NO. 56PA14-2 TWENTY FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

EUGENE & MARTHA KIRBY, HARRIS TRIAD HOMES, INC., MICHAEL HENDRIX, DARREN ENGELKEMIER, IAN HUTAGALUNG, SYLVIA MAENDL, STEPHEN STEPT, JAMES & PHYLISS NELSON, and REPUBLIC PROPERTIES, LLC	)	FROM FORSYTH COUNTY
Plaintiffs-Appellees,	)	Case Nos. 11-CVS-7119 11-CVS-7120 11-CVS-8170 11-CVS-8171 11-CVS-8172 11-CVS-8173 11-CVS-8174 11-CVS-8338 12-CVS-2898
v.	)	
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION	)	
Defendant-Appellant.	)	

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BRIEF OF THE JOHN LOCKE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPLELLEES

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STATEMENT OF INTEREST

The John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. We employ research, journalism, and outreach programs to promote our vision for North Carolina—of responsible citizens, strong families, and successful communities committed to individual liberty and limited, constitutional government.

The John Locke Foundation has a long-standing interest in the Map Act, which we have criticized for being "inefficient, unfair, and unnecessary." We have repeatedly urged the General Assembly to repeal or reform it. We have also taken a keen interest in *Kirby v. NCDOT* and in the legal and constitutional issues that it raises.

ARGUMENT

The Map Act, N.C.G.S. § 136-44.50, *et seq.*, empowers the NCDOT to impose long-term development moratoria on land it intends to eventually acquire for highway rights-of-way by recording official maps of "transportation corridors" within which "no building permit shall be issued ... nor approval of a subdivision ... granted." *Id.* § 136-44.51(a). The central question raised by this case is whether the imposition of such development moratoria by the NCDOT should be construed as an exercise of the power of eminent domain or as an exercise of the police power. In the decision below

the Court of Appeals held that it should be construed as the former. Notwithstanding the NCDOT's arguments to the contrary, that holding is correct, and it should be upheld.

* * *

The NCDOT attempts to characterize its imposition of development moratoria under the Map Act as an ordinary exercise of the police power. After noting that, "The regulation of land use is a common police power function," it asserts that, "The Map Act is similar to other legislation allowing governments to place limitations on certain types of land use in planned highway corridors," and it cites, as examples, specific legislation in North Carolina authorizing cities and counties to impose such limitations and a specific decision by this Court upholding such a limitation. Defendant-Appellant's New Brief at 28.

In fact, however, while the regulation of land use by local governments under legislation like that cited by the NCDOT is certainly quite common, the imposition of long-term and uncompensated development moratoria by state transportation departments under statutes like the Map Act is very uncommon indeed. Furthermore, the Map Act differs from the legislation cited by the NCDOT in many constitutionally significant ways.

Because the Map Act is such an uncommon type of legislation, and because it is so different from the conventional land use legislation cited by the NCDOT, the Court of Appeals was right to carefully scrutinize the NCDOT's power under the Act rather then apply standards and tests that were developed to deal with much different kinds of statutes—and it was also right to find that, "The NCDOT exercised its power of eminent domain when it filed the transportation corridor maps." (Slip. Op. 44)

I. STATUTES AUTHORIZING THE IMPOSTITION OF LONG-TERM, UNCOMPENSATED DEVELOPMENT MORATORIA BY STATE TRANSPORTATION DEPARTMENTS ARE EXTREMELY UNCOMMON.

A 2014 study by the John Locke Foundation found that North Carolina is one of only fourteen states that authorize the imposition of development moratoria on land within transportation corridors identified on official maps. Tyler Younts, Wrong Way: How the Map Act Threatens NC Property Owners (The John Locke Foundation 2014). In addition, the study found that, "Without exception, every other map act state offers more protection to property owners than North Carolina does." *Id.* at 5. The study noted that, "Although North Carolina limits the time that building or subdivision permits can be delayed, the state's 3-year (1,095 day) time limit

is much longer than any other state,”[1] and that, whereas in North Carolina development moratoria continue indefinitely, in most map act states the duration of development moratoria is constrained within statutorily or judicially imposed limits. *Id.* at 5-6. Although not reported in the 2014 study, it should also be noted that four of the map act states identified in the study assign ultimate responsibility for imposing moratoria, not to the state’s transportation department, but to county or municipal governments. Minn. Stat. 394.361; 53 Pa. Cons. Stat. § 2041; S.C. Stat. § 6-7-10 *et seq.*; Tenn. Code Ann. § 54-18-201 *et seq*. In short, only nine other states empower their transportation departments to impose development moratoria by recording transportation corridor maps, and no other state does so with so few restrictions and with such inadequate provisions for relieving hardship and preventing abuse.

The extent to which the Map Act is an exception to the norm can be illustrated by comparing it to the way the other states in the southeastern region provide for their transportation needs. Five of North Carolina’s neighbors in the Southeast—Alabama, Florida, Georgia, Mississippi, and Virginia—rely on conventional land use planning by local governments to provide whatever is needed in the way of interim land use regulation within

[1] *See*, New Brief of Plaintiffs-Appellees at 31-35 for a comprehensive list of delays in other states,.

projected transportation corridors. North Carolina's two additional neighbors in the region—Tennessee, South Carolina—*do* authorize the imposition of development moratoria on land within corridors, but, as noted above, both of them delegate that power to local government rather than to the state transportation department. S.C. Stat. § 6-7-10 *et seq.*; Tenn. Code Ann. § 54-18-201 *et seq.* That leaves North Carolina as the *only* state in the region that gives its transportation department the power to impose development moratoria on land it intends to eventually acquire for highway rights-of-way.

In view of the role that Florida precedent has played in the present case, Florida's evolving approach to transportation planning is particularly interesting. As the Court of Appeals noted in its opinion, at one time Florida had a mapping statute that was very similar to North Carolina's.[2] (Slip Op. at 30-32) In 1990, however, the Florida Supreme Court struck down that statute in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. Ed 662 (Fla 1990). In the twenty-five years that have elapsed since then, Florida has managed to provide for its transportation needs quite well during a period of rapid economic and demographic expansion. It has done so by authorizing local governments to regulate land use within projected

[2] Though, as the Court noted, the Florida statute limited the duration of development moratoria to a maximum of ten years. (Slip Op. 30)

transportation corridors under their customary authority to engage in general land use planning. Fla. Stat. Ann. § 163.3177 (6)(b).

In 1994, in *Palm Beach County v. Wright*, 641 So. 2d 50 (Fla. 1994), the Florida Supreme Court upheld one such regulation. The Court noted that "[Palm Beach County's] thoroughfare map differs in several ways from the maps of reservation invalidated by *Joint Ventures*." *Id.* at 53. Among the differences the Court found constitutionally significant were:

> The thoroughfare map only limits development to the extent necessary to ensure compatibility with future land use [whereas the mapping statute] precluded the issuance of all development permits for land within the recorded map. *Id.*
>
> The thoroughfare map is not recorded as were maps of reservation and may be amended twice a year. *Id.*
>
> Unlike the Department of Transportation, which recorded the maps of reservation, Palm Beach County is a permitting authority which has the flexibility to ameliorate some of the hardships of a person owning land within the corridor. *Id.*
>
> The only purpose of [the mapping] statute was to freeze property so as to depress land values in anticipation of eminent domain proceedings. While the Palm Beach County thoroughfare map … serves as an invaluable tool for planning purposes. *Id.*

The NCDOT cites *Palm Beach County* as evidence that the NC Court of Appeals was wrong to find the Florida Supreme Court's approach in *Joint Ventures* "persuasive and instructive." (Slip. Op. 30) However, the differences that the Florida Court found between absolute development

moratoria imposed by a state transportation department and flexible land use regulations adopted and administered by a local government tend to bolster rather than undermine the relevance of its opinion in *Joint Ventures*.

II. THE MAP ACT IS *NOT* SIMILAR TO THE STATUTES CITED BY THE NCDOT AS EXAMPLES OF "LEGISLATION ALLOWING GOVERNMENTS TO PLACE LIMITATIONS ON CERTAIN TYPES OF LAND USE IN PLANNED HIGHWAY CORRIDORS."

A. THE MAP ACT IS *NOT* SIMILAR TO N.C.G.S. § 136-66.10; ON THE CONTRARY, IT IS DIFFERENT IN MANY CONSTITUTIONALLY SIGNIFICANT WAYS.

The first example the NCDOT cites to support its claim that, "The Map Act is similar to other legislation allowing governments to place limitations on certain types of land use in planned highway corridors," is N.C.G.S. § 136-66.10. NCDOT's New Brief at 28. In fact, however, the Map Act differs from Section 136-66.10 in many ways. One of the differences is that, unlike the Map Act, Section 136-66.10 is part of a statutory scheme under which local governments are given responsibility for the development of comprehensive transportation plans in conjunction with their responsibility for general land use planning. N.C.G.S. §§ 136-66.10(a) & 136-66.2(a). While the Department of Transportation may participate in the development of these transportation plans, it may only do so if "all local governments within the area covered by the transportation plan have adopted

land development plans within the previous five years [or] are in the process of developing a land development plan." *Id.* at § 136-66.2(b1). Significantly:

> A qualifying land development plan may be a comprehensive plan, land use plan, master plan, strategic plan, or any type of plan or policy document that expresses a jurisdiction's goals and objectives for the development of land within that jurisdiction. *At the request of the local jurisdiction, the Department may review and provide comments on the plan but shall not provide approval of the land development plan*. *Id.* (Emphasis added.)

There are very good reasons why responsibility for developing local transportation plans should be assigned to local governments and incorporated into their general planning processes, and there are also very good reasons why the role of the NCDOT in these planning processes should be limited. Compared to the NCDOT, local governments are much more accountable to the people directly affected by any resulting land use restrictions. They are also in a much better position to gather the pertinent information about local conditions and local concerns, and to take that information into consideration in the development and application of those restriction. Furthermore, whereas the NCDOT has a vested interest in suppressing land values within transportation corridors, local governments will generally want to strike an appropriate balance between reducing right-of-way acquisition costs and other goals such as maintaining property values and promoting economic growth. Finally, as agencies explicitly authorized

to exercise the general police power, cities and counties are more likely to possess the expertise needed to exercise that power fairly, flexibly, and with discretion. *Id.* §§ 160A-174 & 153A-121.

B. THE MAP ACT IS ALSO DIFFERENT FROM CONVENTIONAL LAND USE REGULATIONS LIKE THE ONES CITED IN *BATCH V. TOWN OF CHAPEL HILL*.

As evidence that "limitations on certain types of land use in planned highway corridors" do not constitute an exercise of the eminent domain power, the NCDOT cites *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990). Defendant-Appellant's New Brief at 28. In *Batch* this Court upheld Chapel Hill's decision to deny a subdivision application, saying:

> Under N.C.G.S. § 160A-372, a town is clearly authorized to require a developer to take future as well as present road development into account when designing a subdivision. See N.C.G.S. § 153A-331 for parallel authority for counties. A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision. *Id*. at 13, 663.

There are two relevant things about this holding that the NCDOT fails to note. The first is that the Chapel Hill ordinance upheld in *Batch* merely required that "a subdivision design accommodate future road plans," which is a far cry from the absolute ban on new subdivisions imposed by the

NCDOT under the Map Act. The Second is that the Chapel Hill ordinance was enforced through an adjudicative proceeding before a democratically elected town council after extended negotiations between the owner and Chapel Hill's planning staff failed to result in an acceptable compromise, *Id*. at 10, 660, which is a far cry from the blanket imposition of a development moratorium throughout an entire corridor by NCDOT bureaucrats.

The NCDOT also fails to note other ways in which the Map Act differs from the legislation cited in *Batch* and from conventional land use legislation in general. One of these other differences is in the purpose of the legislation. The only stated purpose of the Map Act appears in its title, where it is called, "An Act To Control The Cost Of Acquiring Rights-of-way For The State's Highway System." 1987 N.C. Sess. Laws 1520, 1520, 1538-42, ch. 747, § 19.[3] The statutes cited in *Batch*, on the other hand, make no mention of cost-control, and, instead, list a wide range of purposes, including the creation of conditions "that substantially promote health, safety, morals, and the general welfare." N.C.G.S. §§ 160A-372(a) & 153A-331(a). The sections of the General Statutes that authorize the regulation of

[3] Notwithstanding the NCDOT's *post hoc* claims, the Court of Appeals found that Map Act's primary purpose is not to promote "orderly growth and development"; it is to reduce the cost of right-of-way acquisition. (Slip Op. at 34-35), and there is abundant evidence in the record to support this finding. See, New Brief of Plaintiffs-Appellees at 18-22.

land use by cities and counties by means of zoning similarly state that cities and counties may adopt zoning and development ordinances, "For the purpose of promoting health, safety, morals, or the general welfare." *Id.* §§ 160A-381 & 153A-340.

Another difference between the Map Act and legislation granting local governments the power to regulate the use of land is that, whereas the Map Act only authorizes the NCDOT to restrict land use in one way—by imposing an absolute and indefinite moratorium on development—conventional land use statutes provide cities and counties with a wide variety of flexible planning tools. They can adopt subdivision control ordinances like the one that was challenged in *Batch*. *Id.* §§ 160A-372 & 153A-331. They can adopt zoning and development ordinances. *Id.* §§ 160A-381 & 153A-340. They can "provide density credits or severable development rights for dedicated rights-of-way." *Id.* §§ 136-66.10 & 136-66.11. They can even "adopt temporary moratoria on any … development approval required by law, except for the purpose of developing and adopting new or amended plans or ordinances as to residential uses," though this power is hedged with numerous conditions and exceptions and is subject to numerous provisions designed to severely limit the duration of such moratoria and protect

property owners from hardship and abuse. *Id.* §§ 160A-381(e) & 153A-340(h).

III. THE STANDARDS AND TESTS ADVOCATED BY THE NCDOT ARE NOT APPROPRIATE IN THIS CASE.

The NCDOT takes the Court of Appeals to task for having "effectively second-guessed the wisdom of the General Assembly's determination that legislation is necessary in furtherance of the State's duty to design and build transportation infrastructure." Defendant-Appellant's New Brief at 27. According to the NCDOT, the Court should have deferred to the legislature because, "There is 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." *Id.* at 29 (quoting *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 444 (1979)).

Such a presumption might be appropriate in a case like *A-S-P* that deals with conventional land use regulations imposed by local governments. Such cases have been adjudicated many times and the courts have had ample opportunity to work out the extent to which they can safely defer to the wisdom of the legislature. However, making such a presumption in a case involving the NCDOT's highly unconventional use of development moratoria under the Map Act is not merely inappropriate—it begs the very question under consideration, namely, whether the power exercised by the

NCDOT is the police power or the power of eminent domain.

Moreover, even in *A-S-P* this Court undertook a review of the law in other jurisdictions and based its decision, in part, on its finding that there was a "growing body of authority in other jurisdictions recognizing that the police power may be broad enough to include reasonable regulation of property for aesthetic reasons alone." *Id.* at 213, 450. A similar review in the present case would discover little, if any, authority recognizing that the police power is broad enough to include the imposition of long-term, uncompensated development moratoria for the purpose of reserving highway rights-of-way and a great deal of authority holding that it is not. *See*, New Brief of Plaintiffs-Appellees at 35-42 (listing many such cases). Furthermore, a review of state transportation planning practices would demonstrate conclusively that the vast majority of states are able to provide for their states' transportation infrastructure needs perfectly well without giving their transportation departments the power to impose long-term, uncompensated development moratoria. *See*, *supra*, at 3-6. All of which renders absurd the suggestion that the Court of Appeals should have deferred to the General Assembly's presumed determination that granting such power to the NCDOT is "*necessary*." Defendant-Appellant's New Brief at 27 (emphasis added).

Similar considerations apply when it comes to the NCDOT's suggestion that the Court of Appeals erred by failing to properly apply the second prong of the "ends-means test" articulated in *Responsible Citizens in Opposition to the Flood Plain Ordinance v. The City of Asheville*, 308 N.C. 255, 386 S.E.2d 439 (1989) and *Finch v. City of Durham*, 325 N.C. 353, 384 S.E.2d 8 (1989) (compensation only required when owner deprived or all practical use and property "rendered of no reasonable value") and the "substantial interference" test from *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982) (compensation required when action injuriously affecting property deprives the owner of "all beneficial enjoyment thereof"). These rules may be appropriate for cases involving similar factual circumstances (conventional, locally enacted land use regulations in the first instance, and nuisance caused by government activity in the second), but the circumstances in the present case are very different. Among the many differences: neither of the cited cases pitted a landowner against a government agency with a vested interest in suppressing the value of the land in question. As with the presumption of constitutionality, applying the rules advocated by the NCDOT in the present case would beg the question at

issue, i.e., whether the power exercised by the NCDOT is the police power or the power of eminent domain.[4]

For years the NCDOT has attempted to evade its duty to pay just compensation for land it plans to use for highway rights-of-way by imposing uncompensated, long-term development moratoria on that land. Now it is attempting to evade judicial scrutiny of its actions by encouraging this Court to apply highly deferential standards and tests. However, the Map Act does not merit such deference. It does not resemble the legislation that governs transportation planning in other states; it does not resemble the legislation that governs conventional land use regulation in North Carolina; it is blatantly unfair; it is patently unnecessary; and it violates fundamental rights protected by the United States Constitution and the Constitution of North Carolina, including the rights to equal protection, due process, and just compensation. U.S. Const. amend V; U.S. Const. amend XIV; N.C. Const. art. I, § 19. The Court of Appeals was wise to reject the NCDOT's calls for deference and to subject the Map Act to a level of scrutiny that is appropriate to its history, its character, and its importance.

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[4] In addition, as Plaintiffs-Appellees correctly point out, in the present case there is no reason to reach the second prong of the ends-means test because the NCDOT's restrictions on the use of their property fails the first prong which requires that the restrictions are imposed for a purpose that falls within the scope of the police power. New Brief at 23-25.

CONCLUSION

The Court of Appeals did not err when it held that the imposition of development moratoria by the NCDOT under the Map Act should be construed as an exercise of the power of eminent domain. That holding should be affirmed.

Respectfully submitted,

This the 6th day of November, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is the counsel of record for the John Locke Foundation and that on the date stated below he served a copy of the Motion by the John Locke Foundation for Leave to File an *Amicus Curia* Brief in Support of Respondents-Appellees upon Defendant Appellant by placing said copy in an envelope, first-class postage prepaid, addressed to the persons hereinafter named at the address stated below, in the U.S. Mail and FedEx overnight and by transmitting a copy to said party via e-mail:

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This the 6th day of November, 2015.

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