentally caused a fire and burned down one of the houses. The tenant had a history of drug use and caused about $8,000 in damages. Harris Dep. p. 122, 124. NCDOT did not prohibit Harris from rebuilding the house, and making various other repairs to his five rentals, such as replacing roofs, windows, heating and cooling systems, and decks. He received $112,000 in insurance proceeds for the fire. Dep. p. 69-70, 85, 108. There is no problem getting a permit to make repairs to anything in the protected corridor. Dep. p. 91.

Harris has been earning regular rental income on his five remaining properties since he built the houses in the early 1990s. Harris has been receiving between $950 to $1,150 a month in rent for each house since the 1990s. Dep. p. 79, 101, 252. However, he does not recall how much rent he was charging prior to 2002 because he was not managing his rentals. Dep. p. 104. Nor does he recall how much rent he was charging in 1997 for the houses. Dep. p. 94-95.

Harris was not losing tenants as a result of any competition posed by NCDOT 's rentals. Dep. p. 77-78. His main rental competition over the past seven or eight years is from two private rental home communities with about a mile away up Peace Haven Road that have similar houses as his. Dep. p. 89. Harris does not remember which years his houses sat vacant for three to four months. Dep. p. 100. Harris tried to sell the five subject properties for between $119,000 and $127,900, but received no offers. In 1994, he gave up trying to sell them and rented them to tenants. Dep. p. 138.

Harris believes that public knowledge prior to 1997 regarding NCDOT's plans to build the Northern Beltway over McGregor Park prevented him from selling his properties at his asking prices because he had to disclose to potential buyers that NCDOT's plans. Dep. p. 138. His damages started prior to NCDOT recording the protected corridor map in 1997. Dep. p. 139. **"The damage was already done"** by the time NCDOT filed the protected corridor map. Dep. p. 140.

Harris sold six other houses in McGregor Park prior to 1997, but had to reduce the prices five to six percent to account for disclosure of the Northern Beltway. Dep. p. 140. Harris has not tried to sell his properties since the early 1990s. Dep. p. 141.

Harris paid off the original loans for the five properties in 1994. Dep. p. 51-52. Harris had no difficulty obtaining loans using his McGregor Park properties as collateral, even though they are in the path of the planned Northern Beltway. Dep. p. 157. In 1994, he obtained a loan from and executed a deed of trust to BB&T using the properties as collateral. BB&T was aware that the properties were in the path of the planned Northern Beltway. Dep. p. 153.

In 2002, Harris obtained another loan for $425,000 and granted a deed of trust to BB&T using five McGregor Park properties as collateral to pay off other loans. Dep. p. 159. In 2006, Harris obtained a package loan from BB&T for $525,000 and granted another deed of trust so that he could separate his assets and liabilities from his wife's in the equitable distribution relating to his divorce. Dep. pp. 145, 151, 239; $125,000 was disbursed to Ben Harris for personal use. Dep. p. 153.

BB&T appraised the five subject properties and assigned

market values to them. Dep. p. 145, 149. The appraised values were higher than the county tax assessment values. Dep. p. 148. The fact that the McGregor Park properties are located within the path of the planned Northern Beltway was disclosed to BB&T and did not matter to them. Dep. p. 151. The loan to value ratio was 10 to 15% percent. Dep. p. 151. This loan was renewed in February 2011. Dep. p. 55.

Harris affirmed in both BB&T deeds of trust that "title to the Property is marketable and free and clear of all encumbrances . . . " Harris Exhs. 8, 10, ¶ 15. Harris tried to get a $25,000 loan to finance the construction of garage on his residence located outside the Northern Beltway but was unable to. He does not know the reason why his loan application was rejected. Dep. p. 155, 157.

Harris does not like the "class" of NCDOT tenants because they are different in appearance, how they dress and how their children act. Dep. p. 168. He is aware of only two house break-ins in the McGregor Park neighborhood over the past 20 years. Crime has not increased. "I'm going to say two times in 20 years, that's got to be as good as anywhere." Dep. p. 171. Harris considers NCDOT properties to be run down and "blighted" and referred to photographs in his deposition to describe the conditions. Dep. pp. 239 - 276, Ex. 17 - 39.

From 1992 to 2004, Ben Harris and his rental management company filed at least 13 summary ejectment actions against tenants for non-payment of rent in Harris-owned properties - 11 of which involved properties located outside the Northern Beltway's protected corridor. Harris Dep. p. 173 - 188.

Ben Harris got building permits in 2004 and 2005 to install gas logs in two of his McGregor Park rentals. The protected corridor does not restrict him from obtaining permits to install items like gas appliances, hot tubs, or to keep up his properties. Dep. p. 195-196.

Harris' Hardship Acquisition Request

Ben Harris has inquired on numerous occasions about a Hardship acquisition from NCDOT for various rental properties since February 1999. (Harris had heart bypass surgery in 1997. Since 2004, he has been in good health, goes to the YMCA, hikes, and rides mountain bikes. Dep. p. 214.) However, due to the 1999 federal court order arising out of the *Friends of Forsyth* lawsuit filed against NCDOT and FHWA, NCDOT was prohibited from

conducting Hardship acquisitions unless it got consent from plaintiffs' attorneys (Terris, Pravlik & Millian, LLP, Wash., D.C.) in the federal suit, and approval by the federal court. NCDOT periodically submitted names of proposed Hardship acquisitions to Terris for approval during the pendency of the federal court's injunction on right of way acquisition. Harris Dep. Ex. 14, p. 139.

According to Harris, the *Friends of Forsyth* lawsuit almost put him out of business because it delayed acquisition and construction of the Western Loop and he had difficulty selling his homes due to the delay. Harris Dep. p. 19-20. In 2005, NCDOT proposed to the *Friends of Forsyth* attorneys the acquisition of Harris Triad Homes, Inc., among others. On January 11, 2006, the attorneys did not consent to the request because Ben Harris and his company did not meet the Hardship acquisition criteria under federal law. Harris Dep. Ex. 14, p. 138; Harris Dep. Ex. 14, 139-40. Harris knew that NCDOT was required to get consent from the *Friends of Forsyth* attorneys prior to approving a Hardship acquisition. Harris Dep. p. 212.

From 2005 to 2009, Ben Harris lived in one of his rentals at 712 Bluffridge Trail in McGregor Park. Dep. p. 7. His daughter lives in another rental at 720 Bluffridge Trail. Dep. p. 250. In 2009, Harris moved to a house he built outside the planned Northern Beltway in Rural Hall that he was unable to sell because "the market went to hell." His options were to move into the house or sell it at a $20,000 loss. Dep. p. 203.

After the federal court's injunction was lifted in May 2010, NCDOT notified owners who had previously submitted Hardship requests to resubmit them for reconsideration. Aff. Trogdon, Att. 1. In June 23, 2010, Ben Harris submitted to NCDOT a Hardship request based on financial reasons for five McGregor Park properties he owned through his corporation, Harris Triad Homes, Inc. Harris Dep. Ex. 17, p. 57. The request was sent to Virgil Pridemore in the Raleigh right of way office of NCDOT. Aff. Pridemore p. 7. Harris' request included personal income tax returns for 2009, 2008, 2007. Harris Dep. Ex. 14. Harris did not submit corporate tax returns for Harris Triad Homes, Inc. Dep. p. 204.

The tax returns showed annual rental income of $44,055 from three properties located outside the Northern Beltway that Harris did not want NCDOT to purchase. They did not show the approximate $60,000 in annual income Harris Triad Homes, Inc., received on the five McGregor Park properties Harris wanted

NCDOT to buy. In total, Ben Harris' corporately held properties earn approximately $110,000 in annual gross income. Harris Dep. p. 205-208.

As right of way manager, Pridemore is responsible for making the final decision on whether an advance acquisition request meets the applicable criteria, which is contained in the NCDOT Right of Way Manual, which in turn is based on state and federal rules and regulations. Aff. Pridemore p. 2.

He also receives input from NCDOT staff members representatives from the Federal Highway Administration, "FHWA." All of NCDOT's advance acquisitions in the Northern Beltway, to Pridemore's knowledge, have been approved by a FHWA representative. Aff. Pridemore p. 4.

After June 2010, Ben Harris sent e-mails to Pridemore and then Secretary of Transportation Eugene A. Conti, Jr., inquiring about the status of his Hardship request. Harris Dep. p. 200. On October 26, 2010, Secretary Conti's office replied to Mr. Harris indicating that the matter would be investigated. Secretary Conti instructed Jon Nance, Deputy Chief Engineer, to research the matter and respond to Harris' request. Nance conferred with Pridemore in the right of way office and other NCDOT employees who were familiar with Harris' request. Nance reviewed Harris' e-mails and NCDOT Hardship acquisition criteria. Aff. Nance p. 2.

Based on Harris' e-mails, it appeared to Nance that Harris was a "spec" home builder, i.e., built homes on speculation that he could sell them; his corporation was Harris Triad Homes, Inc.; the five properties that he wanted NCDOT to purchase were owned by Harris Triad Homes, Inc. and were rented to tenants in the McGregor Park neighborhood; Harris' corporation was receiving regular rental income from the properties; Harris' corporation originally purchased 15 lots in the McGregor Park neighborhood and built homes on the lots in 1991 and 1992; because the lots were located within the path of the "preferred alternative" at that time, Harris had to disclose to prospective buyers that the properties were located within the path of the proposed Beltway. Aff. Nance p. 2.

On April 26, 2011, Nance stated in a letter to Mr. Harris that his most recent request for acquisition of his properties was not approved, based upon NCDOT advance acquisition policy, FHWA requirements and information he provided to NCDOT. Aff. Nance p. 2; Harris Dep. p. 7. p 198, 202.

Nelsons

The Nelsons' property is located in the Western Loop of the planned Beltway, just outside of Winston-Salem at 5535 Skylark Road, Pfafftown, Forsyth County. The property consists of two tracts of land. Pl. Cmplt. ¶ 7. They have been living in a house on one tract for 23 years. James Nelson Dep. p. 5. They purchased both tracts in 1989 intending to live on one and subdivide the other and build houses. Dep. p. 31, 35, 82. James Nelson admits that using the property as a domicile is at least one practical use for his property. Dep. p. 90.

Mr. Nelson is retired from RJ Reynolds and previously held general contractor and real estate broker licenses. Dep. p. 21. He is familiar with how to get a building permit from the local inspections office. Dep. p. 26. He never attempted to obtain a building permit for his property. Dep. p. 26, 87.

Mr. Nelson learned about the planned Western Loop at a public meeting held by NCDOT in 1995 where maps of eight potential alternative routes were displayed. Dep. p. 28, 71. He does not have an opinion on how much his property values have been impaired due to planned Northern Beltway. Dep. p. 34. He is aware of the Map Act, but was not aware that the restrictions on making improvements "sunset" three years from the date a building permit or subdivision request is submitted to the local authority. Dep. p. 36, 38. NCDOT has not prevented him from maintaining his properties. Dep. p. 87. Nelson was not aware of NCDOT's variance program. Dep. p. 96.

In March 2002, Nelsons signed a lease with Bell South/Cingular to locate a telecommunications tower on the tract adjacent to their house. Under the lease, Bell South was to pay Nelsons $6,000 for 25 years with three-percent increases each year. They currently receive $11,000 a year in rent. Dep. p. 41. The lease term was recently extended to 2047. Dep. p. 42. Nelsons had to obtain a special use permit from the local jurisdiction to use the property for a cell tower. Dep. p. 43. The Nelsons granted an easement to Bell South to access the tower. Dep. p. 44. Utility and power lines easements also extend across the property in favor of the city and Duke Power. Dep. p. 45.

In 2007, The Nelsons refinanced their existing mortgage on the residential tract with Piedmont Federal Savings at a lower interest rate, creating a new balance of $90,000. Dep. p. 47. The lender did not care that the Northern Beltway was planned to

go over the property because the Nelsons had at least $310,000 in equity in the property. Dep. p. 47.

James Nelson testified that the value of his property was damaged in 1996 when a surveyor drove stakes into his property showing the centerline of the planned Beltway. Dep. p. 51, 73. Nelson thinks his property value also went down as a result of NCDOT buying and removing houses in 1996 or 1997 in Granada Estates; in 1998 in the Dorchester neighborhood; and more recently, the former Vienna Baptist Church, which cannot be seen from the Nelson property and is about 1.4 miles away. Dep. p. 53, 60-64.

The Nelsons have not tried to sell their property. Dep. p. 87. The Nelsons did not apply for a Hardship acquisition because he did not have a financial or medical justification. Dep. p. 65. Though he spoke to NCDOT employees about the Hardship program in 2002, he does not remember what exactly was said. Dep. p. 66.

APPENDIX B

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

NO. COA05-1477

COURT OF APPEALS OF NORTH CAROLINA

2006 N.C. App. LEXIS 1622

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

NOTICE:

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

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

DISPOSITION: AFFIRMED.

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

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

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

OPINION BY: STEELMAN

OPINION

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

STEELMAN, Judge.

The City of Charlotte (defendant), along with the County and other towns of Mecklenburg, initiated planning for a light rail transit system before 1994. Planning, with input from the community, was ongoing, and included the 2025 Integrated Transit/Land-Use Plan produced in 1998. This 1998 plan included recommendation of a light rail transit system using existing rail right-of-way along South Boulevard (South Corridor Project). The 1998 plan also recommended Archdale Drive as a station location on the South Boulevard route. Voters approved a 1/2 cent sales tax to fund the South Corridor [*2] Project in November 1998.

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

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

Plaintiff initiated this action on 10 June 2004, alleging that defendant had publicly announced its intention to develop the light rail project in January of 2002, and that this announcement constituted a taking of plaintiff's interest in the property. Defendant filed a condemnation complaint and declaration of taking for the property on 1 July 2004. This matter was heard 6 June 2005 on [*3]

defendant's motion to decide issues other than damages pursuant to *N.C. Gen. Stat. § 136-108* (2005). The trial court ordered: "There having been no taking of Plaintiff's property on or about January of 2002, this case is DISMISSED with prejudice." From this order plaintiff appeals. In plaintiff's sole argument on appeal, it contends that the trial court erred in concluding defendant's actions prior to 1 July 2004 did not constitute a taking of plaintiff's property interests. We disagree.

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

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

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

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

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

37 A.L.R.3d 127, 2 (2004); *see also, Browning v. North Carolina State Highway Com., 263 N.C. 130, 135-36, 139 S.E.2d 227, 230-31 (1964)*; *Tucker v. Charter Medical Corp., 60 N.C. App. 665, 671, 299 S.E.2d 800, 804 (1983)*; *Barbour v. Little, 37 N.C. App. 686, 691-92, 247 S.E.2d 252, 255 (1978).*

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

AFFIRMED.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).

161 N.C.App. 347, 588 S.E.2d 585 (Table), 2003 WL 22764585 (N.C.App.)
Unpublished Disposition
Briefs and Other Related Documents
Judges and Attorneys
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Appeals of North Carolina.
Al B. MORVAN, Joy A. Morvan, Raymond H. Pierce, Jr., Brenda C. Pierce, E.A. Ardnt, Jr., Lana K. Ardnt and Precast Construction Products, Inc., Plaintiffs,
v.
CITY OF CHARLOTTE, a North Carolina Municipality, Defendant.

No. COA02-1343.
Nov. 18, 2003.

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

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

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

ELMORE, Judge.

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

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

I.

Plaintiffs assign error to the trial court's dismissal of their case on the grounds that the defendant took their property without just compensation. We have stated:

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

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

did not err in dismissing the action.

II.

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

The doctrine of laches is an affirmative defense, and offers no relief to the plaintiffs here. The doctrine of laches is applied ordinarily to situations in which the complainant has failed to act while the other party has materially changed his position. In such a case the doctrine would operate to prevent a complainant from asserting his rights when he has waited too long to do so, thereby causing the other party to change his position in a way that would be to his detriment were the complainant then allowed to assert his right.

*2 In the case at bar, the plaintiffs wish to extend the doctrine of laches to compel the defendant city to exercise a right, because the plaintiffs changed their position in anticipation of the right to condemn being exercised. The doctrine, however, does not operate to that end. Although six years is a considerable amount of time to restrict the use of a private citizen's business, the doctrine of laches is not an appropriate avenue of relief in sucha case. The trial court properly dismissed the case as the plaintiffs did not articulate a legal basis for relief.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).

N.C.App.,2003.
Morvan v. City of Charlotte
161 N.C.App. 347, 588 S.E.2d 585 (Table), 2003 WL 22764585 (N.C.App.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 2002 WL 32392636 (Appellate Brief) Defendant Appellee's Brief (Dec. 27, 2002) Original Image of this Document (PDF)
- 2002 WL 32392635 (Appellate Brief) Appellants' Brief (Nov. 21, 2002) Original Image of this Document (PDF)

Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Elmore, Hon. Richard A.**
State of North Carolina Court of Appeals
Raleigh, North Carolina 27601
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **McCullough, Hon. John Douglas**
State of North Carolina Court of Appeals
Raleigh, North Carolina 27601
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Timmons-Goodson, Hon. Patricia**
State of North Carolina Supreme Court
Raleigh, North Carolina 27601

Attorneys

Attorneys for Plaintiff

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Charlotte, North Carolina 28204

Other Attorneys

- **McCullough, Hon. John Douglas**

Unknown State

END OF DOCUMENT

DAVID J. SOWERS, Plaintiff - Appellant, v. POWHATAN COUNTY, VIRGINIA; BOARD OF SUPERVISORS OF POWHATAN COUNTY, VIRGINIA, Defendants - Appellees, and ROBERT R. COSBY, Party-in-Interest.

No. 08-1633

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

347 Fed. Appx. 898; 2009 U.S. App. LEXIS 22676

September 24, 2009, Submitted
October 15, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Sowers v. Powhatan County, 2010 U.S. LEXIS 4861 (U.S., June 14, 2010)*

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. (3:06-cv-00754-REP). Robert E. Payne, Senior District Judge.

Sowers v. Powhatan County, 2008 U.S. Dist. LEXIS 19112 (E.D. Va., Mar. 12, 2008)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Patrick Michael McSweeney, MCSWEENEY, CRUMP, CHILDRESS & TEMPLE, PC, Richmond, Virginia, for Appellant.

Robert A. Dybing, THOMPSON MCMULLAN, PC, Richmond, Virginia, for Appellees.

ON BRIEF: Wesley G. Russell, Jr., MCSWEENEY, CRUMP, CHILDRESS & TEMPLE, PC, Richmond, Virginia, for Appellant.

JUDGES: Before NIEMEYER and MICHAEL, Circuit Judges, and James P. JONES, Chief United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

[*899] PER CURIAM:

This appeal involves the denial of a rezoning application filed by David J. Sowers in Powhatan County, Virginia. Sowers contends that the Powhatan County Board of Supervisors (the Board) denied him equal protection of the law by departing from its typical application procedures and by initially denying his application. The Board ultimately approved Sowers's application after he filed suit in state court. Sowers later sued the Board in district court under *42 U.S.C. § 1983*, claiming that his application would have been approved sooner, and that he would have avoided [**2] litigation expenses, had the Board not violated his constitutional rights. The district court granted summary judgment to the Board. We affirm because Sowers does not present a genuine factual dispute over whether he was similarly situated to [*900] other zoning applicants, and he does not show that the Board lacked a conceivable rational basis for its differential treatment of his application.

I.

Sowers is a Virginia land developer who applied to the Board in June 2004 for the rezoning of a 250.9-acre tract of land from agricultural to residential. As part of his application Sowers tendered a voluntary cash proffer of $ 3,530 per lot to offset the impact costs of his proposed subdivision. This amount was the Board's suggested minimum at the time. A few weeks after Sowers filed his application, the Board raised its suggested proffer amount to $ 6,395 per lot. Sowers refused official requests that he increase his cash proffer. He was entitled to refuse; under Virginia law, cash proffers are voluntary

and zoning decisions cannot be conditioned on proffers. *Gregory v. Bd. of Supervisors, 257 Va. 530, 514 S.E.2d 350, 353 (Va. 1999).*

In Virginia a rezoning application is reviewed by the local planning commission **[**3]** before it is presented for consideration by the local governing body. Sowers's application was first reviewed by the Powhatan County Planning Commission (the Planning Commission or Commission) in September 2004. Based on concerns voiced by residents and the Commission, Sowers revised his non-cash proffers and received a deferral of his public hearing before the Commission. At the hearing in October 2004 Sowers submitted further amended non-cash proffers to address impact concerns. Although he submitted his amended proffers after the deadline, the Commission voted to consider them. Several citizens spoke at the hearing in opposition to Sowers's proposed subdivision, articulating concerns such as increased traffic and the loss of the area's rural character. Many residents also sent letters in opposition. Additionally, the Virginia Department of Transportation (VDOT) raised concerns regarding the traffic consequences of Sowers's proposal.

The Planning Commission gave Sowers the option of another deferral to address these concerns. Rather than opt for a deferral, Sowers requested that his application be sent to the Board for a vote. The Commission director testified in his deposition that **[**4]** this choice was "unusual." J.A. 670. The director characterized Sowers as a "tough negotiator" compared to other applicants, adding that although Sowers was not totally uncooperative, he was unlike other applicants because he was less willing to negotiate.

The Planning Commission sent Sowers's application to the Board with the recommendation that it be denied as it then stood. Sowers again revised his non-cash proffers to address concerns. However, because he did not submit the proffers at least ten days before the Board's November 17, 2004, public hearing, the Board voted not to consider them. This was admittedly exceptional; in no other instance had the Board refused to accept late proffers. Two days before the public hearing, the Planning Commission recommended to the Board that it either (1) remand Sowers's application to the Commission for consideration of remaining concerns or (2) defer his hearing. Despite the Commission's recommendation, the Board refused to remand or defer. Like the late proffer rejection, the Board's refusal was exceptional.

In the meantime, one Board member, Russell Holland, had recused himself from voting on Sowers's application because he had been elected **[**5]** on a no-growth platform and owned 56 acres of the tract for which Sowers sought rezoning. (Sowers had contracted to buy the 56 acres from Holland.) Several citizens expressed concern that Holland's interest precluded him from representing their interests. Holland's **[*901]** name even appeared as a joint applicant on Sowers's application, though Sowers contends that this was an error.

The Board denied Sowers's rezoning application. The Board member who made the motion to deny gave as his reasons the "unusual circumstances of this case and the refusal of the applicant [Sowers] to initially work with the Planning Commission." J.A. 436. Sowers challenged the denial by suing the Board in state court. In January 2006, while his state suit was pending, the Board voted to reconsider his application. It approved his application in May 2006, and Sowers voluntarily dismissed his state suit.

Sowers then sued the Board in the Eastern District of Virginia under *42 U.S.C. § 1983*, alleging that the Board's unprecedented refusal to consider his late non-cash proffers, defer consideration, or remand to the Planning Commission amounted to an Equal Protection violation. Although his application was ultimately approved, **[**6]** he argued that it would have been approved earlier had the Board considered the revised proffers and deferred or remanded his application. The Board concedes that the only ways in which Sowers refused to work with the Planning Commission were his refusal to increase his cash proffer and his failure to address VDOT's traffic concerns. The district court concluded, however, that the record evidenced several plausible reasons for the Board to treat Sowers's application differently, both procedurally and substantively, and that Sowers failed to negate these conceivable rational bases for the County's differential treatment. The court granted summary judgment to the Board, concluding that Sowers (1) did not raise a genuine factual dispute over whether he was similarly situated to other zoning applicants and (2) did not show that the Board lacked a rational basis for its different treatment of his application. Sowers appeals.

II.

We review the district court's grant of summary judgment *de novo,* "viewing the facts in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." *E.E.O.C. v. Cent. Wholesalers, Inc., 573 F.3d 167, 174 (4th Cir. 2009).* Summary **[**7]** judgment is appropriate only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).*

Sowers premises his Equal Protection claim on being a "class of one," which requires him to show that he was "intentionally treated differently from others simi-

larly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)*. The summary judgment record indisputably establishes that Sowers did not make either showing.

A.

Sowers did not raise a genuine factual dispute over whether he was similarly situated to other zoning applicants in Powhatan County. The County Attorney observed that Sowers's proposal was "extremely controversial," that it encountered "more and better organized opposition . . . than . . . most other rezoning or conditional use permit applications," and that the opposition "was not just limited to citizens living adjacent to the affected area." J.A. 495. Even when it is accepted that some of the other applications that Sowers points to **[**8]** as comparable also raised traffic concerns and aroused public opposition, the record still indisputably demonstrates that the public opposition to Sowers's application was so fervent as to render him differently situated. Dozens of citizens **[*902]** sent letters protesting Sowers's proposal, and many spoke in opposition at the hearings before the Planning Commission and the Board.

Moreover, Sowers's proposed subdivision presented unique traffic concerns, particularly regarding access. All traffic entering and exiting the subdivision would pass through an existing subdivision, creating a "piggyback" or "funnel" traffic effect. J.A. 403-04. Sowers maintains that another application (the McClure application) also presented funnel traffic concerns. Even if this is true, the record shows that the funnel concerns were especially acute with Sowers's application.

Sowers was also differently situated from the standpoint of interpersonal relations, as evidenced by the Planning Commission director's characterization of Sowers as a "tough negotiator" who was unlike any other applicants with whom he had ever dealt. Further, Sowers differentiated himself from other applicants by skirting typical procedures **[**9]** through his request that his application be submitted directly to the Board, thereby removing it from initial Planning Commission consideration.

Even if we were to give Sowers the benefit of an inference that other zoning applications were similar to his with respect to traffic concerns, public opposition, and hard-line negotiators, his application was materially different from others due to the recusal of Board member Holland. The recusal created a unique situation in which the residents most directly impacted by Sowers's proposal were deprived of expected representation. Even if Holland was mistakenly listed as a co-applicant with Sowers, the disclosure that a Board member who had run on a no-growth platform had a vested interest in a rezoning application for residential expansion is enough to show that Sowers was not similarly situated to other applicants.

B.

Sowers's Equal Protection claim fails on an alternative ground: he did not negate every conceivable rational basis for the Board's differential treatment. While it is undisputed that the Board deviated from past practice when it refused to defer, remand, or consider late proffers in Sowers's application, this is not enough to **[**10]** establish an Equal Protection violation when no suspect classification or fundamental right is at issue. Equal Protection is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)*. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*

Sowers urges that because no statutory classification is at issue here, and because zoning decisions are adjudicative rather than general and are circumscribed by state law, the rational basis inquiry does not apply with its typical deferential force. This Court, however, applies the rational basis test to local permit and zoning decisions. *Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 438-39 (4th Cir. 2002)*; *Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 820 (4th Cir. 1995)*. "Whether a statute or administrative action employs a classification explicitly or implicitly," the Equal Protection **[**11]** analysis is the same. *Sylvia, 48 F.3d at 820.*

The "vast majority of governmental action -- especially in matters of local economics and social welfare, where state governments exercise a plenary police power -- enjoys a *'strong presumption* of validity' and must be sustained against a **[*903]** constitutional challenge 'so long as it bears a rational relation to some legitimate end.'" *Van Der Linde Hous., Inc. v. Rivanna Solid Waste Auth., 507 F.3d 290, 293 (4th Cir. 2007)* (emphasis in original). We conclude that Sowers failed to meet the "heavy burden of negating every conceivable basis which might reasonably support" the differential treatment. *Id.* It is not for this court to assess the "wisdom, fairness, or logic (or lack thereof)" of the Board's conduct. *Id. at 294.* "The 'rational' aspect of rational basis review refers to a constitutionally minimal level of rationality; it is not an invitation to scrutinize either the instrumental rationality of the chosen means" nor the "normative rationality of the chosen governmental purpose." *Id. at 295.*

Sowers argues that if state law bars certain grounds for a decision, then a decision based on those impermissible grounds necessarily cannot pass muster **[**12]** under rational basis review. Our precedent makes clear that state law is independent from a rational basis inquiry. A "violation of state law is not tantamount to a violation of a federal right." *Sunrise Corp. v. City of Myrtle Beach, 420 F.3d 322, 328 (4th Cir. 2005).* "[D]isparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim." *Sylvia, 48 F.3d at 825.* Therefore, even if the Board's differential treatment was grounded in part on Sowers's failure to increase his cash proffer, this reason, though illegal under state law, does not necessarily yield an Equal Protection violation.

In this case there was no Equal Protection violation because there were several other conceivable rational reasons for the Board's decision. Rational basis review does not require us to determine the Board's actual motivation. *Beach Commc'ns, 508 U.S. at 315.* We need only decide whether the Board had "plausible reasons" for its different treatment of Sowers's application. *Id. at 313.* The deference to democratic process that undergirds rational basis review means that we consider only whether the Board "reasonably could have believed **[**13]** that [its] action was rationally related to a legitimate governmental interest." *Tri-County Paving, 281 F.3d at 439.*

Because Sowers is unable to "negative every conceivable basis which *might* support" the Board's action, he cannot prevail on his Equal Protection claim as a matter of law. *Beach Commc'ns, 508 U.S. at 315* (emphasis added). His initial request that his application go to the Board for a vote rather than through the Planning Commission provided a rational basis by itself for the Board to reject his later request for more time and the opportunity to submit further revisions. Sowers's own procedural deviation, combined with his tough negotiating stance, could also have led the Board reasonably to believe that further work with Sowers would require too much time and effort and prove fruitless in the end. The vehement public opposition to his application, the unique traffic concerns that his proposal raised, and the recusal of a Board member with a perceived self-interest also clearly provided rational bases for the Board's action. Even if the only way (other than his refusal to increase his cash proffer) in which Sowers refused to work with the Planning Commission was his failure **[**14]** to address VDOT's traffic concerns -- concerns which Sowers maintains he did address in his late-filed proffers -- the Board could still have reasonably determined that re-engaging with Sowers would not have been productive.

Contrary to Sowers's contention, public opposition does furnish a rational basis for differential treatment in zoning decisions. Indeed, the very purpose of the deferential **[*904]** rational basis inquiry is to respect the democratic process, albeit with an eye to whether purely odious classifications are at work. The cases that Sowers cites are inapplicable. In *City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 447, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*, the Supreme Court struck down a zoning ordinance that prohibited the operation of a group home for mentally retarded individuals and observed that a "bare . . . desire to harm a politically unpopular group" is not a legitimate state objective. Similarly, in *Romer v. Evans, 517 U.S. 620, 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)*, the Court invalidated a state constitutional amendment that "identifie[d] persons by a single trait" (homosexuality) and "then denie[d] them protection across the board." The Court reiterated that the "bare . . . desire to harm" an unpopular group is **[**15]** not a legitimate interest. *Id. at 634.* The public's opposition to Sowers's zoning application did not stem from naked animosity or baseless fear, but from genuine concerns over traffic, safety, and the loss of rural surroundings. His was not a case of "mere negative attitudes . . . unsubstantiated by factors which are properly cognizable in a zoning proceeding." *Cleburne, 473 U.S. at 448.*

C.

For the foregoing reasons, we conclude that Sowers has not raised a genuine issue of material fact as to whether he was similarly situated to other zoning applicants. Nor has he shown that the Board lacked a conceivable rational basis for its different treatment of his application. Accordingly, the judgment of the district court is

AFFIRMED.