NO. 390PA11-2 TWENTY FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

Appellants,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

Appellee.

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

APPEAL FROM
FORSYTH COUNTY

Case No. 10-CVS-6926

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APPELLANTS' NEW BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court and Court of Appeals err in denying class certification because they each misapprehended the nature of NCDOT's action as an exercise of the police powers?

2. Did the Court of Appeals err in not considering the Appellants' claims for *de facto* taking and condemnation blight in the Northern Beltway?

STATEMENT OF THE CASE

On 16 September 2010, Appellants, on behalf of themselves and approximately 800 Forsyth County property owners, filed this action asserting the following claims against NCDOT:

1) inverse condemnation pursuant to N.C.G.S. § 136-111 based on NCDOT Roadway Corridor Official Maps and property acquisitions (N.C.G.S § 136-44.50 et seq., herein the "Map Act");

2) constitutional claims based on the Fifth Amendment of the United States Constitution as applied to North Carolina pursuant to the Fourteenth Amendment and in violation of 42 USC § 1983;

3) that the hardship program created under N.C.G.S. § 136-44.53 and administered according to 23 CFR § 710.503(c) violates the equal protection clause in derogation of the Fourteenth Amendment of the U.S. Constitution as applied to North Carolina pursuant to the Fourteenth Amendment and in violation of 42 USC § 1983;

4) wrongful taking by NCDOT in violation of Article I, Section 19 of the North Carolina Constitution; and

5) declaratory relief as to the constitutionality of N.C.G.S. § 136-44.50 et seq. R. p. 4-18.

On 18 November 2010, NCDOT filed Answer and motions to dismiss under Rules 12(b)(1), (2) and (6) and asserting the defense of sovereign immunity. R. p. 40.

NCDOT's motion to dismiss was heard before The Honorable Lindsay R. Davis, Jr. on 28 March 2011. On 19 April 2011, Judge Davis, denied the motion as to the inverse condemnation claim

under N.C.G.S. § 136-111 and the declaratory judgment claim, made in the alternative, as to the constitutionality of the Act, and granted the motion as to the 28 U.S.C. § 1983 and the North Carolina constitutional claims. R. p. 303

On 18 March 2011 Appellants moved to certify the lawsuit as a class action for all owners listed in the NCDOT's Forsyth County Roadway Corridor Official Maps. R. pp. 13, 184. The motion was heard by Judge Davis on 26 April 2011. Class certification was denied by his order of 20 May 2011 (the "Order"). R. p. 310. The Court of Appeals affirmed the trial court's ruling by its opinion issued on 15 May 2012.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Appellants' appeal is before the Supreme Court of North Carolina as the Court granted Appellant's Petition for Discretionary Review pursuant to N.C.G.S. § 7A-31 on 7 March 2013.

STATEMENT OF FACTS

A. NCDOT Roadway Corridor Official Map In Forsyth County.

The Map Act authorizes NCDOT to file official roadway maps listing properties that are in a proposed roadway in order to create a protected corridor for future roadways ("Protected Corridor") that prevents owners from developing their land thereby limiting (and oftentimes eliminating) any increase in

value of the land. Ostensibly, this is done to save taxpayers money. R. p. 19. This map is filed with the register of deeds and placed in the owners' chain of title. N.C.G.S. § 136-44.50(b)(3)& (4); ROA Rule 9(d) Ex. p. 1-66, 82-88. Property owners in the protective corridor are prohibited from obtaining building permits or sub-dividing their property. N.C.G.S. § 136-44.51(a). However, an owner may apply for a building permit or subdivision approval and, after a three year wait, a permit or approval shall be issued. N.C.G.S. § 136-44.51(b). NCDOT has no obligation to purchase or condemn the property though it may elect to do so in lieu of issuing the permit or approval. Id. The Map does not terminate and the Map Act provides no deadline for NCDOT to take any action otherwise.

Sixteen years ago, on 6 October 1997, NCDOT filed the Roadway Corridor Official Map for State Project 6.62800IT (R-2247) in the Forsyth County Register of Deeds (known as the "Western Loop"). ROA Rule 9(d) Ex. pp. 1-4. The Western Loop lists approximately 578 parcels in the roadway routed across the western part of Winston-Salem and Forsyth County. ROA Rule 9(d) Ex. p. 67. The document states:

> The Official Map has been prepared for the purpose of setting forth the location of portions of the proposed Western Loop. Any property included in the Roadway Corridor shown on the Official Map is subject to restrictions on issuance of building permits and sub division..."(ROA Rule 9(d)Ex.p. 1).

On 26 November 2008, NCDOT recorded the Roadway Corridor Official Map for State Project 34839 (U-2579 and U-2579A) in the Forsyth County Register of Deeds (the "Eastern Loop"). ROA Rule 9(d) Ex. pp. 6-66. The Eastern Loop is 1,929 parcels and joins with the Western Loop to form a thirty-four mile horseshoe around Winston-Salem called the "Northern Beltway." ROA Rule 9(d) Ex. p. 67. (Herein "Maps" refer to the Roadway Corridor Official Maps for Northern Beltway; "Property Owners" and "Owners" refers to owners listed in the Maps or depicted in tax maps as in the Northern Beltway; "Property" and "Properties" refers to property in the Northern Beltway.)

Appellants own Property in both sections of the Northern Beltway. R. p. 5. Appellants are an oil company, out of state owner (Ms. Crockett's father WR Moore died at 102), a landlord renting homes, and homeowners. R. p. 189-220. The Smiths (as are some number of owners) are not listed in the Maps but are depicted in the NCDOT roadway and tax maps. R. p. 208 ¶ 4; ROA Rule 9(d)Ex. p. 69,79. These properties are evenly spread throughout the Northern Beltway.

NCDOT maintains a document on its website entitled "Protected Corridor: What You Really Need To Know" stating that:

- "it is ***highly unlikely*** that property owners will be allowed to do things that ***will increase the cost of building the road*** (by dramatically increasing the cost of buying the property)";

- "How long can a property be in the 'protected corridor': ***For as long as it takes for North Carolina to get enough money to build the road.***"

- "Why: ***This protection is designed to protect North Carolina taxpayers from excessive increases in expense when the State starts to buy property to build the road.***"

- "Sometimes, a potential route becomes a 'protected corridor' because the area is growing so quickly it is important to limit new buildings ***to help save taxpayers money***" and

- "The following is a list of things that are typically **NOT** approved: subdividing property to build more houses, add square footage to a building, develop land."

R. p. 10-11, ¶¶ 45-46, R. p. 19. (Emphasis is in the original NCDOT publication.)

B. NCDOT's Conduct In The Northern Beltway; Acquisition Of Some Owners But Not Others.

NCDOT acquires Properties under various programs, including the "Advanced Acquisition Due to Hardship" (the "Hardship Program"). N.C.G.S. § 136-44.53. R. pp. 6-7 ¶¶ 28-32, pp. 138-147. The Hardship Program is administered under 23 CFR § 710.503(c). NCDOT must concur with the owner's submissions that:

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

> (2) *Documents an inability to sell the property because of the impending project, at fair market value*, within a time period that is typical for properties not impacted by the impending project.

R. pp. 6-7, ¶¶ 26-32, (emphasis added).

NCDOT has admittedly acquired 454 properties through its Hardship Program. R. pp. 6-7 ¶¶ 28-32. This "remedy" is only available to Property Owners that experience medical or financial distress (as NCDOT determines in its discretion) and is thus unavailable to hundreds of physically and financially sound Property Owners. If a hardship is approved, NCDOT will not negotiate on its price and owners must use NCDOT approved appraisers. R. p. 8 ¶30, p. 141. NCDOT puts distressed owners in a dilemma - to sell to NCDOT at a non-negotiable price dictated by NCDOT or wait for eventual condemnation at some undetermined date.

Examination of the properties owned by NCDOT in Forsyth County reveals hundreds of properties were purchased in all corners of the project before the respective Maps were filed. R. p. 127-137 (Western Loop October 1997, Eastern Loop November 2008). R. p. 6. NCDOT's pervasive property acquisition before filing the Maps undermines any idea that NCDOT is acting in either a planning or regulatory manner when the Map is recorded (to the point, NCDOT actions are *de facto* condemnation).

NCDOT instituted ten condemnation proceedings in the Western Loop in 1998.[1] Other than those cases, NCDOT has continued to make selective acquisitions.[2] R. pp. 43-45, ¶¶ 25-28, pp. 239-240 ¶15-19; p. 241 ¶24. Some Northern Beltway neighborhoods have a large number of NCDOT owned property (R. p.127-137), much of it rented out. R. pp. 7-8 ¶¶ 33-38, p. 119 ¶¶ 13-14, pp.123-126, ROA Rule 9(d) Ex. p. 78-81(Appellants' property in yellow, NCDOT property in red).

The Property Owners' injuries became more acute in late July 2010 when NCDOT announced to Property Owners that it would be at least another ten (10) years before NCDOT *might* begin the process of condemning property for the Northern Beltway. R. p. 9-10 ¶ 40-46; R. p. 203 ¶ 8. NCDOT's chief operating officer spoke to Property Owners and told them they would not be permitted to make improvements to their property because those actions would increase NCDOT's acquisition costs. R. pp. 9-10 ¶¶ 43-44. NCDOT also stated that there are no funds available to purchase property in the Northern Beltway for the next ten (10) years. Id. ¶ 41. Three weeks later, finding money when there are no funds available, NCDOT paid $1,600,000 to buy

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[1] This fact was determined from the public records post Notice of Appeal.

[2] Tax records confirm NCDOT owns hundreds of parcels. R. p.127-137, 240 ¶ 20.

Vienna Baptist Church. R. p. 4 ¶ 28. The church is now torn down.

ARGUMENT

Approximately eight hundred owners are forced to indefinitely bear the burden of the Northern Beltway for the sake of the State's taxpayers. R. p. 19. Using the Map Act when "construction is imminent" and with a modest and reasonable delay in acquisition thereafter is perhaps permissible. To use the Map Act, which never expires and mandates no action by NCDOT, to burden any owner for public benefit is an act of eminent domain. Instead of the Map Act instilling a sense of urgency in NCDOT, the Map Act frees NCDOT to be dilatory and arbitrary, with the detrimental loss of fundamental property rights afford all North Carolina citizens falling squarely and singly upon the Property Owners. *Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E.2d 252, 256 (1941) ("property" extends to every aspect of right and interest capable of being enjoyed and means the *right to possess, use, enjoy and dispose of it); Long v. City of Charlotte,* 306 N.C. 187, 293 S.E.2d 101 (1982); *Manufactured Hous. Communities of Washington v. State,* 13 P.3d 183, 191 (Wash. 2000) (anything destroying one's *unrestricted right to use, enjoy or dispose* of property, to any extent, destroys the property).

The owners' anger, resentment, frustration, and abandonment

are difficult to convey in a written brief. R. p. 9-10. Justice Hugo Black succinctly expresses the crux of the Appellants' and Property Owners' complaint with NCDOT:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960) (J. Black), *L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, 2011 WL 1467366 (N.C. App. 2011) (citing *Armstrong*); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980). See Justice Brady's concurrence in *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 669 S.E.2d 286, (2008) (No free-man shall be seized, or imprisoned, or *dispossessed*, ... excepting by the legal judgment of his peers, or by the laws of the land).

Appellants contend class certification is the most efficient and judicious method to address what will be hundreds of identical claims against NCDOT. Class action spares the State and the Forsyth County Superior Court from the inconvenience and burden of dealing with multitudes of repetitious and identical liability cases. The proposed class members, Property Owners in the Northern Beltway, are admittedly

a diverse social and economic group: young, not as young, husbands, wives, families, corporations, landlords, businesses, churches, widows, heirs, estates, store owners, investors, and farmers. R. p. 189-221. Their properties are homes, parsonages, farms, churches, gas stations, vacant land, rental houses, retail stores, and machine shops. Many owners have modest and fixed incomes. Some are wealthy. Many cannot pursue NCDOT on their own due to health, age, finances, or because they do not live near Winston-Salem.

This proposed class has a common injury. NCDOT has effected an inverse condemnation of their properties. No owner can freely sell or improve their property as a direct result of NCDOT. NCDOT has confiscated hundreds of millions of dollars of property values belonging to the proposed class, with only the promise to pay when North Carolina gets enough money to build the road however long that may take.

I. THE PROPER TEST FOR CLASS ACTION IS THE UNEQUIVOCAL INTENT / IRREVERSIBLE DAMAGE TEST AS NCDOT IS EXERCISING ITS POWER OF EMINENT DOMAIN, NOT POLICE POWERS.

The trial court determined that a "practical use" evaluation would have to be conducted on a property by property basis. As a result the trial court decided that Appellants' cases were not suitable for class action certification. The trial court denied

class certification finding that no class exists because there were different issues of fact for each property owner, namely the "use" of each property. The trial court used a zoning/regulatory analysis, despite Appellants expressly claiming an eminent domain action where NCDOT has caused a *de facto* taking. R. p. 11-13 ¶¶ 49-54. Appellants assert that using a zoning/regulatory analysis for class certification is an error of law by the trial court which fundamentally misclassifies NCDOT's actions. The Order states that the Maps were a statutory restriction that involved police powers requiring an "ends-means", "practical use" analysis. R. pp. 314-317.

> ***whether the interference with the owners' rights amounts to taking, depends on whether the interference renders the use of the property impractical and the property itself of no reasonable value....*** How the *statutory restrictions* affect each property will be different because each property is different.... whether a taking has occurred must be determined on a property by property basis. R. p. 317. (Emphasis added.)

Unless the correct legal test is applied in the first instance, the trial court is unable to properly exercise its discretion. *N.C. Dept. of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) (if trial court exercises its discretion under a misapprehension of the law, remand is appropriate for reconsideration in light of the correct law). The importance of recognizing the State's exercise of eminent

domain power versus police powers in analyzing a takings claim is imperative. "Unless this fundamental precept is understood, the analysis of any litigant begins on the wrong path and must necessarily end in error." *MAKING A CASE FOR PRE-CONDEMNATION BLIGHT*, SD40 ALI-ABA 93 at p. 102-103. This mistake of law on the proper test to apply prevented the trial court from properly determining how to best handle multitudes of identical complaints.

The lower courts misapplied the law in determining that NCDOT is exercising its police powers in a regulatory manner, rather than finding that NCDOT is actually using its power of eminent domain to acquire property. Fundamentally, NCDOT is not a regulatory agency. NCDOT builds roads, it does not "zone" them. NCDOT only exercises its police power inside or adjacent to its right of way when it has actually acquired the right of way (i.e., sign locations, medians, curbs, stoplights and speed limits).

This misapprehension resulted in the lower courts holding that the Appellants need to demonstrate at trial that NCDOT has deprived them of all practical use and reasonable economic value. Slip opinion p. 37. The proper analysis should focus on the fact that the NCDOT, through a combination of actions - purchasing Properties in the Northern Beltway through hardship and early acquisition, filing the Map Act to restrict the Properties, unreasonably delaying in condemning Properties, and demolishing

dozens of homes - has exercised its power of eminent domain on the owners and inversely condemned all Property Owners.

NCDOT acquires land for our roads, and it has done so in the Northern Beltway no less than 454 times. NCDOT undoubtedly intends to acquire the Appellants and the proposed class members. It refuses to do so now simply because it wants to continue to purchase only on its own unilateral and unfair terms. Fairness can only be ensured if the owners have a right to a jury of their peers determining just compensation.

A. Eminent Domain vs. Police Power: Eminent Domain Bestows A Public Benefit While Police Powers Prevent A Public Harm.

Police powers and eminent domain derive from the same source, the sovereignty of the state. Regulation is analyzed in terms of the exercise of police power, whereas acquisition is analyzed in terms of the state's power of eminent domain. *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 625 (Fla. 1990), citing *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987).

> The threshold question in any takings claim is whether the government action is an exercise of its eminent domain power or its police power. . . . . Courts have long looked behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent domain. . . Eminent domain takes private property for a public use, while the police

> power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public . . . But, when *private property rights* are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable. (Emphasis added.)

City of Des Moines v. Gray Businesses, LLC, 124 P.3d 324, 328-329 (Wash. Ct. App. 2005), *citing Eggleston v. Pierce County*, 64 P.3d 618 (Wash. 2003).

North Carolina agrees that the State's use of police powers must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm. *State v. Ballance*, 229 N.C. 764, 769-70, 51 S.E.2d 731, 735 (1949) (state's exercise of the police power must relate to public health, morals, safety, or general welfare). The distinction between bestowing a public benefit versus preventing a public harm is critical to the proper resolution of this case.

> It may be said that the state takes property by eminent domain because it is useful to the public and under the police power because it is harmful . . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.

Smoke Rise, Inc. v. Washington Suburban San. Comm'n, 400 F.Supp. 1369 (D.Md.1975) quoting Professor Freund, The Police Power, § 511, at 546-47 (1904); See *Matter of Recycling & Salvage Corp.*,

586 A.2d 1300, 1313-14 (N.J. App. Div. 1991) (the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful). Thus, forcing private citizens to indefinitely "donate" their property to the State for a public benefit is an act of eminent domain which requires just compensation as a matter of right.[3] *Ventures In Property I v. The City Of Wichita*, 594 P.2d 671 (Kan. 1979) citing *Nichols on Eminent Domain*, "Nature and Origin of Power" § 1.42(1), p. 116-121 (3d rev. ed. 1976).

NCDOT's avowed purpose in creating a Protected Corridor is to "save the taxpayers money," in part by preventing owners from

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[3] States have uniformly found roadway reservation statutes to be takings. *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 625 (Fla. 1990) (cited by NCDOT in its Corridor Preservation Methods R. p. 25-29); *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951) (action in plotting ground for a park and freezing it for three years was in reality a "taking"); *Lomarch Corp. v. Mayor & Common Council of City of Englewood*, 237 A.2d 881 (N.J. 1968) (the 'option' for the purchase of land was statutorily granted to the municipality only upon the implied duty and obligation to make payment of adequate compensation to the landowner for the temporary taking and his deprivation of use); *Grosso v. Board of Adjustment of Millburn Tp. in Essex County*, 61 A.2d 167 (N.J. 1948) (A municipality in exercise of planning power could not dedicate tract of land to highway uses on "official map" and thereby deprive land owner of all use of tract without making compensation until municipality was prepared to lay out the highway.) *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 996 (1st Cir. 1983) (official map freezing property constituted a taking); *The Maryland-National Capital Park and Planning Commission v. George A. Chadwick*, 405 A.2d 241 (Md. Ct. App. 1979) (reservation was tantamount to a "taking" without compensation); *Lackman v. Hall* 364 A.2d 1244 (Del. Ch Ct 1976) (statute allowing reservation of roadway corridors unconstitutional).

increasing the value of their property so the State's eventual acquisition costs are controlled when "North Carolina gets enough money." R. p. 19. This is bestowing a public benefit to the citizens of North Carolina: the State obtains the property at the best prices possible. While saving taxpayers money is a laudable goal, doing so by burdening a few unlucky owners without paying just compensation upon the taking is unconstitutional.

To determine that NCDOT is exercising its police powersin a regulatory taking, the lower courts necessarily had to determine that a public harm was being created by the Appellants. There is no support for finding a public harm. This is a significant error as it neglects consideration of the constitutional injury admittedly inflicted by NCDOT: Appellants' inability to dispose of their property to any buyer other than NCDOT and NCODT's inexcusable delay and irrational discrimination between owners.

B. **The "Practical Use" Test As Expressed By NCDOT Illustrates Its Failings; Proper Test Focuses On Owners' Property Rights.**

The failings of using the "police powers" analysis for determining the instant takings issue is evident in how NCDOT defends its actions in the Northern Beltway. NCDOT asserts its conduct is harmless in that the homeowners can still live in their homes, that landlords can still rent their houses, and landowners can still operate their dog kennels. These "uses" trumpeted by NCDOT are a cynical and empty statements. "Use"

does not address NCDOT's confiscation of the owners' equity in their property and inability to do anything of economic improvement on their property. Affirming a police powers "use" test that allows NCDOT to avoid liability for its actions in the Beltway simply because an owner can still flush his toilets, rent his rooms, or run his dogs cannot possibly be the correct outcome to the situation created by NCDOT in Forsyth County.

NCDOT has long designated Appellants' land for a public use and eventual acquisition. NCDOT has repeatedly acted on that designation next to and around the all Owners' Properties. Therefore, the proper test should examine the interference with an owner's fundamental property rights and whether the designation "results in such governmental intrusion as to inflict virtually irreversible damage." *Fifth Ave. Corp. v. Washington County, By & Through Bd. of County Com'rs*, 282 Or. 591, 614, 581 P.2d 50, 63 (1978); *Dodd v. Hood River County*, 317 Or. 172, 181, 855 P.2d 608, 614 (1993) (*Fifth Avenue* test applied in cases where the zoning decision is made in contemplation of the eventual taking of private property for public use). As *Fifth Avenue* illustrates, the State's eventual act of acquisition is determinative to the test to be applied. See *Textron Inc. v. Wood,* 355 A.2d 307 (Conn. 1974) (highway officials expressed their irreversible intent to take the plaintiff's land for six years *by filing a map which had the*

statutory effect of depicting that property as part of a legally laid out state highway; capacity to freely dispose of property was effectively arrested and constituted a "substantial interference" with property rights thus a taking in a constitutional sense).

NCDOT is flexing its power of eminent domain - 454 times- to bestow a public benefit, not using police powers to prevent a public harm. NCDOT is empowered to buy these Northern Beltway properties only because they are needed for the public roadway to protect against future development. N.C.G.S. §136-44.53; See *Carolina Mills, Inc. v. Catawba County Board of Education,* 27 N.C. App 524, 219 S.E.2d 509 (1975) (power to purchase is the power of eminent domain). If North Carolina is using its power of eminent domain, the correct test must examine the interference with the owners' fundamental property rights and irreversible damage of the taking by NCDOT that has occurred.

C. North Carolina Cases Dealing With "Practical Use, Reasonable Value" Are Land Use / Land Regulation Cases Not Condemnation Cases.

Not a single case relied on by NCDOT or the lower courts deals with a situation where the State was regulating property for the ultimate act of acquisition. An examination of the North Carolina cases dealing with the issue of real property's "practical use" reveals first, that each of those cases involved either re-zoning, wet lands regulation, building codes, or land

use regulation and, secondly, that the properties had either existing income producing uses or that the owner was still allowed to develop the land but at greater expense or for different purposes. The lone outlier is *E. Appraisal Services, Inc. v. State*, 118 N.C. App. 692, 457 S.E.2d 312 (1995) which dealt with the Department of Insurance seizure of claims files which contained an appraisers work product. In stark contrast to the situation in Northern Beltway, in each of these cases (see below) the governments' ultimate end was ***NOT*** to acquire the properties. None of these cases involved NCDOT, its eventual acquisition of property, the building of a road, or a situation where the State had affirmatively acted to buy hundreds of properties and was continuing to do so.

The cases in which the "practical use" issue is mentioned and addressed are: *Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8 (1989) (contesting rezoning of property from office-institutional to residential); *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983)(regulations on land in a flood zone required new improvements on property be built in manner so as to prevent or minimize flood damage resulting in greater building expense); *Weeks v. N. Carolina Dept. of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 388 S.E.2d 228 (1990) (property owner on Bogue Sound denied permit for a pier for his sailboat);

King By & Through Warren v. State, 125 N.C. App. 379, 481 S.E.2d 330 (1997) (environment regulations impacting driveway left 6 of 8 acres developable); *City of Concord v. Stafford*, 173 N.C. App. 201, 618 S.E.2d 276 (2005) (owner disputed necessity for median in front of his property); *Guilford County Dept. of Emergency Services v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 441 S.E.2d 177 (1994) (zoning change caused increased remediation costs for hazardous waste property, not a taking); *Messer v. Town of Chapel Hill*, 346 N.C. 259, 485 S.E.2d 269 (1997) (owner sold property for $1,500,000 established that property had "a practical use and a reasonable value" following amendment to zoning ordinance); *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990) (developer's claim that total restriction on development of three acres resulted in taking ignored fact that in return for developer's promise to set aside three acre common area, the city permitted development of developer's subdivision tract in a more intensive manner than otherwise permitted); *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961) (property rezoned from industrial to residential); *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 655, 669 S.E.2d 286, 289 (2008) (town conservation ordinance and variance program impacted use).

The "practical use, reasonable value" analysis, or any other regulatory based analysis, is inappropriate in this

instance. The lower courts erred in this regard. For these reasons, this case should be remanded to the trial court with instructions to analyze the motion for class certification under the proper test: whether NCDOT's actions are an unequivocal intent to condemn, have effectively arrested any of the Property Owners' fundamental rights or caused irreversible damage.

II. APPELLANTS' COMPLAINT IS NOT LIMITED TO USE OF THE MAP ACT; IT FOCUSES ON ALL ASPECTS OF NCDOT'S ACTIONS THROUGHOUT THE NORTHERN BELTWAY THAT RESULT IN A *DE FACTO* TAKING.

While the filing of the Maps constituted the unequivocal end of planning and the NCDOT's exercise of eminent domain, Appellants expressly complain about a myriad of NCDOT actions and impacts not involving the restrictions of the Map Act that all result in an inverse condemnation. The lower courts ignored Appellants' complaint that a *de facto* taking of their property was caused by NCDOT's pervasive acquisition, unequal treatment and its unmistakable, overt and noxious presence throughout the Northern Beltway that went far beyond the restrictions of the Map Act. The "Takings Allegations" in Appellants' complaint have many assertions independent of the Map Act and its restrictions. R. p. 11-13 ¶ 49-54.

Appellants apparently present the first case that would cause North Carolina to consider a claim for *de facto* taking.[4] It is not a novel concept elsewhere. Numerous jurisdictions recognize a cause of action for *de facto* taking. Plaintiffs have found no jurisdiction that has categorically refused to recognize the claim.

The factors considered in examining *de facto* takings allegations are: i) project announcements are widely published, ii) project maps are published, iii) development restrictions are placed on property, iv) some owners bought, others left behind like a hole in the donut, v) oppressive behavior by State. *MAKING A CASE FOR PRE-CONDEMNATION BLIGHT*, SD40 ALI-ABA 93. *Littman v. Gimello,* 557 A.2d 314, 321 (N.J. 1989) (when the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of the property, which are: (1) extraordinary delay or unreasonable conduct on the part of the condemning authority; (2) the imminence of condemnation; and (3) the severity of the injury and hardship to the property owner.)

Thus, the issue for class action is: Does NCDOT exercise its power of condemnation over all owners when NCDOT 1) announces the impending condemnation, 2) delays for 16+ years

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[4] Justice Brady used the term in his concurrence in *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill,* 362 N.C. 649, 655, 669 S.E.2d 286, 289 (2008).

and counting, 3) buys one-quarter of all Beltway properties, 4) spends millions on acquisitions, 5) buys some owners but refuses or ignores others, 6) has unwritten and unequal standards it applies to owners, 7) affirmatively prevents economic development of owners' properties, 8) puts Maps and restrictions in the chain of title, and 9) publically announces that it will be at least a decade before NCDOT begins acquisitions. Appellants say yes to this question. Appellants argue that if their 454 neighbors are bought then they and all class members must be bought, too. NCDOT's behavior has occurred in all sections of the Beltway and has rendered property unmarketable, undevelopable economically and thus all owners are subject to the impact of this behavior.

Appellants have found no other case in the United States that appears to combine as many "*de facto*" issues as exist in the Northern Beltway. There are numerous cases in the United States that have some of what is found in Forsyth County that affirm *de facto* condemnation: *Althaus v. United States*, 7 Cl. Ct. 688 (1985) (ten years resulted in *de facto* exercise of power of eminent domain); *Levine v. City of New Haven*, 294 A.2d 644 (Conn. Super. Ct. 1972) (holding failure of state to take nine years after commencement of project entitles property owner to damages); *Gaughen v. Commonwealth*, 554 A.2d 1008 (Pa. Commw. Ct. 1989) (proposed highway condemnation delayed by the State,

deprived owner of the use and enjoyment of his property that may result in a *de facto* taking); *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977) (12 year delay); *Klopping v. City of Whittier,* 500 P.2d 1345 (Cal. 1972) (When the pre-condemnation activities of the government are unreasonable or oppressive and the affected property has diminished in market value as a result of the governmental misconduct, the owner of the property may be entitled to compensation); *People ex rel. Dept. of Transp. v. Diversified Properties Co. III,* , 17 Cal. Rptr. 2d 676 (1993) (*de facto* taking of real estate developer's property by delaying eminent domain action for two and one-half years); *Garland v. City of St. Louis,* 596 F.2d 784 (8th Cir. 1979) (five years); *Clay County Realty v. City of Gladstone,* 254 S.W.3d 859 (Mo. 2008) (aggravated delay, bad faith, or untoward activity by the condemning authority); *Reichs Ford Road Joint Venture v. State Roads Commission of the State Highway Administration,* 880 A.2d 307, 319-20 (2005) (14-year delay in condemnation proceedings); *Luber v. Milwaukee County,* 177 N.W.2d 380, 384 (Wis. 1970) (four year delay); *Foster v. City of Detroit,* 254 F. Supp. 655 (E.D. Mich. 1966) (ten year delay constituted an unconstitutional taking before the actual condemnation); *Roth v. State Highway Comm'n of Missouri,* 688 S.W.2d 775, 777-78 (Mo. Ct. App. 1984) ("aggravated delay" after seven years from the announcement by

defendant of its condemnation plans); *Textron Inc. v. Wood,* 355 A.2d 307(Conn. 1974); *Lincoln Loan Co. v. State, By and Through State Highway Commission* 545 P.2d 105 (Ore. 1978); *Johnson V. The City Of Minneapolis,* 667 N.W.2d 109 (Minn. 2003), (City uniquely burdened owners by impairing their existing and prospective uses of the properties for an unreasonable period of time); *Ehrlander v. State, Dept. of Transp. & Pub. Facilities,* 797 P.2d 629, 635 (Alaska 1990); *Sayre v. U.S.,* 282 F.Supp. 175, 185 (D.C. Ohio 1967) (ten year delay stated an abuse of the exercise of the power of eminent domain that would constitute a taking of property without just compensation if that abuse directly and proximately contributed to, hastened, and aggravated, acting alone or in combination with other causes, the deterioration and decline in value of the area and the subject property).

To the extent that the Court finds that the "eminent domain" test annunciated by Appellants in Section I is inapplicable or not fulsome, the Court may remand the case to the trial court to determine if class certification is appropriate under a de facto taking claim.

III. APPELLANTS' INVERSE CONDEMNATION and DECLARATORY JUDGMENT CLAIMS SATISFY THE REQUIREMENTS FOR CLASS CERTIFICATION.

The proposed class is all owners of property listed in the Maps or depicted as being in the Northern Beltway on Forsyth County Tax Maps or on NCDOT roadway maps. R.p 184-185. The class is easily identified and geographically discrete.

The trial court has discretion to determine whether "a class action is superior to other available methods for the adjudication of the controversy." *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C.App. 545, 548, 613 S.E.2d 322, 326 (2005). However, if the trial court exercises its discretion under a misapprehension of the law, remand is appropriate for reconsideration in light of the correct law. *N.C. Dept. of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

North Carolina's Rules of Civil Procedure Rule 23(a) addresses class actions:

> Representation - If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

Class certification requires that there be issues of law or fact common to the class. This requirement is met when there is at least "one core common legal question that is likely to have one common defense." *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir.1993). Appellants have the burden of showing that the "prerequisites to utilizing the class action procedure are

present." *Blitz v. Agean, Inc.*, 197 N.C.App. 296, 302, 677 S.E.2d 1, 5 (2009). There is no requirement under Rule 23, however, that the claims asserted in a class action be factually identical as to all class members. *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 345 N.C. 683, 698, 483 S.E.2d 422, 432 (1997) (state argued members of the potential class would receive recoveries in different amounts, court said how damages determined for individuals was collateral issues not sufficient to deny class); see *Pitts v. American Sec. Ins. Co.*, 144 N.C.App. 1, 13, 550 S.E.2d 179, 189 (2001) (individual issues of damages and the individual showing required in a fraud action outweighed by the common issues of law and fact), see *Richardson v. Bank of America, N.A.*, 182 N.C. App. 531, 561, 643 S.E.2d 410, 429 (2007) (fact that class will be entitled to varied amounts of damages does not render class certification inappropriate); *Moore. v. U.S.*, 41 Fed. Cl. 394 (1998).

Class actions must have common issues of law or of fact that predominate over issues affecting only individual class members. Other prerequisites for bringing a class action are: (1) the named representatives must fairly and adequately represent the interests of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a

genuine personal interest in the outcome of the case; (4) class representatives will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C.App. at 548, 613 S.E.2d at 325-326. The trial court found that Appellants met the burden of personal interest, numerosity and the ability to provide adequate representation and notice.

The Property Owners share commons issues of fact: their Properties are listed in and subject to restrictions of the Maps; NCDOT has and continues to purchase Beltway hundreds of properties; NCDOT buys under the Hardship Program; NCDOT does not offer and has not condemned Property; NCDOT has made public announcements about the Beltway regarding construction, timing and acquisition.

The common issue of law to the class is whether NCDOT conduct has substantially interfered with the Property Owners' fundamental property rights to affect a taking requiring just compensation?

Federal case law provides guidance in addressing the commonality criterion. In addition to common issues of law or fact, the court should consider whether those common questions "predominate over any questions affecting only individual

members." A finding of commonality does not require that the claims be identical; "[r]ather, . . . the questions underlying the claims of the class merely must share essential characteristics, so that their resolution will advance the overall case." *Barnes v. U.S.*, 68 Fed. Cl. 492, 496 (2005). The threshold for proving commonality "is not high." *King v. U.S.*, 84 Fed. Cl. 120, 125 (2008); *Haggart*, 89 Fed. Cl. 523.

If the trial court finds the party seeking certification has established the prerequisites, the trial court must then determine whether "a class action is superior to other available methods for the adjudication of th[e] controversy." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987). A class action "should be permitted where [it is] likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 11, 550 S.E.2d 179, 188 (2001) *aff'd*, 356 N.C. 292, 569 S.E.2d 647 (2002); It also helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion. *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 540-41 (Nev. 2005); *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632 (Tenn. 1996).

The trial court found class action not to be a superior method because the Properties were different: improved,

unimproved, commercial or residential. R. p. 317. The trial court was wrong. Class certification is superior to Forsyth County dealing with possibly hundreds of identical lawsuits, and certainly prevents inconsistent results on the application of the proper legal standard. Here, the claims of Property Owners "share essential characteristics" - the NCDOT's interference with property rights, NCDOT's pervasive presence in the Beltway, and discriminatory conduct of buying 454 owners but not the class members. A class action is more efficient, convenient and accommodating for the many elderly, ill, working, financially restricted, out of state, and apprehensive Property Owners for which individual lawsuits are problematic. It is fundamentally unfair to burden these Property Owners with the Northern Beltway in the first instance and then force them to shoulder the cost, effort, difficulty, and delay of an individual lawsuit.

If certain Property Owners are presently content with their situation and use of their land, then those owners may opt out of the class. Furthermore, once there has been a determination of liability and date of taking for the class, Appellants foresee only the most difficult valuation cases possibly going to trial on damages - such as vacant land, partial takings, and business property. Residential valuations are susceptible to settling as homes are easier to value. Concern about the damages class being unmanageable is overstated and ignores that

if NCDOT acted properly sixteen years ago it should have filed hundreds of condemnation actions by now anyway. NCDOT has not done so, refuses to do so and has forced Appellants before this Court.

A. Inverse Condemnation Cases Have Been Certified As Class Actions.

Appellants' motion for class certification for the inverse condemnation action is not a novel situation. The propriety of inverse condemnation cases being certified as class actions has been confronted in several cases. In *Moore. v. U.S.*, 41 Fed.Cl. 394 (1998), plaintiffs asserted that the United States took their property when it prevented reversion of plaintiffs' fee interests to the abandoned railroad rights-of-way. The United States unilaterally transformed the rights-of-way into a recreational trail used by the general public without compensation to the plaintiffs. The Court of Federal Claims held that suit met requirements for certification of a class action for 2,000 property owners. The Court gave no consideration of an "ends-means" / zoning analysis; this case was a taking of a property interest, not a zoning regulation.

Amen v. City of Dearborn, 718 F.2d 789 (6th Cir. 1983), was a class action based on inverse condemnation against the city of Dearborn, Michigan, by former residents of certain neighborhoods. The owners presented claims that the government

caused a credible and prolonged threat of condemnation over property that significantly diminished value or forced owners to sell to the government. The court concluded that, while single governmental actions alone might have sufficed, the aggregate of that conduct *did* result in a taking. See inverse condemnation cases granting class actions: *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968), *Meighan, supra; Van Dissel v. Jersey Central Power & Light Co.*, 377 A.2d 1244 (N.J.Super. 1977); *Florida Department Of Agriculture And Consumer Services v. City Of Pompano Beach*, 829 So.2d 928 (Fl. App. 2002); *Hammer v. City of Eugene*, 121 P.3d 693 (Or. Ct. App. 2005); *Neumont v. Monroe County, Fla.*, 198 F.R.D. 554, 556 (S.D. Fla. 2000); *Haggart v. U.S.*, 89 Fed.Cl. 523 (2009).

CONCLUSION

The trial court misapprehended the law by applying zoning concepts to the Appellants' claims whereas Appellants' claims are based upon fundamental property rights, *de facto* taking, and eminent domain. This misapprehension resulted in the trial court finding class action not to be a superior method for Appellants' claims and prevented the trial court from appropriately evaluating Appellants' class certification motion. A correct application of the law regarding the exercise of eminent domain powers results in commonality of law and fact

supporting class certification. This case requires remand with instructions that the trial court apply an eminent domain test focusing fundamental property rights, irreversible damage and unequivocal intent. Appellants have indeed satisfied all the prerequisites for class certification, it is a superior method of adjudication, and that the lawsuit is to be granted class action status.

This is the 21st day of March 2013.

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

SUPREME COURT OF NORTH CAROLINA

****

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

Appellants,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

Appellee.

From
N.C. COURT OF APPEALS

APPEAL FROM
FORSYTH COUNTY

Case No. 10-CVS-6926

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CERTIFICATE OF SERVICE
****

This is to certify that the undersigned has on March 21, 2013 served this Appellants' Brief in the above-entitled action upon all other parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, properly addressed to:

ADDRESSEES:

Dahr Joseph Tanoury
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This the 21st day of March, 2013.

Matthew H. Bryant