NO. 56P14-2 TWENTY FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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RESPONDENTS-APPELLEES' RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

And

NOTICE OF APPEAL UNDER N.C.G.S. § 7A-30(1)

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v.	**11-CVS-8170**
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RESPONDENTS-APPELLEES' RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

And

NOTICE OF APPEAL UNDER N.C.G.S. § 7A-30(1)

****

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

Respondents-Appellees **EUGENE & MARTHA KIRBY, HARRIS TRIAD HOMES, Inc., MICHAEL HENDRIX**[1], **DARREN ENGELKEMIER, IAN HUTAGALUNG, SYLVIA MAENDL, STEPHEN STEPT, JAMES & PHYLISS NELSON, and REPUBLIC PROPERTIES, LLC** ("Respondents") pursuant to N.C.

[1] Mr. Hendrix died of a stroke on 15 November 2013. He was 71.

Rules of Appellate Procedure Rule 15 and N.C.G.S. § 7A-31(b) respond to the North Carolina Department of Transportation's ("NCDOT") Petition for Discretionary Review and Notice of Appeal.

These cases are the companions to the first Map Act case *Beroth Oil v. NCDOT* before the Court as 390PA11-2, which addressed the issue of class action certification for owners in NCDOT's Northern Beltway protected corridors.

REASONS WHY CERTIFICATION SHOULD BE DENIED

NCDOT has restricted property development for properties located in the Winston-Salem Northern Beltway since October 1997 and November 2008. The inverse condemnation litigation to force NCDOT to purchase the owners' properties began on 16 September 2010. *Beroth Oil Co. v. N.C. DOT*, 367 N.C. 333 (2014) ("Beroth II").

In *Beroth II*, this Court stated: "We acknowledge that some property owners have suffered significant adverse effects as a result of the filing of the corridor maps and the long delay in any subsequent action by NCDOT." In *Beroth II*, there was little, if any, factual evidence in the record for the Court to draw upon to evaluate the actions of the NCDOT for class certification. *Beroth II* involved a record that was essentially only the complaint, the answer, a handful of admissions and a few tax card records.

The *Kirby v. N.C. DOT* record consists of 106 deposition exhibits totaling 2408 pages, thirty (30) affidavits from respondents' witnesses totaling 218 pages, sixteen (16) affidavits from NCDOT's witnesses totaling 372 pages, depositions of seventeen (17) NCDOT officials, and depositions of ten (10) respondent witnesses with pages of exhibits.

This voluminous record allowed the Court of Appeals to conduct the extensive fact-based inquiry mentioned in *Beroth II*. The record indicates that the sole purpose of the Map Act is to control NCDOT's future acquisition costs of hundreds of properties in NCDOT's protected corridor. The record indicates that the protected corridor destroys the market for Beltway property, prevents owners from freely using their property, represses all economic incentive to improve property, and leaves NCDOT as the only buyer in the market. As a result, NCDOT has been able to acquire and control entire areas of the Northern Beltway. The opinion from the Court of Appeals in *Kirby* confirms that inverse condemnation is the proper remedy for NCDOT's indefinite taking of their property rights.

NCDOT contends that confiscating citizens' property rights without having to pay for that benefit is a permissible and beneficial governmental action. To the contrary, the State is forcing certain citizens to bear a burden that our constitutions provide is to be borne by all of us.

The Petitioner would have Respondents, who have already endured nearly two decades of property without market value, to either wait indefinitely for NCDOT to condemn the property or attempt to qualify for NCDOT's arbitrary and "puzzling" hardship program.

As North Carolina has noted, "[T]he power to purchase is tantamount to the power of eminent domain." Ex. 16 p. 489 (citing *Carolina Mills v. Catawba County Board of Education*, 27 N.C. App. 524, 527, 219 S.E.2d 509, 511 (1975). NCDOT is and has been exercising its power of eminent domain over Respondents' properties in the protected corridor to exact a public benefit without making just compensation. These acts of the NCDOT constitute inverse condemnation and require just compensation.

The Court of Appeals' opinion correctly analyzes the distinction between the State's regulatory police power activity and its eminent domain activities taking property rights for public benefit. The Court of Appeals opinion places North Carolina jurisprudence in accord with all other states that have heretofore confronted roadway reservation statutes. The taking of property rights for the purpose of reducing the state's ultimate acquisition costs is an exercise of the state's power of eminent domain requiring just compensation. "While reducing the cost for the future acquisition of property may be a

laudable public policy, that purpose falls under the category of public benefit or advantage rather than public protection." *Beroth II*, p. 352 (J. Newby dissent). The NCDOT offers no other justification for its use of the protected corridor other than it will make NCDOT's ultimate property acquisitions easier and less costly - a public benefit. The Court of Appeals' ruling affirms the admonition of Justice Black that:

> 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.*, 211 N.C. App. 148, 149, 712 S.E.2d 146, 148(N.C.App. 2011)(citing *Armstrong*); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 83, (1980)(Governmental action which places a burden on an individual's property which in fairness the entire community should share constitutes a taking and the government must compensate the property owner for the loss).

This Court should deny the NCDOT's petition for discretionary review.

STATEMENT OF THE CASE

Upon the trial court in *Beroth v. NCDOT* denying class certification, the instant Respondents elected to proceed independently of the Beroth plaintiffs in an effort to expedite a ruling on the merits of their inverse condemnation claims. These Respondents filed their actions between 12 October 2011 and 26 April 2012. R. p. 3-143.

The Respondents asserted claims for inverse condemnation, equal protection, and constitutional takings claims based on the North Carolina and Federal constitutions. The complaints assert that compensation is due from the date of taking. R. p. 46 (¶ 62), R. p. 48 (¶ 4 & 5). The memorandum of action for each case states that the date of taking is at least the date of filing the Map. R. p. 158-173.

On 3 and 4 January 2013, Respondents filed Motion and Amended Motion for Summary Judgment for inverse condemnation and violations of the federal and state constitutions. R. pp. 371-376. On 11 February 2013, NCDOT filed its Cross-Motion for Summary Judgment. R. p. 377. The summary judgment hearing was held 21-22 February 2013.

On 20 June 2013, the trial court dismissed Respondents' inverse condemnation claims as "unripe" based on the asserted date of taking being the date of filing the maps and dismissed most of the constitutional claims for lack of standing for

failing to apply for a building permit or Hardship. R. pp. 431-440. Harris Triad had applied for Hardship and its equal protection claim was the sole survivor. Id.

Respondents filed Notice of Appeal on 17 July 2013. R. p. 481. NCDOT cross-appealed on 25 July 2013. R. p. 486.

The Court of Appeals properly conducted a de novo review of the denial of summary judgment. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Under a de novo review, the Court of Appeals "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Exercising the above standard, the Court of Appeals reversed the trial court's denial of Respondents' motion for summary judgment, granted the Respondents' claims for inverse condemnation, and remanded for a trial on damages. The Court of Appeals did not reach the state and federal constitutional claims.

NCDOT filed this present Petition for Discretionary Review and Notice of Appeal on 24 March 2015.

STATEMENT OF FACTS

A. NCDOT'S ROADWAY CORRIDOR OFFICIAL MAP AND THE NORTHERN BELTWAY.

1. NCDOT Files Maps for Protected Corridor.

N.C. Gen. Stat. § 136-44.50 *et seq* (the "Act") authorizes NCDOT to file official roadway maps listing properties in the proposed roadway and imposes development restrictions on those properties. This map creates a protected corridor. The two maps at issue in this case were filed with the Forsyth County Register of Deeds, cross-indexed, and depicted on tax maps. The first map was filed on 6 October 1997, listing 578 parcels (R-2247)(the "Western Loop"). Ex. 5 p. 176-219; Ex. 6 p. 220. The second map was filed on 26 November 2008 listing 1,929 parcels for Project 34839 (U-2579) (the "Eastern Loop"). Ex.4-4A p. 25-175. The recorded documents (the "Maps") state on their face:

> The Official Map has been prepared for the purpose of setting forth the location of portions of the proposed Western (Eastern) Loop. Any property included in the Roadway Corridor shown on the Official Map is subject to restrictions on issuance of building permits and subdivision..." Ex 4 p. 25)

2. The Purpose of the Map Act.

The Map Act's only purpose is to restrict owners' right to develop or improve property so that NCDOT's future acquisition costs are lower. The Court of Appeals' ruling focused on the NCDOT affidavit of Calvin Leggett. Leggett Aff. p. 2806-2810.

NCDOT's justification for a protected corridor is solely premised upon preventing owners' from improving their property so that when NCDOT finally does get around to acquiring the property its acquisition costs are less than they would otherwise be.

NCDOT published a document entitled "Protected Corridor: What That Really Means to You." R. pp. 19-20. This official document frankly states that protected corridors are used to prevent development to save taxpayers money and property will be in a protected corridor for "*[f]or as long as it takes for North Carolina to get enough money to build the road.*" *Id.*

James Trogdon (NCDOT Chief of Operations) testified:

> **Q. (Mr. Bryant)...is this a true statement: The protected corridor is designed to save the State of North Carolina money when it ultimately acquires the property?**
>
> A. (Trogdon) I would say that's -- I mean, certainly, one of the objections is to limit future development within the corridor to reduce the impact, so that would save money. ***But the number one priority would be to reduce the development.*** (emphasis added)
>
> **Q. Which saves the state money?**
>
> A. And in the end would save the state - the taxpayers' funds in the end. (Trogdon depo. p. 56 lines 14-25)(See App. pp. 17-21)

See also Trogdon depo. pp. 7, 58; V. Pridemore depo. pp. 77-80 (Right of way manager; depo of 23 March 2012).

The Court of Appeals' ruling determines that that the Act's protected corridor and its restrictions are indefinite and the Act mandates no time for condemnation by NCDOT. In support of this ruling, the Court of Appeals cited NCDOT's James Trogdon warning to owners in an August 2010 letter that "[NCDOT] will still be constructing urban loops in our state for at least 60 years. I do not believe ... living within a protected corridor for 60 years or greater is desirable." Rule 9(d) pp. 2624-1 to 2624-2.

3. No Improvements Built.

Respondents and all owners are expressly told not to apply for building permits. R. p. 19. NCDOT's James Trogdon told owners they would not be permitted to make improvements or subdivide their property. Affs. Clapp ¶8 p. 2420, Reynolds ¶11 p. 2523, Hriniak ¶16 p. 2555, Smith ¶8 p. 2494. NCDOT testified that variances would not be allowed that increase NCDOT's acquisition costs. M. Stanly depo. pp. 31-34.

In response to an interrogatory to identify all building permit applications forwarded to NCDOT, NCDOT stated that no Beltway owner - out of the 2300+ parcels in the Beltway - had a building permit application forwarded to NCDOT for review. Rule 9(d) Exhibits pp. 2624-108 ¶9; N.C. Gen. Stat. § 136-44.51 (Secretary... shall be notified within 10 days of all requests for building permits or subdivision approval within the transportation corridor.) NCDOT is unaware of building permits

being issued, any improvements being built, or any subdivisions being authorized in the Beltway. Id., Ivey depo. pp. 67-70 87; Hatton depo. p. 54. NCDOT has not identified any improvement built in its Beltway; there are no photos of new buildings in the Beltway. Aff. Robertson p. 2557 (the city has only issued permits for signs, demolition and tenant upfits).

4. Economic Activity Does Not Exist In The Beltway.

a. NCDOT Owns One-Third of Beltway.

Pursuant to N.C. Gen. Stat. § 136-44.53, NCDOT began purchasing Beltway property in 1996, purchasing over 454 properties as of 2012. Exs. 7 & 9, pp. 221-231, 253-254; Pridemore depo. p. 66 ln 7, Ex. 23 p. 628 ¶15; Yancy depo. p. 28 ln 21. Since Beroth filed in September 2010, NCDOT has purchased an additional seventy-five (75) properties. Ex. 25 pp. 676-874. Exhibit 9 illustrates that NCDOT is present in all parts of the Beltway (NCDOT owned parcels in red). Ex.9 pp. 253-254.

b. De Minimus Sales / Market Activity.

Since the Maps were filed in October 1997 and November 2008, through the date of the summary judgment hearing, there have been 16,162 qualified sales within a one-mile radius along but *outside* the Beltway. Joyce Aff. p. 2591-2592. A real property market does exist *near* the Beltway.

In contrast, there is no market for property actually *in*

the Beltway. NCDOT hired McCracken & Associates ("McCracken") to examine the market for Beltway properties. McCracken Depo. pp. 15-16. After a yearlong effort, McCracken found thirty-nine qualified Beltway sales[2]; however, these sales are only *slightly* in the Beltway or not actually *in* the Beltway at all. Id. pp. 13, 29, 60, and Rule 9(d) pp. 2624-42 to 2624-93 (green=Beltway). Only nine sales are actually *in* the Beltway and of those, only five are possibly qualified sales (several owners purchased at foreclosure, were uninformed of the Beltway, or were renting the houses before buying). Rule 9(d) pp. 2624-42 to 2624-93. McCracken confirmed there is no market for unimproved Beltway land and not enough sales of unimproved land occurred to conduct any analysis. McCracken Depo. pp. 18-19. NCDOT does not present evidence to dispute the destruction of the market; in fact, its acquisition of 454++ properties confirms the destruction.

5. NCDOT's Timeline for Acquisition.

At oral argument in *Beroth II*, Assistant Attorney General confirmed that there is no set date for acquisition. Since the early 1990s, NCDOT has given owners numerous dates for the beginning of programmed and funded property acquisition but each

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[2] A qualified sale is an arm's length transaction, exposed to the market, no duress and informed buyer. Foreclosure sales, inter-family sales, and uninformed buyers are not qualified sales. McCracken p. 16-18.

date has been recanted and no dates is currently set. Lasley Aff., Ex. pp. 72-79, Ivey depo. pp. 70-83.

RESPONSE TO PETITIONER NCDOT's ARGUMENT

Respondent will address each of Petitioner NCDOT's contentions in turn using the Petitioner's own headings:

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING ON TAKINGS LAW AND PROCEDURE.

A. THE COURT OF APPEALS DID NOT APPLY THE PROPER LEGAL ANALYSIS.

The Court of Appeals correctly decided that the State's use of protected corridors to impose development restrictions of indefinite duration was not regulatory in nature. Thus, such action did not fall under the State's police powers. The Respondents' have a fundamental right to just compensation and to freely use, dispose, and enjoy their property. *Department of Transp. v. Rowe,* 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001) *Long v. City of Charlotte,* 306 N.C. 187, 293 S.E.2d 101 (1982); *Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E.2d 252, 256 (1941). The Map Act expressly interferes with those rights without any time mandated for the State to act.

When the government exercises its police power, it acts to protect the "public health, safety, morals and general welfare." *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979). This Court agreed with the *Beroth II* plaintiffs "that there is a 'distinction between the police

power and the power of eminent domain.'" This Court stated: "The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable." *Beroth II at* 342, S.E.2d at 473-474.

The Map Act and NCDOT's use of protected corridors is not to prevent that the Respondents use of their property in a manner injurious to the public health, safety, morals or general welfare; i.e. operating a go cart track in a subdivision, running a tavern next to a school, putting mobile homes in a subdivision, install billboards too near intersection or creating load noises from activities on their properties. Our State's development moratorium statutes recognize that a governing body cannot indefinitely interfere with owners' property rights; restrictions must be of short duration (60 days) and must relate to imminent threats to public health and safety. N.C. Gen. Stat. § 153A-340(h) and N.C. Gen Stat. § 160A-381(h).

While the NCDOT certainly has police powers to regulate its right of way (medians, traffic lights, access points, driveway cuts), it must first acquire that right of way to do so. The Court of Appeals concluded that NCDOT took fundamental property rights of owners merely to lower acquisition costs when condemnation finally occurred. This public benefit of better prices is an act of eminent domain mandating just compensation. A taking by eminent domain for the benefit or advantage of the public occurs when government action causes a "substantial interference with elemental rights growing out of the ownership of the property." *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982). A governmental act that extinguishes a fundamental attribute of ownership will trigger the Takings Clause protection of the United States Constitution. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979)(when owners "right to exclude" was taken, even if the Government physically invades only an easement in property, it must nonetheless pay just compensation). NCDOT's offers no evidence, that the Map Act is prevent the Respondents use of their property in a manner injurious to the public health, safety, moral or general welfare.

Petitioner continues to advocate the "ends-mean" test of *Responsible Citizens and Finch v. City of Durham.* NCDOT repeatedly cites cases dealing with zoning that do not have the

government as the ultimate purchaser of the property at issue. See *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. 1975)(government, as an acquirer, cannot pass laws to advantage itself over its citizens). The Petitioner's cases do not involve roadway purchases, but instead the use of property in a manner that might be injurious to community health, safety, or morals.

While persistently advocating for the "ends-means" test, the Petitioner never addresses the "ends" prong of the test which requires that the "object of the legislation" be within the scope of the [police] power. Petitioner ignores the "ends" issue to get to the prong it likes: "deprived of all practical use of the property and the property was rendered of no reasonable value." It avoids discussing the "ends" prong because the "object of the legislation" has been and can only be expressed as cost control for the State's future acquisition of right-of-way; there is no concern with public health or safety. *Treants Enterprises, Inc. v. Onslow Cnty.*, 83 N.C. App. 345, 352, 350 S.E.2d 365, 369-70 (1986) aff'd, 320 N.C. 776, 360 S.E.2d 783 (1987) (the law must have a rational, real and substantial relation to a valid governmental objective; i.e., the protection of the public health, morals, order, safety, or general welfare); *Weeks v. N. Carolina Dep't of Natural Res. &*

Cmty. Dev., 97 N.C. App. 215, 225, 388 S.E.2d 228, 234 (1990)("A failure in either 'ends' or 'means' results in a taking").

B. THE REMAND ORDER IS CONTRARY TO STATE LAW.

The NCDOT position that the property interest taken is not determined is incorrect and disingenuous. NCDOT has purchased over 454 properties in fee simple within the areas of the filed Maps. Exs. 4A, 5, 25 (fee simple deeds). Petitioner's acquisition guidelines require that "the design for the proposed project must be sufficiently complete to determine that the property is needed for the proposed right of way, and to describe the limits of proposed acquisition." Ex. 8 Rule 9(d) p. 241, 251.

Second, the filed Maps have extremely detailed right of way and controlled access demarcations. Exs. 4A, 5, 43, 44. For example, the Maps clearly show that Republic Properties has no access to 183.92 of its 190 acres. On 21 February 2007, NCDOT made Republic an offer to purchase its 183.62 acres because its access was taken. Rule 9(d) pp. 2624-40 - 2624-41. NCDOT cherry picks facts and creates non-existent issues without properly disclosing its own actions to the Court.

C. THE COURT OF APPEALS ERRED IN FINDING THAT PLAINTIFFS' CLAIMS WERE RIPE.

Petitioner is incorrect that the Respondents' claims are not "ripe" because they did not apply for building permits or

subdivision approvals.

NCDOT has repeatedly told owners that building permit applications, subdivision requests, or variances that increase NCDOT acquisition costs will not be approved. R. p. 19 ("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)"); Affs. Clapp ¶8 p. 2420, Reynolds ¶11 p. 2523, Hriniak ¶16 p. 2555, Smith ¶8 p. 2494; M. Stanly depo. pp. 31-34 (variances not allowed that result in higher acquisition costs). As a result, it is littles wonder that no owners have applied for permits. Rule 9(d) pp. 2624-108 ¶9.

Respondents are not required to undertake a futile act, or take action where the remedy is inadequate. *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, ___N.C.App.___, 760 S.E.2d 302(2014); *Guerra v. Scruggs,* 942 F.2d 270, 276 (4th Cir. 1991) (doctrine of exhaustion will not apply if outcome would "predictably be futile"). Pursuing an administrative remedy is "futile" when it is useless to do so as a legal or practical matter. *Honig v. Doe*, 484 U.S. 305, 327 (1988), *Orange County v. NCDOT,* 46 N.C.App. 350, 376, 265 S.E.2d 890, 908 (1980)(failure to exhaust administrative remedy will not bar judicial review if remedy is inadequate). A remedy is inadequate unless it is "calculated to give relief more or less

commensurate with the claim." *Shell Island Homeowners Ass'n, Inc. v. Tomlinson,* 134 N.C. App. 217, 222, 517 S.E.2d 406, 411 (1999). In this instance, a building permit is not a remedy for inverse condemnation.

Nor should Respondents be required to engage in economic folly. Investing one's hard earned capital in building or subdivision plans and their ultimate construction, involving some measure of risk in a normal situation, is foolhardy when the market for Beltway property is non-existent. Certainly, the evidence that in nearly twenty years no improvements have been built in the Beltway bears out this economic reality.

II. THE DECISION OF THE COURT OF APPEALS INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.

A. THE OPINION IS THE CULMINATION OF MISAPPLICATION OF STATE LAW

The Petitioner returns to reliance on Responsible Citizens' "ends-means" test. This is a zoning test, and again, Respondent offers no explanation how the Map Act and its cost control objective passes the "ends" prong.

The Petitioner also cites *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481 (1950), a case pre-dating the Map Act by almost four decades, to espouse the antiquated notion that inverse claims require actual physical invasion and ousting. The concept of a "taking" of property rights has evolved from

the need for physical invasion, to the current generalized definition of "an impermissible encroachment on private property rights." *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1380 (Fla.1981). "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value ... is, in fact and in law, a 'taking' in a constitutional sense." *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622, 624 n.6 (Fla. 1990). See, *Lackman v. Hall*, 364 A.2d 1244, 1251 (Del. Ch. 1976)(in striking down reservation statute as a taking, court rejected Highway Department's position that there can be no "taking" of property if the property is never actually disturbed).

The Petitioner also cites *Penn v. Carolina Virginia* without any explanation of the context of the case. *Penn* is a 1950 case involving a 1949 statute that allowed the construction of toll roads by municipal corporations, in this case the Carolina Virginia Coastal Corporation. The landowners, Penn, complained "That the engineers of the corporations have surveyed the proposed right-of-way along the Outer Banks of the said counties, and have set their survey marks and stakes thereon." The Penn owners sought to have the surveyed and staked right of way purchased. Respondents agree that the placing of stakes and survey markers in *Penn*, especially in the nascent stage of planning (within one year of the statute being passed and the

road being marked), and not recorded by metes and bounds in the register of deeds is routine planning and does not implicate eminent domain activity.

The *Penn* case ***did not*** involve development restrictions of any sort, nor did the State in passing the legislation have any future acquisition cost control motivations. The Petitioner's reliance on *Penn* is misplaced.

The Court of Appeals also properly relied on *Long v. City of Charlotte,* 306 N.C. 187, 293 S.E.2d 101 (1982). *Long* dealt with low-flying aircraft and expressed the concept that substantial interference with elemental rights growing out of the ownership of the property is a taking. The State's indefinite restriction of property rights for better future acquisition prices is a substantial interference with owners' fundamental right to use and dispose of their property. *Long*, supra.

The Court of Appeals did indeed conduct the "ad hoc, factual inquiries into the circumstances of each particular case." The *Kirby* record is voluminous, and the Court of Appeals delved into the evidence, specifically that which NCDOT provided to it in the form of NCDOT affidavits, documents, letters, and deposition testimony. The evidence that NCDOT presented in its own defense supports the conclusion of the Court of Appeals: the sole purpose of the development restrictions in the Map Act is

cost control for NCDOT's future acquisitions, and that purpose causes a taking for a public benefit requiring just compensation.

It is acknowledged that the damages and compensation owed to a plaintiff will indeed vary from property to property. Some property is heavily impacted by the NCDOT right of way, some may not be. Some owners are offended by this impact, others are not. However, this variation in damages does not change the conclusion that there is liability to each property owner for the taking that requires just compensation. An evaluation of damages is, as the Court of Appeals noted, the purpose of the appraisal required of the State before the taking in a condemnation action.

B. THE COURT OF APPEALS ERRONEOULSY RELIED ON FOREIGN CASE LAW.

The Court of Appeals properly understood the case law dealing with roadway reservation statutes. As set out below, *Kirby v. NCDOT* is in accord with national jurisprudence.

Unlike the Florida statute at issue in *Joint Ventures* where restrictions terminated after five years, the North Carolina Map Act never ends. The Western Loop Map filed in October 1997 is still in effect. In 2010, when owners' properties had already been in a corridor for 13 years, NCDOT's Jim Trogdon warned they could be in protected corridors for another sixty years.

Furthermore, the *Tampa-Hillsborough County* case cited by Petitioner does not have similar facts as this case. The *Hillsborough* case lacks destruction of market value of a broad swath of property, explicit, repeated statements of purpose by DOT, hundreds of property acquisitions within the protected corridor, active warnings by NCDOT not to improve property, numerous years in the protected corridor, and never ending development restrictions.

The *Davis v. Brown* case from Illinois is likewise unavailing to the Petitioner and a far cry from the three year permit triggering window and never expiring restrictions employed by NCDOT. The Illinois statute at issue deals with a *60* day restriction period, followed by a *45* day decision period for the state, and the state must then act to buy or condemn the property in *120* days. Unlike North Carolina, Illinois owners can also simply write a letter to Illinois DOT to trigger this acquisition process. The Illinois map will lapse after 10 years. 605 Ill. Comp. Stat. Ann. § 5/4-510.

The Court of Appeals opinion places North Carolina squarely in accord with all other courts reviewing the use of reservation statutes for controlling future acquisition costs. Reservation statutes have universally been found to take owner's property rights, with *Joint Ventures*, *supra* being a seminal ruling. The

list of cases finding reservation statutes to affect a taking is long, dating back to 1893 with *Forster v. Scott* from New York.

> The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. ***It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.***

Forster v. Scott, 136 N.Y. 577, 584, 32 N.E. 976 (N.Y. 1893). See *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 88, 224 N.E.2d 700, 703 (1966)(180 day reservation was a taking), *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951)(three year restrictions are a taking); *Lomarch Corp. v. Mayor & Common Council of City of Englewood*, 237 A.2d 881 (N.J. 1968)(one year

restriction requires just compensation); *Grosso v. Board of Adjustment of Millburn Tp. in Essex County*, 61 A.2d 167(N.J. 1948); *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 996 (1st Cir. 1983)(14 years in roadway corridor); *The Maryland-National Capital Park and Planning Commission v. George A. Chadwick*, 405 A.2d 241 (Md. Ct. App. 1979)(three year restriction equated to a taking); *Lackman v. Hall* 364 A.2d 1244 (Del. Ch Ct 1976)(indefinite restrictions improper taking); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. 1975); *Howard County v. JJM, Inc.*, 482 A.2d 908 (Md. 1984)(development restriction without time limitation meant there was a taking of property without compensation); *Gordon v. City of Warren Urban Renewal Comm'n*, 185 N.W.2d 61 (Mich. Ct. App. 1971), *aff'd*, 199 N.W.2d 465 (planning commission could not require that the property owners' land be set aside without compensation for possible future condemnation in order to avoid increased costs of condemning the land in the future); *Ventures In Property I v. The City Of Wichita*, 594 P.2d 671 (Kan. 1979)(reservation of roadway in plat was a taking); *State ex rel. Willey v. Griggs*, 358 P.2d 174, 175 (Ariz. 1960)(two year restriction for acquisition decision too long); *Henle v. City of Euclid*, 125 N.E.2d 355, 358 (Ohio Ct. App. 1954) (cannot "freeze" property thereby preventing the owner from improving it so that he may enjoy a beneficial use thereof only because the

city may, in the future, need such property in constructing a freeway); *Petersen v. City of Decorah*, 259 N.W.2d 553, 554 (Iowa Ct. App. 1977), *Galt v. Cook Cnty.*, 91 N.E.2d 395, 399 (Ill. 1950).

NCDOT cites no cases that support laws designed to control a government's future acquisitions costs by the use of indefinite development restrictions.

III. THE SUBJECT MATTER OF THE APPEAL HAS SIGNIFICANT PUBLIC INTEREST.

The Respondents agree this case is of great public interest in North Carolina and elsewhere, but not for the self-serving, "sky is falling" reasons given by NCDOT.[3] The Map Act has allowed Petitioner NCDOT to prolong its project acquisition schedules without financial consequence by forcing an unfortunate few to bear a public burden for so long as it takes North Carolina to get enough money to build the road. The Map Act has allowed our legislature an easy out on funding and revenue issues. The Court of Appeals ruling corrects our State's

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[3] The Texas Court of Appeals disregarded an argument similar to Petitioner's in finding that "[t]o hold a governmental agency liable under the facts of this case will not cause the heavens to fall, nor will it transform government into a giant shackled into inactivity by the fear of potential liability.... The only result will be that it will not be able to 'rig' the market in its favor. That is, government will merely be discouraged from giving itself, under the guise of governing, an economic advantage over those whom it is pretending to govern." *San Antonio River Auth., supra at* 274.

misplaced priorities; no longer will a few citizens have to shoulder the burdens that our State and Federal Constitutions deem are to be borne by the public. See, *Armstrong* supra. The Court of Appeals opinion properly addresses this preeminent concern by placing North Carolina jurisprudence in line with the rest of the nation by requiring just compensation for the taking of property rights by declaring inverse condemnation has occurred as of the date of filing the Maps.

The greater public concern is that the Court of Appeals' well-reasoned ruling be given final effect so that these owners may receive the just compensation that has long been denied them.

Finally, the Court should strike Petitioner's argument that relates to the financial impact on the State as a result of the *Kirby* decision. *Harvel's, Inc. v. Eggleston*, 268 N.C. 388, 392, 150 S.E. 2d 786 (1966)(party's financial ability to respond in damages, is totally irrelevant to the issue of liability).

CONCLUSION

The Court of Appeals had an extensive record before it in which to reach its conclusion that a taking has occurred. The Petitioner's own evidence proved it was substantially interfering with owners' property rights for many years and undeterrred from continuing the practice for many more. The Court of Appeals properly determined that the State exercised

its power of eminent domain and that the case must be remanded to the trial court to determine damages.

This is the 6th day of April 2015.

/s/
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/s/
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CERTIFICATE OF SERVICE

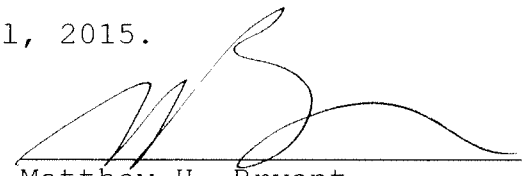
The undersigned hereby certifies that he is the attorney for the Respondents Appellees herein, and that on the date stated below, he served a copy of the **RESPONSE TO PETITION FOR DISCRETIONARY REVIEW AND NOTICE OF APPEAL** upon Petitioner - Appellant NCDOT by placing said copy in an envelope, first-class postage prepaid, addressed to the persons hereinafter named at the address stated below, in the U.S. Mail:

Christie Speir Cameron
Clerk of Court
North Carolina Supreme Court
2 E. Morgan Street
P. O. Box 2170
Raleigh, NC 27602-2170

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

John H. Connell, Clerk
NC Court of Appeals
P. O. Box 2779
Raleigh, NC 27602-2779

This the 6th day of April, 2015.



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