No. **TWENTY-FIRST DISTRICT**

THE SUPREME COURT OF NORTH CAROLINA

****

Eugene Kirby, et al, 11-CVS-7119, **Harris Triad Homes, Inc., 11-CVS-7120,** **Michael Hendrix, et al, 11-CVS-8170,** **Darren Engelkemier, 11-CVS-8171,** **Ian Hutagalung, 11-C VS-8172,** **Sylvia Maendl, 11-CVS-8173,** **David Stept, 11-CVS-8174,** **James Nelson, et al, 11-CVS-8338,** **Republic Properties, LLC, 12-CVS-2898,** **Plaintiffs,** **v.** **NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,** **Defendant.**	)	**From Forsyth County** **COA14-184**

****

NOTICE OF APPEAL
UNDER N.C.G.S. § 7A-30(1)
(CONSTITUTIONAL QUESTION)
AND
PETITION FOR DISCRETIONARY REVIEW
UNDER N.C.G.S. § 7A-31(c)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES Defendant, through counsel, pursuant to Rule 14 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-30(1) and hereby gives Notice of Appeal from the judgment and opinion of the North Carolina Court of Appeals in *Kirby v. N.C. DOT*, COA14-184 (Feb. 17, 2015), which directly involves a substantial question arising under the constitutions of the United States and North Carolina.

Defendant also hereby petitions the Supreme Court of North Carolina, pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31(c), to certify the Court of Appeals' decision in this matter for discretionary review because the decision is in conflict with decisions of this Court, involves legal principles of major significance to the jurisprudence of the State, and concerns subject matter of significant public interest.

NOTICE OF APPEAL

Defendant NCDOT hereby gives notice of appeal pursuant to N.C.G.S. § 7A-30(1) because the lower court's decision that Plaintiffs' inverse condemnation and declaratory judgment (seeking a taking declaration) claims are ripe and a taking occurred directly involve substantial questions arising under the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth

Amendment; the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and Article I, Section 19 of the North Carolina Constitution, "Law of the Land." U.S. CONST. AMEND. V, XIV; N.C. CONST. ART. I, § 19. Defendant NCDOT has consistently argued at all stages of the proceedings that NCDOT's actions pursuant to the Map Act, N.C.G.S. § 136-44.50 *et seq*. fall within the State's police power and do not constitute a taking.

ISSUES TO BE PRESENTED ON APPEAL

In the event the Court finds the constitutional questions presented to be substantial, Defendant intends to present the following issues in its brief for review:

1. Did the Court of Appeals erroneously hold that the Map Act, N.C.G.S. § 136-44.50 *et seq*., empowered NCDOT to exercise the power of eminent domain and that NCDOT exercised that power and took Plaintiffs' property rights when it recorded protected corridor maps?

2. Did the Court of Appeals erroneously remand this matter for a determination of damages?

3. Did the Court of Appeals misapprehend takings jurisprudence and erroneously hold that Plaintiffs' claims are ripe and that a taking occurred in this matter?

REASONS WHY CERTIFICATION OF DEFENDANT'S PETITION SHOULD ISSUE

The takings and police power issues in this matter implicate the right to just compensation for a taking under both state and federal constitutions. *Responsible Citizens in Opposition to Flood Plain Ordinance v. Asheville*, 308 N.C. 255, 266, 302 S.E.2d 204, 211, (1983). The lower court's conclusion that the Map Act falls outside the State's police power because, inter alia, it is not preventing a future detriment to the public interest, also implicates the Due Process provision of the Fourteenth Amendment of the United States Constitution. *Kirby*, slip. op. at 36; *Durham v. Cotton Mills*, 141 N.C. 615, 640, 54 S.E. 453, 462 (1906). Because the lower court's ruling imposes liability upon the State for a taking under Fifth Amendment and Due Process taking theories, substantial constitutional questions are present herein.

The Court of Appeals erred by effectively creating a *per se* taking cause of action for Plaintiffs and any owner of property within the limits of a protected corridor map filed under the Map Act, even though all of the Plaintiffs attributed their property damages to events unrelated to the Map Act's restrictions, and none of them were denied by NCDOT the ability to improve their properties on account of the Map Act. The court incorrectly held that Plaintiffs' inverse condemnation and declaratory relief taking claims were ripe, the Map Act is an eminent domain statute

which falls outside the State's police power, and recording maps under the Map Act was an exercise of eminent domain and a taking. *Kirby*, slip. op. at 22-23.

STATEMENT OF THE CASE

Plaintiffs alleged five claims arising out of the North Carolina Transportation Corridor Official Map Act, N.C.G.S. § 136-44.50 *et seq.*, "Map Act," and NCDOT filing maps pursuant to the statute in 1997 and 2008: (1) taking through inverse condemnation, pursuant to N.C.G.S. § 136-111; (2) taking under the Fifth Amendment of the United States Constitution, as applied to Defendant through the Fourteenth Amendment; (3) violation of Plaintiffs' Equal Protection rights under the Fourteenth Amendment of the United States Constitution; (4) taking under the North Carolina Constitution, N.C. CONST. ART. I, § 19, "Law of the Land"; and (5) declaratory relief, N.C.G.S. § 1-253, alleging that the Map Act, NCDOT's Hardship acquisition program, are "invalid exercises of legislative power as they effect a taking by the NCDOT without just compensation and are unequal in their application to property owners." Plaintiffs alleged that their entire "fee simple" property interests were taken, not partial takings or easement interests, and that none of them "want or require a building permit or subdivision." (R pp 4, 13, ¶¶ 52, 57; 141, 159, ¶ 4)

Defendant timely answered, asserting affirmative defenses and moving to dismiss the claims pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2) and (6) on the grounds that Plaintiffs failed to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C.G.S. § 136-111, lack of standing and ripeness, statutes of limitations and repose, and failure to exhaust administrative remedies. (R pp 176-315) On 31 July 2012, these cases were consolidated and designated as exceptional under Rule 2.1 of the General Rules of Practice. (R pp 335-47)

The trial court dismissed with prejudice all of Plaintiffs' claims except those for inverse condemnation and declaratory relief alleging the Map Act is unconstitutional. (R pp 348-53) The trial court granted Defendant's summary judgment motion in part, dismissing without prejudice Plaintiff's inverse condemnation due to lack of ripeness and the declaratory relief claim due to lack of standing, ripeness and a genuine controversy. (R pp 436-37) The court denied Defendant's motion as to Plaintiff Harris Triad Homes, Inc.'s ("Harris") declaratory judgment claim regarding application of NCDOT's Hardship program as to Harris. (R p 439)

Plaintiffs filed notices of appeal of the court's dismissal and summary judgment orders. (R p 481) Defendant filed a cross-appeal. (R p 486) The trial court

denied Plaintiffs' motions to amend their complaints and amend/alter the summary judgment order of 20 June 2013. Plaintiffs did not appeal this order. Plaintiffs' Petition for Discretionary Review pursuant to N.C.G.S. § 7A-30(b) prior to determination by the Court of Appeals was denied on 6 March 2014.

The Court of Appeals issued its decision on 17 February 2015, reversing the trial court and holding, *inter alia*, that Plaintiffs' inverse condemnation and takings claims were ripe. *Kirby*, slip. Op. at 2, 47. The lower court ruled that the Map Act empowered NCDOT to exercise its power of eminent domain and that NCDOT took Plaintiffs' property rights when it recorded protected corridor maps that created "perpetual" restrictions on the use of Plaintiffs' properties. The Court of Appeals remanded the matter to the trial court for a determination of damages. *Kirby,* slip. op. at 48. Although the Court of Appeals also reversed the trial court's dismissal of Plaintiffs' declaratory judgment taking claim, it did not state the basis for the reversal. *Kirby*, slip. Op. at 2, 47.

STATEMENT OF THE FACTS

Plaintiffs own property located within protected corridors adopted by NCDOT under the Map Act for the proposed Winston-Salem Northern Beltway. The Map Act imposes restrictions on new improvements to properties located within a protected corridor. N.C.G.S. § 136-44.51 (2014). All of the Plaintiffs testified that

their property damages ***predated*** NCDOT's filing of the protected corridor maps in 1997 and 2008 and attributed their injuries to activities unrelated to the Map Act's restrictions. Harris' property damage arose in 1991 after the city placed a stamp on his building permit about the Beltway, (Bk 8 Harris Dep pp. 28-29, 37, 138-40);[1] Nelsons' damages arose in 1996 due to surveyor stakes placed in their yard. (Bk 8 Nelson Dep. pp. 51, 73); Maendl's property value decreased in 2007 due to real estate market slump, (Bk 8 Maendl Dep. pp. 49, 70); Kirbys' damages occurred in 2004 due to public communications relating to NCDOT's environmental planning. (Bk 8 Kirby Dep pp. 36, 40-42, 67; Dep. p. Ex. 7); Hendrix's damages arose in 1993 upon notice of potential routes for Beltway, (Bk 8 Hendrix Dep pp 25-26); Republic's property was rendered "unmarketable and economically useless" after receiving an offer from NCDOT to purchase the property in 2006. (Bk 8 McInnis Dep p 58).

Properties owned by Plaintiffs Kirby, Maendl, Engelkiemer, Hutagalung, Stept, Hendrix and Republic are located in the Eastern Loop of the Beltway and subject to the 2008 protected corridor map; Harris and Nelson's are located in the Western Loop and subject to the 1997 map.(Doc Ex Bk 6 p 2805) Plaintiffs Maendl,

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[1] "Bk" refers to the documentary exhibits and deposition transcripts that were submitted with the Record on Appeal.

Engelkiemer, Hutagalung and Stept ("California Plaintiffs") are real estate investors from California and purchased their properties in 2006 after learning about the proposed Northern Beltway while attending a real estate investment seminar where representatives pitched the idea of buying property within the path of NCDOT's highway project. (Bk 8 Dep Maendl pp 11, 14-16, 17, 19, 21, 37; Dep Hutagalung pp 43-44, 48; Dep Stept pp 24-25, 44, 77; Dep Engelkemier pp 16, 17, 28, 30) Some of the Plaintiffs viewed the prospect of a future condemnation to be an investment safety net. (Bk 8 Dep Engelkemier pp 16, 17, 30) A map of the planned Beltway was displayed to attendees at the seminar. (Bk 8 Dep Hutagalung pp 50, 68) These Plaintiffs were encouraged to purchase rental property within the path of the Northern Beltway with the expectation that they would earn a return on their investments once NCDOT started condemnation proceedings six years later. (Bk 8 Dep Hutagalung pp 62, 65-67, Ex 5)

All of the California Plaintiffs have been receiving rental income from their properties since 2006. (Bk 8 Dep Maendl p 58 Ex 1; Dep Engelkemier pp 12, 21, 22; Dep Hutagalung pp 48, 55, Dep Stept pp 27-28, 32-33) NCDOT has not prevented Stept from using his property as a rental. (Bk 8 Dep Stept p 48) None of the above Plaintiffs applied for Hardship acquisitions. (Bk 8 Dep Maendl p 66; Dep Engelkemier p 63; Dep Hutagalung p 78; Dep Stept p 69) They have not been denied

mortgages due to the Map Act's restrictions. (Bk 8 Dep Maendl pp 33–35; Dep Stept p 49; Dep Hutagalung pp 58-59, 82) They do not desire to make new improvements to their properties nor have they been denied building permits by NCDOT. (Bk 8 Dep Maendl pp 50, 57; Dep Engelkemier pp 61-64; Dep Hutagalung p 72; Dep Stept p 50) They have not attempted to sell their properties. (Bk 8 Dep Engelkemier pp 61-64; Dep Hutagalung pp 58-59, 82; Dep Maendl pp 29-30)

The Kirbys own 41 acres partially inside the Eastern Loop where they have been operating a dog kennel business for 22 years. (Bk 8 Dep Kirby pp 11, 46; Doc Ex Bk 6 p 2762) The Hendrix property is partially inside the Eastern Loop's protected corridor. (R p 52; Doc Ex Bk 6 pp 2782-89) Two single-family dwellings once stood on the property but were demolished by the owner due to code violations. (Bk 8 Dep Hendrix pp 22, 23, 52, Ex 6) There is no evidence that Hendrix was denied a building permit or subdivision approval on account of the Map Act's restrictions. Republic Properties owns 188 acres with approximately 139.73 acres lying *outside* the Northern Beltway's protected corridor that are suitable for development into residential lots. (Doc Ex Bk 6, pp 2886, 2903, 2963, 2973, 3011-A) Republic never submitted a building permit or subdivision application to the city or NCDOT to improve the property. (Bk 8 Dep McInnis pp 41, 43)

Harris has earned regular income from five rental properties since the early 1990s and had no difficulty obtaining mortgages from BB&T on the properties. (Bk 8 Dep Harris pp 79, 101, 145, 148-49, 151, 153, 157, 159, 252) Harris was not prevented from rebuilding a house after a fire, or making repairs to other rentals. (Bk 8 Dep Harris pp 69-70, 85, 108) The Nelson Plaintiffs have been living on their property located in the Western Loop since 1989. (Bk 8 Dep Nelson pp 5, 31, 35, 82) Since March 2002, they have been earning income by renting part of their property to Bell South/Cingular for a telecommunications tower. (Bk 8 Dep Nelson pp 41-42) Nelson refinanced the mortgage on his property in 2007. (Bk 8 Dep Nelson p 47)

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

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

The ends-means analysis is the established standard to determine whether legislation and government actions exceed police powers and constitute a taking requiring payment of compensation. *Responsible Citizens,* 308 N.C. at 255-56, 264-65, 302 S.E.2d at 204, 206, 210-11. "In determining when a regulatory taking has in fact occurred, our courts apply a test often referred to as the 'ends-means' test." PATRICK K. HETRICK, ET AL. 2-19 *Webster's Real Estate Law in North Carolina, "Inverse Condemnation,"* § 19.02 (a) (5th ed.1999) (internal quotations

omitted). The court must engage in a two-part analysis by asking whether the "particular exercise of the police power was legitimate, by determining whether the ends sought, i.e., the object of the legislation, is within the scope of the power, and then whether the means chosen to regulate are reasonable." *Finch v. Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citations and quotation marks omitted). Under the reasonable interference prong, the court must examine the facts and determine whether the owner "was deprived of all practical use of the property and the property was rendered of no reasonable value." *Finch*, 325 N.C. at 364, 384 S.E.2d at 15 (quotation marks omitted).

The analysis is appropriate in situations where, like here, plaintiffs alleged a taking under several theories. *Responsible Citizens*, 308 N.C. at 257, 302 S.E.2d at 206 (Fifth Amendment and N.C. CONST. ART. I. Sec. 19); *Guilford Cnty. Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 12, 441 S.E.2d 177, 183 (1994) (inverse condemnation and due process); *accord*, *Town of Midland v. Wayne*, 748 S.E.2d 35, 39, 2013 N.C. App. LEXIS 929, *9 (N.C. Ct. App. 2013), (counterclaim for inverse condemnation) *disc. review granted*, 367 N.C. 292, 753 S.E.2d 664 (Jan. 23, 2014). Resolution of taking claims filed under the state and federal constitutions also answers the question of whether a taking occurred in an inverse condemnation cause of action. *Guilford Cnty.*, 114 N.C. App. at 12, 441

S.E.2d at 183. The ends-means analysis has been used to determine taking issues in non-zoning matters to determine whether a State agency's denial of a development permit constituted a taking. *Weeks v. N.C. Dep't of Nat. Resources & Community Dev.*, 97 N.C. App. 215, 388 S.E.2d 228, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990); *King v. State*, 125 N.C. App. 379, 481 S.E.2d 330, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997).

The Court of Appeals should have employed the ends-means taking analysis to examine Plaintiffs' inverse condemnation and declaratory judgment taking claims because the facts herein involve legislation and its alleged impact on Plaintiffs.[2] All of the elements to support application of the test are present. And the Court of Appeals implicitly acknowledged that the claims were in the nature of a regulatory taking where its analysis focused on the Map Act, land-use regulations, and the State's police power. *Kirby*, slip. op. at 47. The Court of Appeals had previously acknowledged the regulatory nature of these types of claims. *Beroth Oil Co. v. N.C. DOT*, 220 N.C. App. 419, 434, 725 S.E.2d 651, 662 (2012) ("*Beroth I"), aff'd in*

[2] The trial court's order dismissed Plaintiffs' claims for inverse condemnation and declaratory judgment. (R pp 436-37) Both claims alleged a taking of Plaintiff' entire fee simple interests arising out of the Map Act, NCDOT's administration thereof, and recording protected corridor maps. (R pp 159, ¶ 4)

part, vacated in part, and remanded, 367 N.C. 333, 757 S.E.2d 466 (2014) ("*Beroth II*").

The failure to employ the ends-means analysis conflicts with decisions of this Court and other decisions where the analysis was used to determine whether land-use regulations and their enforcement fell outside the government's police powers and created a taking requiring payment of just compensation. *Finch*, 325 N.C. at 385, 384 S.E.2d at 26.

B. THE REMAND ORDER IS CONTRARY TO STATE LAW.

The Court of Appeals' decision conflicts with holdings of this Court that require the trial court to hold an evidentiary hearing under N.C.G.S. § 136-108 in inverse condemnation claims to determine all preliminary issues, including the alleged *areas and interests* taken, prior to a determination of damages by a jury. N.C.G.S. § 136-108 (2014); *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). The provisions of Section 136-108 apply to inverse condemnation proceedings brought under Section 136-111. *Berta v. State Highway Com.*, 36 N.C. App. 749, 754, 245 S.E.2d 409, 412 (1978).

Chapter 136, Article 9 of the General Statutes contemplates two proceedings, one to determine whether a taking occurred, and the other to determine damages before a jury. One purpose of a Section 136-108 hearing is to eliminate from the jury

any question as to the areas and interests taken. *Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784. A hearing pursuant to Section 136-108 is a bench trial wherein witnesses are heard, evidence is received, and the trial court makes findings of fact and conclusions of law. *N.C. DOT v. Cromartie*, 214 N.C. App. 307, 309, 314, 319, 716 S.E.2d 361, 363, 366, 370 (2011).

> It is the trial court's function at a section 108 hearing to decide all questions of fact. In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues *joined in the pleadings*; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly.

DOT v. Webster, ___ N.C. App. , __, 751 S.E.2d 220, 224, 2013 N.C. App. LEXIS 1208, *9 (N.C. Ct. App. 2013) (internal citations and quotation marks omitted (emphasis added)), *disc. review denied*, 367 N.C. 332, 755 S.E.2d 618 (2014). Issues regarding whether NCDOT acted outside its police power and affected a taking are proper issues for a hearing under Section 136-108. *Id*.

Remanding this case for a determination of damages is erroneous because neither the Court of Appeals nor the trial court has identified the areas and interests allegedly taken, *e.g*., a fee simple, an easement, or some other interest. *Kirby*, slip op. at 45-47. For example, approximately 139.73 acres of Republic's mostly vacant 188-acre tract lies *outside* the protected corridor (and not subject to the Map Act's restriction) and are suitable for residential development. (Doc Ex Bk 6, pp 2886,

2903, 2963, 2973, 3011-A). The Court of Appeals did not state how much of the 188 acres was taken by NCDOT. Similar issues apply to all Plaintiffs' claims.

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

The Court of Appeals erred by holding that both the inverse condemnation and declaratory judgment taking claims were ripe where none of the Plaintiffs desired, applied for, or were denied building permits or subdivision approvals, the very things that are the focus of the Map Act's restrictions. *Kirby*, slip. op. at 2, 47; N.C.G.S. § 136-44.51. Nor is there record evidence showing that Plaintiffs sought variances from the Map Act's restrictions.

The holding conflicts with established precedent holding that inverse condemnation and due process takings claims are not ripe until a final decision is made by the governing body as to how the regulation will be applied to the plaintiff's property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190, 194, 200, 87 L. Ed. 2d 126, 143, 147 (1985) (petitioner's claims were not ripe because he did not apply for a subdivision or variance or obtain a final decision on how he would be allowed to develop his property); *Andrews v. Alamance County*, 132 N.C. App. 811, 815, 513 S.E.2d 349, 351 (1999). "Any challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted." *Id.* (citation omitted). Because

Plaintiffs never applied for building permits, subdivisions, or variances, their inverse condemnation and constitutional claims were not ripe and they lacked standing to challenge the Map Act and its restrictions as applied to them.

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

The Court of Appeals' decision erroneously creates a *per se* taking cause of action for *any* owner of property located within a protected corridor, regardless of whether the owner experienced an *actual* interference with the use of his property. *Kirby*, slip. op. at 31, 36, 47. The court selected the incorrect takings analysis in this matter, and misapplied the analysis it selected. *Kirby*, slip. op. at 31, 37.

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

As stated previously, the established standard to determine a regulatory or legislative taking in North Carolina is the ends-means analysis. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208. In contrast, a determination as to whether conduct constituting an actual taking has occurred requires the establishment of an:

> entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Penn v. Carolina Virginia Coastal Corp., 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950).

Though the Court of Appeals referred to the *Penn* standard, it applied a truncated version of the analysis to Plaintiffs' claims, holding that their property rights were "substantially interfered" with by the Map Act's restrictions. *Kirby*, slip. op. at 43. The Court of Appeals adopted this short-hand statement of the law from *Long v. Charlotte,* 306 N.C. 187, 198, 293 S.E.2d 101, 109 (1982); *Kirby*, slip. op. at 40. The shortened version is but one part of the proper larger analysis that requires an examination into whether the government action worked to "substantially [] oust the owner and deprive him of all beneficial enjoyment [and use] thereof." *Penn.* 231 N.C. at 484, 57 S.E.2d at 819.

This error suggests that Plaintiffs can establish a taking without showing that the alleged harm, restrictions on use, impacted their abilities to use the properties, *e.g.*, "deprive him of all beneficial enjoyment thereof." *Penn*, 231 N.C. at 484, 57 S.E.2d at 819. Employing the abbreviated *Long* standard in this matter is further misguided because *Long* involved facts entirely inapposite to those herein: low-flying aircraft (at 100 to 500 feet above houses; noise; vibrations; pollution) and the alleged taking of avigation easements. *Kirby*, slip. op. at 43; (citing *Long*, 306 N.C. at 199, 293 S.E.2d at 109).

The Court of Appeals also failed to perform "ad hoc, factual inquiries into the circumstances of each particular case" to determine whether an *actual* taking of each Plaintiff's property rights occurred. *Beroth Oil Co. v. N.C. DOT*, 367 N.C. 333, 342, 757 S.E.2d 466, 473 (2014) (*"Beroth II")*; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 648 (1978). By failing to examine the extent of the "use" deprivation for each Plaintiff, the Court of Appeals contradicted the directive of this Court that "liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." *Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474; *Kirby*, slip. op. at 47.

The Court of Appeals' conclusion that Plaintiffs sustained a substantial interference with their property rights merely because of the "potentially long-lasting statutory restrictions [of the Map Act]," *Kirby*, slip op. at 42, does not meet the "ad hoc, factual inquiries" requirement of this Court and takings jurisprudence. *Beroth II*, 367 N.C. at 342, 757 S.E.2d at 473. *Penn Cent.*, 438 U.S. at 124, 57 L. Ed. 2d at 648. Though the lower court referred to the constraint on "Plaintiffs' ability to freely improve, develop, and dispose of their own property," *Kirby*, slip. op. at 45, it is well recognized that the "right to improve property is subject to the reasonable exercise of state authority, including the enforcement of

valid zoning and land-use restrictions." *Palazzolo v. Rhode Island*, 533 U.S. 606, 606, 150 L. Ed. 2d 592, 613 (2001).

Under any as-applied taking standard, the court's proper focus must be on the extent to which an owner's ability to use the property has been deprived, which is an inquiry the Court of Appeals failed to undertake.

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

The Court of Appeals erroneously relied on a Florida case for the conclusion that a taking occurred in this matter, misconstruing the Florida Supreme Court's holding in the case it cited. *Kirby*, slip. op. at 22, 31 (citing *Joint Ventures, Inc. v. DOT*, 563 So. 2d 622 (Fla. 1990)). The *Joint Ventures* decision did *not* stand for the proposition that a *per se* taking occurred for every owner of property located within a highway map of reservation. *See Palm Beach County v. Wright*, 641 So. 2d 50, 52 (Fla. 1994) ("[W]e held that landowners with property inside the boundaries of maps of reservation invalidated by *Joint Ventures, Inc., are not* legally entitled to receive per se declarations of taking." (emphasis added)). Additionally "*Joint Ventures* should not be read to mean that all properties located within the maps of reservation were per se taken without just compensation." *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994). And the Illinois Supreme Court recently came to the same conclusion regarding a taking challenge to

its protected corridor statute restrictions where plaintiffs never applied for improvement permits. *Davis v. Brown*, 221 Ill. 2d 435, 448, 851 N.E.2d 1198, 1207 (2006). "We cannot say, as a matter of law, that the mere potential of a 165-day reservation period amounts to a per se regulatory taking for every landowner who falls within a right-of-way map." *Id.*

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

Under the Court of Appeals' ruling, owners of property within all urban loop projects covered by a protected corridor would conceivably be entitled to a *per se* finding that their property rights have been unconstitutionally taken and are entitled to compensation due to the Map Act's restrictions. This result could be the case even though the owners were not denied permission from NCDOT to make new improvements to their properties under the Map Act.

Over 90 other inverse condemnation and takings claims have been filed against NCDOT by Plaintiffs' counsel on behalf of other owners of property within protected corridors across North Carolina. If the Court of Appeals' ruling stands, then NCDOT and North Carolina taxpayers could be compelled to purchase hundreds of millions of dollars of property for planned transportation projects that have not been or funded for project-wide right of way acquisition or construction. This would dramatically add to the current inventory of property owned by NCDOT

and the State in the Northern Beltway (and in other areas) that were acquired in large part under the Hardship program to assist owners who were suffering from health and financial problems. *Kirby*, slip. op. at 46.

As of 2013, there were 25 urban loop projects in North Carolina. (Doc Ex Bk 6, p 2882) Estimated right of way acquisition costs in 2011 for the Northern Beltway were over $73 million for the Western Loop and $221 million for the Eastern Loop; the total estimated cost to construct the entire Northern Beltway is over $1.2 billion if construction costs are included. (R pp 17-18) It could cost North Carolina taxpayers over $8 billion dollars to construct all 25 urban loop projects at the same time using 2011 dollars. Each urban loop, not to mention the hundreds of other *non-loop* NCDOT projects, must compete with each other for limited funding. (Doc Ex Bk 6, p 2882)

The Court of Appeals' decision not only impacts planned NCDOT projects, but could also affect projects planned by municipalities, metropolitan planning organizations, and regional transportation authorities because they have authority under the Map Act to adopt protected corridors as well. N.C.G.S. § 136-44.50 (a) (2014).

Therefore, because of the conflicts created by the decision of the Court of Appeals, the potential impact the decision will have on the State's jurisprudence,

and the significant public interest issues involved, this Court should exercise its "institutional role . . . to provide guidance and clarification" in this matter. *State v. Lawrence*, 365 N.C. 506, 511, 723 S.E. 2d 326, 330 (2012); *accord In re R.T.W.*, 359 N.C. 539, 542, 614 S.E.2d 489, 491 (2005) (petition for discretionary review allowed to resolve conflicts in Court of Appeals' case).

WHEREFORE, Defendant respectfully petitions this Court to accept this case for review pursuant to N.C.G.S. § 7A-31.

ISSUES TO BE PRESENTED FOR REVIEW

In the event the Court allows this petition for discretionary review, Defendant intends to present the following issues:

1. Did the Court of Appeals erroneously hold that the Map Act, N.C.G.S. § 136-44.50 *et seq*. empowered NCDOT to exercise the power of eminent domain and the NCDOT exercised that power and took Plaintiffs' property rights when it recorded protected corridor maps?

2. Did the Court of Appeals erroneously remand this matter for a determination of damages?

3. Did the Court of Appeals misapprehend takings jurisprudence and erroneously hold that Plaintiffs' claims are ripe and a taking occurred in this matter?

Respectfully submitted this the 24th day of March 2015.

ROY COOPER
ATTORNEY GENERAL

Electronically Submitted
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N.C. App. R. 33(b) Certification:
I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed.

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Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL UNDER N.C.G.S. § 7A-30(1) (CONSTITUTIONAL QUESTION) AND PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31(c) were this day served upon Plaintiff by placing the same in the United States mail, postage prepaid, and addressed to their attorney of record as follows:

Matthew H. Bryant
Attorney at Law
Hendrick Bryant & Nerhood, LLP
723 Coliseum Drive, Suite 101
Winston-Salem, N.C. 27106

This the 24th day of March 2015.

Electronically Submitted
John F. Maddrey
Solicitor General

NO. COA14-184

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

EVERETTE E. KIRBY and Wife, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, as Executor of the Estate of Frances Hendrix; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL; STEVEN DAVID STEPT; JAMES W. NELSON and wife, PHYLLIS H. NELSON; and REPUBLIC PROPERTIES, LLC, a North Carolina company (Group 1 Plaintiffs),
Plaintiffs,

v.

Forsyth County
Nos. 11 CVS 7119-20
11 CVS 8170-74, 8338
12 CVS 2898
Rule 2.1 Cases

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
Defendant.

Appeal by Plaintiffs and Cross-Appeal by Defendant from orders entered 8 January 2013 and 20 June 2013 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 12 August 2014.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, and Kenneth C. Otis, III, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury and Assistant Attorney General John F. Oates, Jr., for Defendant.

McGEE, Chief Judge.

Everette E. and Martha Kirby ("Mr. and Mrs. Kirby"), Harris Triad Homes, Inc. ("Harris Triad"), Michael Hendrix, as Executor of the Estate of Frances Hendrix ("the Hendrix Estate"), Darren Engelkemier ("Mr. Engelkemier"), Ian Hutagalung ("Mr. Hutagalung"), Sylvia Maendl ("Ms. Maendl"), Steven David Stept ("Mr. Stept"), James W. and Phyllis H. Nelson ("Mr. and Mrs. Nelson"), and Republic Properties, LLC ("Republic") (collectively "Plaintiffs") appeal from: (1) the trial court's 8 January 2013 order granting Defendant North Carolina Department of Transportation's ("NCDOT") motions to dismiss Plaintiffs' claims alleging violations of the Constitutions of the United States and of the State of North Carolina; and (2) the trial court's 20 June 2013 order granting NCDOT's summary judgment motion on (a) Plaintiffs' inverse condemnation claims under N.C. Gen. Stat. § 136-111, and (b) Plaintiffs' — excluding Harris Triad's — claims seeking declaratory judgments. NCDOT cross-appeals from the same orders. For the reasons stated, we reverse the orders of the trial court and remand this matter for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

This case concerns, in broad terms, challenges to the

constitutionality and propriety of legislation related to the proposed development of a thirty-four-mile highway that would loop around the northern part of the City of Winston-Salem ("the Northern Beltway" or "the Northern Beltway Project") in Forsyth County, North Carolina. Plaintiffs Mr. and Mrs. Kirby, the Hendrix Estate, Mr. Engelkemier, Mr. Hutagalung, Ms. Maendl, Mr. Stept, and Republic own real property located in the section of the Northern Beltway that would extend from U.S. Highway 52 to U.S. Highway 311 in eastern Forsyth County ("the Eastern Loop"). Plaintiffs Harris Triad and Mr. and Mrs. Nelson own real property located in the section of the Northern Beltway that would extend from U.S. Highway 158 to U.S. Highway 52 in western Forsyth County ("the Western Loop").

Before Plaintiffs filed their respective complaints with the trial court, our Court considered a separate case brought by several plaintiffs who owned real property in both sections of the proposed Northern Beltway Project, and who alleged almost identical claims against NCDOT as those alleged by Plaintiffs in the present case. *See Beroth Oil Co. v. N.C. Dep't of Transp.* (*Beroth I*), 220 N.C. App. 419, 420, 423-24, 725 S.E.2d 651, 653, 655 (2012), *aff'd in part, vacated in part, and remanded*, 367 N.C. 333, 757 S.E.2d 466 (2014). Because the challenged legislation and general factual background of the present case are the same as

those underlying this Court's and our Supreme Court's respective decisions in the *Beroth* case — which we will discuss in further detail later in this opinion — we rely on those decisions to recount the relevant background of the case now before us.

In *Beroth I*, this Court stated: "In 1989, our General Assembly established the North Carolina Highway Trust Fund to finance the construction of 'urban loops' around designated urban areas." *Id.* at 420 n.1, 725 S.E.2d at 653 n.1. "The Northern Beltway Project has been in the works for more than two decades," *id.*, and "[t]he area encompassed by the Northern Beltway Project was and remains designated for development." *Id.* Pursuant to the Transportation Corridor Official Map Act ("the Map Act"), *see* N.C. Gen. Stat. §§ 136-44.50 to -44.54 (2013), NCDOT "recorded corridor maps with the Forsyth County Register of Deeds on 6 October 1997 and 26 November 2008 identifying transportation corridors for the construction of . . . the Northern Beltway." *Beroth Oil Co. v. N.C. Dep't of Transp.* (*Beroth II*), 367 N.C. 333, 334, 757 S.E.2d 466, 468 (2014).

Pursuant to the Map Act, after a transportation corridor official map is filed with the register of deeds and other notice provisions are met, *see* N.C. Gen. Stat. §§ 136-44.50(a1), 136-44.51(a) (2013), "the Map Act imposes certain statutory restrictions on landowners within the corridor." *Beroth I*,

220 N.C. App. at 421, 725 S.E.2d at 654. Specifically, N.C. Gen. Stat. § 136-44.51(a) provides that "no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision . . . be granted with respect to property within the transportation corridor." N.C. Gen. Stat. § 136-44.51(a).

The Map Act provides three potential avenues of relief from the statutory restrictions imposed upon affected property located within a transportation corridor. First, as we said in *Beroth I*, the Map Act provides a maximum three-year limit on the building permit issuance restrictions set forth in N.C. Gen. Stat. § 136-44.51(a). *See id.* § 136-44.51(b). If an application for a building permit is still being reviewed three years after the date of the original submittal to the appropriate local jurisdiction, the entity responsible for adopting the transportation corridor official map affecting the issuance of building permits or subdivision plat approval "shall issue approval for an otherwise eligible request or initiate acquisition proceedings on the affected properties," *id.*, or "an applicant within the corridor may treat the real property as unencumbered and free of any restriction on sale, transfer, or use established by [the Map Act]." *Id.*

Second, in accordance with the procedures set forth in N.C.

Gen. Stat. § 136-44.52, the Map Act allows property owners within the transportation corridor to petition for a variance from the Map Act's restrictions, which may be granted upon a showing that, as a result of the Map Act's restrictions, "no reasonable return may be earned from the land," N.C. Gen. Stat. § 136-44.52(d)(1) (2013), and such requirements "result in practical difficulties or unnecessary hardships." *Id.* § 136-44.52(d)(2).

Finally, the Map Act provides that, once a transportation corridor official map is filed, a property owner "has the right of petition to the filer of the map for acquisition of the property due to an imposed hardship [('the Hardship Program')]." N.C. Gen. Stat. § 136-44.53(a) (2013). Upon such petition, the entity that initiated the transportation corridor official map "may make advanced acquisition of specific parcels of property when that acquisition is determined by the respective governing board to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner." *Id.* The Map Act further provides that this same entity is tasked with the responsibility of "develop[ing] and adopt[ing] appropriate policies and procedures to govern the advanced acquisition of right-of-way and . . . assur[ing] that the advanced acquisition is in the best overall public interest." *Id.* § 136-44.53(b).

According to an affidavit by NCDOT's Right-of-Way Branch Manager, Virgil Ray Pridemore, Jr. ("Mr. Pridemore") — who is responsible for the implementation of right-of-way policies and administration of all phases of NCDOT acquisition work in the NCDOT Raleigh central office — he makes his decisions with respect to the Hardship Program applications by relying on "the criteria and regulations in the NCDOT Right[-]of[-]Way Manual, the [Code of Federal Regulations], and input and recommendations from various NCDOT staff members from the preconstruction and roadway design branches, NCDOT Advance Acquisition Review Committee members, and representatives from [the Federal Highway Administration]." The Map Act further provides that "[a]ny decision" made with respect to a Hardship Program petition "shall be final and binding." *Id.* § 136-44.53(a).

Between October 2011 and April 2012, Plaintiffs separately filed complaints against NCDOT alleging that NCDOT's actions "placed a cloud upon title" to Plaintiffs' respective properties, rendered Plaintiffs' properties "unmarketable at fair market value, economically undevelopable, and depressed Plaintiff[s'] property values." Plaintiffs' complaints also alleged that NCDOT treated similarly situated property owners differently by "depriving Plaintiff[s] of the value of their Properties, . . . substantially interfering with the Plaintiff[s'] elemental and

constitutional rights growing out of the ownership of the Properties, and . . . restricting the Plaintiff[s'] capacity to freely sell their Properties." Plaintiffs further alleged that the administrative remedies offered by NCDOT were "inadequate and unconstitutional," and, thus, "futile" and not subject to exhaustion. Finally, Plaintiffs alleged that the Hardship Program was "unequal in its treatment of similarly situated persons in the Northern Beltway in that physically unhealthy or financially distressed owners are considered for acquisition yet healthy and financially stable owners are not."

Plaintiffs' complaints set forth the following claims for relief: a taking through inverse condemnation pursuant to N.C. Gen. Stat. § 136-111; a taking in violation of the Fifth Amendment of the United States Constitution, as applied to NCDOT through the Fourteenth Amendment; a violation of the Equal Protection Clause of the Fourteenth Amendment; a taking in violation of Article I, Section 19 (the "Law of the Land" Clause) of the North Carolina Constitution; and a declaration that the Map Act and, specifically, the Map Act's Hardship Program are unconstitutional and "invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners." NCDOT answered and moved to dismiss each of Plaintiffs' respective complaints with prejudice pursuant to N.C.

Gen. Stat. § 1A-1, Rules 12(b)(1), (b)(2), and (b)(6), asserting various affirmative defenses, including sovereign immunity, statutes of limitation and repose, failure to exhaust administrative remedies, and lack of standing and ripeness.

Given "the identical nature of the causes of action and legal theories, similarity of the subject matter, need for similar discovery, expert testimony, and other factual issues" of the parties in the present action and in a series of companion cases that were or were soon-to-be filed, counsel for Plaintiffs and NCDOT filed a joint motion pursuant to Rule 2.1 of North Carolina's General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure on 27 July 2012. In this joint motion, the parties requested that the trial court recommend to the Chief Justice of our State's Supreme Court that these cases be designated as "exceptional." In an order entered 31 July 2012, the Chief Justice granted the parties' joint motion pursuant to Rule 2.1. For case management purposes, in a subsequent order entered 8 January 2013, the trial court ordered that these exceptional cases be split into three groups. Plaintiffs in the present case were designated by the trial court as "Group 1" Plaintiffs and are the only plaintiffs who are parties to this appeal.

The trial court heard NCDOT's motions to dismiss the

complaints of Group 1, Group 2, and Group 3 Plaintiffs, and entered an order on 8 January 2013 disposing of the motions concerning all three groups as follows:

> 1. Defendant's motions to dismiss with prejudice are DENIED regarding the claims for inverse condemnation, under N.C. Gen. Stat. § 136-111; . . . and claims seeking Declaratory Judgments as to the constitutionality of the Hardship Program and the "Map Act," statutes N.C. Gen. Stat. §§ 136-44.50, 136-44.51, 136-44.52 and 136-44.53.
>
> 2. Defendant's motions to dismiss with prejudice are GRANTED regarding all remaining claims, including a taking under N.C. Const. art. I, § 19, Law of the Land; a taking under the Fifth Amendment of the United States Constitution, as applied to Defendant through the Fourteenth Amendment; and claims for Equal Protection violations under the Fourteenth Amendment of the United States Constitution.

Group 1 Plaintiffs — who are Plaintiffs in the present case — and NCDOT filed cross-motions for summary judgment with respect to the remaining claims for inverse condemnation under N.C. Gen. Stat. § 136-111 and for declaratory judgments as to the constitutionality of the Map Act and the Map Act's Hardship Program; NCDOT additionally moved to exclude Plaintiffs' affidavits and exhibits submitted in support of Plaintiffs' motion for summary judgment. Over NCDOT's objections, Plaintiffs also moved to amend their complaints, pursuant to N.C. Gen. Stat. § 1A-

1, Rule 15, to include allegations in support of Plaintiffs' contention that "the taking is presently occurring and did occur at an earlier date upon any of the[] events in time" that Plaintiffs sought to incorporate into their respective complaints.

The trial court entered its order on the parties' cross-motions for summary judgment on 20 June 2013. With respect to Plaintiffs' inverse condemnation claims, the trial court first concluded that Plaintiffs' claims were not yet ripe. Citing *Beroth I*, the trial court determined that the purported takings at issue were exercises of the State's police power rather than exercises of the State's power of eminent domain, and that an "ends-means" analysis was the proper method to determine whether the exercise of that police power, in fact, resulted in the purported takings.

The trial court reasoned that, in their original complaints, Plaintiffs alleged only that the effective dates of NCDOT's purported takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in the Forsyth County Register of Deeds in 1997 and 2008, respectively. The trial court stated that "it is established North Carolina law that mere recording of project maps do not constitute a taking," and found that all Plaintiffs "claim the date of the taking occurred when the maps were published, and do not claim the taking took place on

any other dates." Thus, the trial court granted NCDOT's motion for summary judgment with respect to Plaintiffs' inverse condemnation claims, and denied Plaintiffs' motion for the same.[1]

With respect to Plaintiffs' claims for declaratory judgments as to the constitutionality of the Map Act and the Map Act's Hardship Program, the trial court determined that all such claims, except for those by Harris Triad, were not ripe and were "subject to dismissal due to a lack of standing to bring a declaratory action." The trial court noted that, with the exception of Harris Triad, no Group 1 Plaintiffs applied for variances, permits, or the Hardship Program, or accepted any offers from NCDOT to purchase their respective properties. Although Plaintiffs in the present case asserted that such applications would be futile, the trial court reasoned that challenges under the Declaratory Judgment Act necessitated a showing that each Plaintiff did, or soon would, sustain an injury as a result of a final determination by NCDOT concerning how each may "be permitted" to use his or her own property. Thus, the trial court granted NCDOT's motion for summary judgment with respect to all Plaintiffs' equal protection claims,

[1] The trial court also rejected Plaintiffs' argument that they suffered "*de facto* taking[s]" by NCDOT. While Plaintiffs asserted that NCDOT's actions resulted in "*de facto* taking[s]" in their motion for summary judgment, Plaintiffs articulated no such allegation or claim in their respective complaints. Therefore, we decline to consider Plaintiffs' argument on appeal asserting that NCDOT's actions resulted in "*de facto* taking[s]."

except for those brought by Harris Triad, and denied those Plaintiffs' motion for the same.

With respect to Harris Triad's claim for a declaratory judgment as to the constitutionality of the Map Act and the Map Act's Hardship Program, because Harris Triad had applied for the Hardship Program and was denied, the trial court determined that Harris Triad was "cur[ed]" of the "standing problems that beset the remaining Plaintiffs." The trial court then undertook a rational basis review of Harris Triad's equal protection claim and, after finding that the evidence showed "unequal application of the [H]ardship [P]rogram" and "puzzling decisions that emanated from the NCDOT regional office regarding the [P]rogram," the trial court concluded that Harris Triad "successfully presented evidence that [its] company was denied a [H]ardship [P]rogram offer while other similarly-situated parties were accepted and were paid a fair price for their land and improvements." Thus, the trial court denied NCDOT's motion for summary judgment with respect to Harris Triad's equal protection claim, and concluded that Harris Triad could "go forward in an attempt to prove [an as-applied] claim that [the] company's rights ha[d] been violated," and that the scope of such review "must encompass the entire history of hardship purchases for this particular Forsyth County project," and should not be limited by time or geography — i.e., the review should

examine "the entire history of" NCDOT's Hardship Program decisions as to both Western and Eastern Loop purchases.

Plaintiffs appealed from the trial court's 8 January 2013 order granting NCDOT's motions to dismiss Plaintiffs' claims, and from the trial court's 20 June 2013 order on the cross-motions for summary judgment. NCDOT cross-appealed from the same orders.

Because all parties urge this Court to examine the *Beroth I* and *Beroth II* decisions as we undertake our analysis of the issues presented on appeal in the present case, we first examine the questions presented and answered by our appellate Courts' decisions in *Beroth I* and *Beroth II*. In *Beroth I*, as in the present case, the trial court had entered an order denying NCDOT's motion to dismiss the plaintiffs' claims for inverse condemnation and the plaintiffs' requests for a declaratory judgment that the Map Act and the Map Act's Hardship Program were unconstitutional. *See Beroth I*, 220 N.C. App. at 424, 725 S.E.2d at 656. However, unlike the present case, the *Beroth I* plaintiffs did not appeal from that order. *See id.* at 425, 725 S.E.2d at 656. Instead, in *Beroth I*, the question before this Court was whether the trial court had erred by entering a separate order denying the plaintiffs' motion for class certification of their inverse condemnation claims. *Id.* at 425–26, 725 S.E.2d at 656–57. Although this Court did declare that the plaintiffs and "all owners

of real property located within the corridor have sustained the effects of government action," *id.* at 430, 725 S.E.2d at 659, we maintained that "[w]hether this action constitutes a taking . . . [wa]s not the question before this Court," *id.*, and that we were not expressing any opinion on that issue. *See id.*

Nevertheless, to answer the question presented, this Court undertook an extensive review of "takings" law and examined whether the trial court erred by employing an ends-means analysis to conclude that the plaintiffs' individual issues would predominate over their common issues, if any. *See id.* at 431–37, 725 S.E.2d at 660–63. This Court then concluded that "the distinguishing element in determining the proper takings analysis [wa]s not whether police power or eminent domain power [wa]s at issue, but whether the government act physically interfere[d] with or merely regulate[d] the affected property," *id.* at 437, 725 S.E.2d at 663, and determined that the trial court correctly relied on the ends-means analysis because the alleged takings were "regulatory in nature." *Id.* This Court also determined that the property interest at issue was "in the nature of an easement right," *id.* at 438, 725 S.E.2d at 664, because the plaintiffs had "relinquished their right to develop their property without restriction." *Id.* This Court then upheld the trial court's denial of the plaintiffs' request for class certification because we determined: "[w]hile

the Map Act's restrictions may be common to all prospective class members, liability can be established only after extensive examination of the circumstances surrounding each of the affected properties," *id.* at 438–39, 725 S.E.2d at 664; and "[w]hether a particular property owner has been deprived of all practical use of his property and whether the property has been deprived of all reasonable value require case-by-case, fact-specific examinations regarding the affected property owner's interests and expectations with respect to his or her particular property." *Id.* at 439, 725 S.E.2d at 664. Finally, although this Court "stress[ed]" that our holding had "no bearing on [the plaintiffs'] declaratory judgment claim[s]," *id.* at 442, 725 S.E.2d at 666, we recognized that the plaintiffs did not need to be members of a class in order to obtain a declaration that the Hardship Program and the Map Act were unconstitutional and invalid exercises of legislative power and were unequal in their application to property owners, because "[i]f the Map Act [wa]s declared unconstitutional to one, it [wa]s unconstitutional to all." *Id.*

Our Supreme Court later affirmed this Court's holding in *Beroth I* that the trial court "did not abuse its discretion in denying plaintiffs' motion for class certification because individual issues predominate over common issues." *Beroth II*, 367 N.C. at 347, 757 S.E.2d at 477. However, our Supreme Court

also determined that the trial court and our Court "improperly engaged in a substantive analysis of plaintiffs' arguments with regard to the nature of NCDOT's actions and the impairment of their properties." *Id.* at 342, 757 S.E.2d at 474. Our Supreme Court then "expressly disavow[ed]" the portion of this Court's opinion that stated: "'[t]he trial court correctly relied upon the ends[-]means test in the instant case, as the alleged taking is regulatory in nature and as [the trial court] ha[s] specifically held this analysis applicable outside the context of zoning-based regulatory takings.'" *Id.* at 342–43, 757 S.E.2d at 474 (first and fourth alterations in original) (quoting *Beroth I*, 220 N.C. App. at 437, 725 S.E.2d at 663).

As we noted above, in the present case, the trial court's 20 June 2013 summary judgment order determined all of Plaintiffs' claims, except for Harris Triad's declaratory judgment claim, which renders the appeals before us interlocutory. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) ("[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes."); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d

377, 381 ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Amer. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[n]otwithstanding this cardinal tenet of appellate practice, . . . immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.'" *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations omitted); *see* N.C. Gen. Stat. § 1-277(a) (2013) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding[.]"); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2013) ("Appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which . . . [a]ffects a substantial right."). Because this Court has previously held that an order granting partial summary judgment on the issue of NCDOT's liability to pay just compensation for a claim for inverse

condemnation is an immediately appealable interlocutory order affecting a substantial right, *see Nat'l Adver. Co. v. N.C. Dep't of Transp.*, 124 N.C. App. 620, 623, 478 S.E.2d 248, 249 (1996) (citing *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 106–07, 338 S.E.2d 794, 797 (1986)), we will consider the merits of the issues on appeal that are properly before us.

II. Analysis

A. Power of Eminent Domain and Police Powers

Plaintiffs first contend the trial court erred when it determined their claims for inverse condemnation were not yet ripe because Plaintiffs' respective properties had not yet been taken. Plaintiffs assert the trial court erred because the takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in 1997 and 2008, respectively. Plaintiffs further urge that the takings were either an exercise of the State's power of eminent domain, for which they are due just compensation, or were an improper exercise of the State's police powers.

"[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation," *Finch v. City of Durham*, 325 N.C. 352, 362–63, 384 S.E.2d 8, 14, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989), our Supreme Court has

"inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Id.* at 363, 384 S.E.2d at 14.

"The legal doctrine indicated by the term, 'inverse condemnation,' is well established in this jurisdiction," *City of Charlotte v. Spratt*, 263 N.C. 656, 663, 140 S.E.2d 341, 346 (1965), and provides that, where private property is "*taken* for a public purpose by a[n] . . . agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor." *Id.* Inverse condemnation is "a term often used to designate a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Id.* at 662–63, 140 S.E.2d at 346 (internal quotation marks omitted); *see Ferrell*, 79 N.C. App. at 108, 338 S.E.2d at 798 ("Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." (internal quotation marks omitted)). The remedy allowed by inverse condemnation, which is now codified in N.C. Gen. Stat. § 136-111, *see Ferrell*, 79 N.C.

App. at 108, 338 S.E.2d at 798, provides, in relevant part:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court . . . alleg[ing] with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken.

N.C. Gen. Stat. § 136-111 (2013).

"An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose." *Adams Outdoor Adver. of Charlotte v. N.C. Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). "In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental[.]" *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982). Because "[t]he 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," *see Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514,

126 S.E.2d 732, 737–38 (1962) (internal quotation marks omitted), in order to address whether Plaintiffs' respective properties have been taken pursuant to the Map Act, and, thus, whether the trial court erred by dismissing as unripe Plaintiffs' claims for inverse condemnation, we consider whether the Map Act confers upon the State the right to exercise its power of eminent domain or to exercise its police power.

"Eminent domain means the right of the [S]tate or of the person acting for the [S]tate to use, alienate, or destroy property of a citizen for the ends of public utility or necessity." *Griffith v. S. Ry. Co.*, 191 N.C. 84, 89, 131 S.E. 413, 416 (1926). "This power is one of the highest attributes of sovereignty, and the extent of its exercise is limited to the express terms or necessary implication of the statute delegating the power." *Id.*; *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) ("The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty."). "The right of eminent domain which resides in the State is defined to be [t]he rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common," *Spencer v. R.R.*, 137 N.C. 107, 121, 49 S.E. 96, 101 (1904) (internal quotation marks omitted), "and to appropriate and control individual property for

the public benefit as the public safety, necessity, convenience or welfare may demand." *Id.* at 121–22, 49 S.E. at 101 (internal quotation marks omitted). "This right or power is said to have originated in State necessity, and is inherent in sovereignty and inseparable from it." *Id.* at 122, 49 S.E. at 101.

In *Wissler v. Yadkin River Power Co.*, 158 N.C. 465, 74 S.E. 460 (1912), our Supreme Court recognized that the phrase "eminent domain" "originated in the writings of an eminent publicist, Grotius, in 1625," *id.* at 466, 74 S.E. at 460, who wrote:

> The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.

Id. (internal quotation marks omitted). Thus, "[t]he right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged." *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451, 455–56 (2 Dev. & Bat.) (1837) (per curiam).

> [W]hen the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied, that the power to have things before appropriated to

> individuals again dedicated to the service of the [S]tate, is a power useful and necessary to every body politic.

Id. at 456.

"A familiar instance of the exercise of th[is] power . . . is that of devoting private property to public use as a highway. A nation could not exist without these powers, and they involve also the welfare of each citizen individually." *Id.*; *see Nichols on Eminent Domain* § 1.22[1], at 1-78 (rev. 3d ed. 2013) [hereinafter *Nichols*] ("The primary object for the exercise of eminent domain in any community is the establishment of roads."). "An associated people cannot be conceived, without avenues of intercommunication, and therefore the public must have the right to make them without, or against, the consent of individuals." *Raleigh & Gaston R.R. Co.*, 19 N.C. at 456. "[I]t is a power founded on necessity. But it is a necessity that varies in urgency with a population and production increasing or diminishing, and demanding channels of communication, more or less numerous and improved, and therefore to be exercised according to circumstances, from time to time." *Id.* at 458.

However, "[o]ur Constitution, Art. I, sec. 17, requires payment of fair compensation for the property so taken [pursuant to the State's power of eminent domain]. This is the only limitation imposed on sovereignty with respect to taking." *Hutton*

& Bourbonnais Co., 251 N.C. at 533, 112 S.E.2d at 113. "The taking must, of course, be for a public purpose, but the sovereign determines the nature and extent of the property required for that purpose." *Id.* "It may take for a limited period of time or in perpetuity." *Id.* "It may take an easement, a mere limited use, leaving the owner with the right to use in any manner he may desire so long as such use does not interfere with the use by the sovereign for the purpose for which it takes," *id.*, "or it may take an absolute, unqualified fee, terminating all of defendant's property rights in the land taken." *Id.*

"What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest." *Nichols* § 1.42, at 1-132 to 1-133 (footnote omitted). "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." *Id.* § 1.42, at 1-133, 1-142. "The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of 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) (citation omitted); *Skinner v. Thomas*, 171 N.C. 98, 100–01, 87 S.E. 976, 977 (1916) ("It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end." (internal quotation marks omitted)). "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property." *Skinner*, 171 N.C. at 101, 87 S.E. at 977 (internal quotation marks omitted).

> [T]he police power[] [is] the power vested in the Legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

Durham v. Cotton Mills, 141 N.C. 615, 639–40, 54 S.E. 453, 462 (1906).

"Laws and regulations of a police nature . . . do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." *Nichols* § 1.42, at 1-145 to 1-146, 1-148. "'Regulation' implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the property subject

to the regulation." *Id.* § 1.42, at 1-145.

"[T]here is a considerable resemblance between the police power and the power of eminent domain in that each power recognizes the superior right of the community against . . . individuals," *id.* § 1.42, at 1-153, "the one preventing the use by an individual of his own property in his own way as against the general comfort and protection of the public," *id.*, "and the other depriving him of the right to obstruct the public necessity and convenience by obstinately refusing to part with his property when it is needed for the public use." *Id.* § 1.42, at 1-153 to 1-154. "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain," *id.* § 1.42, at 1-157, "but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain." *Id.*

"In the exercise of eminent domain[,] property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public." *Id.* § 1.42[2], at 1-203. "In the exercise of the police power[,] the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of such property is

injurious to the public welfare." *Id.* "Under the police power the property is not generally appropriated to another use, but is destroyed or its value impaired, while under the power of eminent domain it is transferred to the [S]tate to be enjoyed and used by it as its own." *Id.* § 1.42[2], at 1-203, 1-212, 1-214 (footnote omitted).

Police powers are "established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety." *Cotton Mills*, 141 N.C. at 638–39, 54 S.E. at 461. "They are a just restraint of an injurious use of property, which the Legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom, where it is not controlled by fundamental law." *Id.* at 639, 54 S.E. at 461.

> It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.

Id. (internal quotation marks omitted). "Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative action to declare what general regulations shall be deemed

expedient." *Id.* "This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor." *Id.* at 639–40, 54 S.E. at 461–62.

The State's police power "prescribe[s] regulations to promote the health, peace, morals, education, and good order of the people, and . . . legislate[s] so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." *Id.* at 641, 54 S.E. at 462 (internal quotation marks omitted). "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 642, 54 S.E. at 462 (internal quotation marks omitted); *Brewer v. Valk*, 204 N.C. 186, 189–90, 167 S.E. 638, 639–40 (1933) ("The police power is an attribute of sovereignty, possessed by every sovereign state, . . . [whereby e]ach State has the power . . . to regulate the relative rights and duties of all persons, individuals and corporations, within its jurisdiction, for the public convenience and the public good."). Such legislation "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict

his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." *Cotton Mills*, 141 N.C. at 642, 54 S.E. at 462 (internal quotation marks omitted).

In order to determine whether the Map Act in the present case is an exercise of the State's power of eminent domain or police powers, we find persuasive and instructive the Florida Supreme Court's approach to a comparable question concerning the constitutionality of a similar state statute in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). In *Joint Ventures*, the court considered the constitutionality of a Florida statute that prohibited the development of property subject to a map of reservation recorded by the Florida Department of Transportation ("the Florida DOT"). *Joint Ventures*, 563 So. 2d at 623. The Florida statute provided that, with limited exception, properties subject to the map of reservation could not develop the land for a minimum of five years, which period could be extended for an additional five years. *Id.* The Florida DOT, like NCDOT in the present case, argued that the legislature "did not 'take' but merely 'regulated'" the plaintiff's property "in a valid exercise of the police power." *Id.* at 624. The court's inquiry thus concerned whether the statute was "an appropriate regulation under the police power, as [the Florida] DOT assert[ed], or whether the

statute [wa]s merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain." *Id.* at 625.

The Florida DOT suggested that the statute was "a permissible regulatory exercise of the state's police power because it was necessary for various economic reasons." *Id.* ("[W]ithout a development moratorium, land acquisition costs could become financially infeasible. If landowners were permitted to build in a transportation corridor during the period of [the Florida] DOT's preacquisition planning, the cost of acquisition might be increased."). However, the Florida Supreme Court determined that, "[r]ather than supporting a 'regulatory' characterization," *id.*, the circumstances showed the statutory scheme to be an attempt to acquire land by sidestepping the protections of eminent domain. *See id.* The court reasoned: "[T]he legislative staff analysis candidly indicate[d] that the statute's purpose [wa]s not to prevent an injurious use of private property, but rather to reduce the cost of acquisition should the state later decide to condemn the property." *Id.* at 626. Because the court "perceive[d] no valid distinction between 'freezing' property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings," *id.*, the court determined that "the state exercised its police power *with a mind toward property*

acquisition." *Id.* at 627 (emphasis added). Thus, although the court "d[id] not question the reasonableness of the state's goal to facilitate the general welfare," *id.* at 626, it was concerned "with the means by which the legislature attempt[ed] to achieve that goal," *id.*, when such means were "not consistent with the constitution." *Id.* Because "[a]ssuring highway safety and acquiring land for highway construction are discrete state functions," *id.* at 627, the court held that the statute was unconstitutional, since it permitted the Florida DOT to take the plaintiff's private property without just compensation or the procedural protections of eminent domain. *See id.* at 627–28.

In the present case, when the General Assembly enacted the Map Act, it stated that the enabling legislation was "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 (emphasis added). NCDOT argues that its use of the Map Act is for "corridor protection," which is "a planning tool NCDOT uses in designing and building highways because it allows the highway's proposed location to fit into the long-range plans a community has for its future development," and that corridor protection "accomplish[es] more than merely 'saving taxpayers money.'"

According to an affidavit from Calvin William Leggett ("Mr. Leggett") — the manager of NCDOT's Program Development Branch who

is responsible for managing the official transportation corridor map program and is "familiar with NCDOT's corridor protection process and why NCDOT utilizes the Map Act to accomplish corridor protection" — corridor protection generally, and the Map Act specifically: "facilitate[] orderly and predictable development;" "enable[] NCDOT to preserve the ability to build a road in a location that has the least impact on the natural and human environments;" "can minimize the number of businesses, homeowners, and renters who will have to be relocated once the project is authorized for right[-]of[-]way acquisition and construction;" and "protect[] the planned highway alignment by limiting future development within the corridor" and, thus, "reduc[e] future right[-]of[-]way acquisition costs for the proposed highway," which "represent the single largest expenditure for a transportation improvement, particularly in growing urbanized areas where transportation improvements needs are the greatest." In other words, NCDOT asserts that the restrictions of the Map Act are intended to facilitate a less disruptive and lower cost migration of residents and businesses "if or when" the Northern Beltway Project is sufficiently funded and is under construction, and that, without such restrictions, "proposed urban loop routes could be jeopardized due to increased development, disruption related to relocations, property access issues, and future

right[-]of[-]way acquisition costs."

Nonetheless, these detriments or harms to the public welfare that are purportedly prevented or averted as a result of the Map Act's restrictions are *only* injurious to the public welfare if the Northern Beltway Project is constructed and NCDOT condemns the properties within the transportation corridor. Effectively, NCDOT urges that "proposed urban loop routes could be jeopardized" due to these "harms," but none of these issues cause harm to the public welfare unless the Northern Beltway Project is built and unless NCDOT has to acquire the affected properties. Thus, there is no detriment to the public interest that the Map Act's purported "regulations" will prevent unless NCDOT needs to condemn Plaintiffs' respective properties to build the Northern Beltway. Therefore, we conclude that the Map Act is a cost-controlling mechanism, and, "[b]y recording a corridor map, [NCDOT] is able to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels." *See Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part). Because the power exercised through this legislation is one "with a mind toward property acquisition," *see Joint Ventures*, 563 So. 2d at 627, we conclude that the Map Act empowers NCDOT with the right to exercise the State's power of

eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map that was recorded in accordance with the procedures set forth in N.C. Gen. Stat. § 136-44.50, which power, when exercised, requires the payment of just compensation. *See, e.g.*, *Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 407, 14 S.E.2d 252, 256 (1941) ("If the land is needed for a public use, the law provides a way for acquiring it, and the Constitution prohibits its appropriation for such a use without compensation." (internal quotation marks omitted)).

B. Filing of Transportation Corridor Maps as an Exercise of Power of Eminent Domain

We next examine whether NCDOT exercised its power of eminent domain by filing the transportation corridor maps in accordance with the provisions of the Map Act. Specifically, we consider whether NCDOT exercised its powers of eminent domain under the Map Act against Plaintiffs' respective properties located in the Western Loop when it filed the transportation corridor map for the Western Loop in 1997, and against Plaintiffs' respective properties located in the Eastern Loop when it filed the transportation corridor map for the Eastern Loop in 2008, and whether the filing of these transportation corridor maps provide the basis for Plaintiffs' takings claims. We begin where the trial court ended, by considering whether Plaintiffs' claims for inverse

condemnation were not yet ripe because Plaintiffs "claim[ed] the date of the taking occurred when the maps were published," Plaintiffs "d[id] not claim the taking took place on any other dates,"[2] and "it is established North Carolina law that mere recording of project maps do not constitute a taking."

"The United States Supreme Court has recognized that a 'nearly infinite variety of ways [exist] in which government actions or regulations can affect property interests.'" *Beroth II*, 367 N.C. at 341, 757 S.E.2d at 473 (alteration in original) (quoting *Ark. Game & Fish Comm'n v. United States*, __ U.S. __, __, 184 L. Ed. 2d 417, 426 (2012)). "Short of a permanent physical intrusion, . . . no set formula exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property." *Beroth II*, 367 N.C. at 341, 757 S.E.2d at 473 (alteration in original) (internal quotation marks omitted).

[2] Plaintiffs moved to amend their complaints pursuant to N.C. Gen. Stat. § 1A-1, Rule 15, to include additional allegations that the taking of their respective properties was "presently occurring" and "did occur at an earlier date upon any of" the twenty-three dates further alleged in the motion to amend. Plaintiffs' motion was denied by the trial court on 26 July 2013 — nine days after Plaintiffs filed their notice of appeal with this Court from the 8 January 2013 and 20 June 2013 orders. Plaintiffs did not seek to appeal from the trial court's order denying their motion to amend the complaints. Accordingly, we consider only the allegations in Plaintiffs' original complaints, which alleged that Plaintiffs suffered their respective takings when the transportation corridor maps were filed for the Western and Eastern Loops.

Thus, while our Supreme Court recognized that "the goal of inverse condemnation here is relatively straightforward: to compensate at fair market value those property owners whose property interests have been taken by the development of the Northern Beltway," *id.*, "[d]etermining whether there has been a taking in the first place . . . is much more complicated." *Id.*

"The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Long*, 306 N.C. at 201, 293 S.E.2d at 110 (internal quotation marks omitted). "The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Id.* (internal quotation marks omitted).

A "taking" has been defined as "'entering upon private property for more than a momentary period, and under warrant or color of legal authority,'" *id.* at 199, 293 S.E.2d at 109 (quoting *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)), "'devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.'" *Id.* (quoting *Penn*, 231 N.C. at

484, 57 S.E.2d at 819). "Modern construction of the 'taking' requirement is that an actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of the property." *Id.* at 198–99, 293 S.E.2d at 109. Thus, "'taking' means the taking of something, whether it is the actual physical property or merely the right of ownership, use or enjoyment." *Tel. Co. v. Hous. Auth.*, 38 N.C. App. 172, 174, 247 S.E.2d 663, 666 (1978) ("[P]roperty itself need not be taken in order for there to be a compensable taking."), *disc. review denied*, 296 N.C. 414 (1979); *see also Beroth II*, 367 N.C. at 351–52, 757 S.E.2d at 479 (Newby, J., dissenting in part and concurring in part) ("A substantial interference with a single fundamental right inherent with property ownership may be sufficient to sustain a takings action; wholesale deprivation of all rights is not required."). "[T]here is a taking when the act involves an actual interference with, or disturbance of property rights, resulting in injuries which are not merely consequential or incidental." *Penn*, 231 N.C. at 484–85, 57 S.E.2d at 820 (internal quotation marks omitted). "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *United States v. Gen. Motors Corp.*,

323 U.S. 373, 378, 89 L. Ed. 311, 318 (1945).

"[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ark. Game & Fish Comm'n*, __ U.S. at __, 184 L. Ed. 2d at 426. Nonetheless, the Supreme Court "has recognized few invariable rules in this area." *Id.* at __, 184 L. Ed. 2d at 426. Aside from the cases that involve "a permanent physical occupation of property authorized by government" or "a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land, . . . most takings claims turn on situation-specific factual inquiries." *Id.* at __, 184 L. Ed. 2d at 426 (citation omitted).

"It is the general rule that a mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected." *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135, 139 S.E.2d 227, 230 (1964) (internal quotation marks omitted). "Thus, the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof." *Id.* at 135–36, 139 S.E.2d at 230–31 (internal quotation marks omitted); *id.* at 138, 139 S.E.2d at 232 ("[T]he mere laying out of a right[-]of[-]way is

not in contemplation of law a full appropriation of the property within the lines." (internal quotation marks omitted)). "No damages are collectible until a legal opening occurs by the actual taking of the land. When the appropriation takes place, any impairment of value from such preliminary steps becomes merged, it is said, in the damages then payable." *Browning*, 263 N.C. at 136, 139 S.E.2d at 231 (internal quotation marks omitted); *id.* at 138, 139 S.E.2d at 232 ("Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property by the Highway Commission. When such appropriation takes place, the remedy prescribed by the statute is equally available to both parties." (internal quotation marks omitted)). "A threat to take, and preliminary surveys, are insufficient to constitute a taking on which a cause of action for a taking would arise in favor of the owner of the land." *Penn*, 231 N.C. at 485, 57 S.E.2d at 820 (citation omitted).

In the present case, this Court must consider whether the restrictions of the Map Act that were applicable to Plaintiffs at the time the maps were filed substantially interfered with the elemental rights growing out of Plaintiffs' ownership of their properties so as to have effected a taking and provided grounds

for the trial court to consider Plaintiffs' claims for inverse condemnation as ripe.

Upon the filing with the register of deeds of a permanent, certified copy of the transportation corridor official map and the filing of "[t]he names of all property owners affected by the corridor," *see* N.C. Gen. Stat. § 136-44.50(a1)(2), (a1)(3), the statutory restrictions of N.C. Gen. Stat. § 136-44.51(a) are applicable to each "affected" owner noticed pursuant to N.C. Gen. Stat. § 136-44.50(a1). These restrictions prohibit the issuance of building permits "for any building or structure or part thereof located within the transportation corridor," N.C. Gen. Stat. § 136-44.51(a), and "the[se] restrictions imposed by [S]tate law never expire," *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part), and are absolute. NCDOT urges that the statutory restrictions of the Map Act cannot be deemed a taking because the Map Act merely "creates a temporary three-year restriction on new improvements to properties located within the mapped corridor," (emphasis in original omitted), which restrictions "are lifted, i.e. sunset, three years from when the property owner first submits a permit request to the local government," and that such restrictions "do not affect current property uses." However, the restrictive provisions of the Map Act do not independently or uniformly "sunset" at any time

following the date of the filing of a transportation corridor map pursuant to the Map Act. Rather, as the Map Act was written and enacted by the General Assembly, NCDOT was granted the right to exercise its power of eminent domain at any time after the transportation corridor maps for the Northern Beltway Project were filed and the environmental impact statements were completed in accordance with N.C. Gen. Stat. § 136-44.50(d). *See* N.C. Gen. Stat. § 136-44.51(a).

Further, the record includes a letter sent by NCDOT's Chief Operating Officer Jim Trogdon ("Mr. Trogdon") in response to a request for information following a 2010 public meeting concerning the status of the Northern Beltway Project. In the course of his effort to "improve communication regarding advanced acquisition hardship requests and procedures for requesting property improvements within the protected corridor," Mr. Trogdon indicated that NCDOT "will still be constructing existing urban loops in our [S]tate for at least 60 years." Thus, based on our review of the statutory language and based on the evidence in the record before us, the restrictions of the Map Act could quite possibly continue to bind "affected" property owners for "at least 60 years," if the Northern Beltway Project is not completed before then.

Therefore, with potentially long-lasting statutory restrictions that constrain Plaintiffs' ability to freely improve,

develop, and dispose of their own property, we must conclude that the Map Act is distinguishable from the cases that established the rule that "the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof." *See Browning*, 263 N.C. at 135–36, 139 S.E.2d at 230–31 (internal quotation marks omitted). In the case before us, NCDOT has not merely "made initial alternative planning proposals" that "contemplate ultimate acquisition of certain lands" owned by Plaintiffs for the purpose of constructing the Northern Beltway. *Cf. Barbour v. Little*, 37 N.C. App. 686, 691, 247 S.E.2d 252, 255, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). Rather, between 1996 and 2012, NCDOT acquired at least 454 properties located in the transportation corridor for the Northern Beltway Project. This Court understands that NCDOT's acquisition of these and other properties located within the Western and Eastern Loops of the Northern Beltway Project does not guarantee that the State has the funds necessary to begin or complete construction of the Northern Beltway. However, this has no bearing on the perpetual applicability of the restrictions of the Map Act upon Plaintiffs' properties, or upon our determination that, without a specified

end to the restrictions on development or improvement, NCDOT exercised its power of eminent domain when it filed the transportation corridor maps for the Western and Eastern Loops. Since "[t]he courts have no jurisdiction to determine matters purely speculative, . . . deal with theoretical problems, give advisory opinions, . . . adjudicate academic matters, . . . or give abstract opinions," *see Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), we decline to consider whether our holding would have been different had the General Assembly imposed time limitations upon the restrictions affecting Plaintiffs' properties pursuant to N.C. Gen. Stat. § 136-44.51.

Further, "[w]hile NCDOT's generalized actions [pursuant to the Map Act] may be common to all, . . . liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." *See Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474 (internal quotation marks omitted). "This discrete fact-specific inquiry is required because each individual parcel is uniquely affected by NCDOT's actions. The appraisal process contemplated in condemnation actions recognizes this uniqueness and allows the parties to present to the fact finder a comprehensive analysis of the value of the land subject to the condemnation." *See id.* These issues

should be among the trial court's considerations on remand.

III. Conclusion

Accordingly, we hold the trial court erred when it concluded Plaintiffs' claims for inverse condemnation were not yet ripe based on its determination that Plaintiffs did not suffer a taking at the time NCDOT filed the transportation corridor maps for the Western and Eastern Loops. We remand this matter to the trial court to consider evidence concerning the extent of the damage suffered by each Plaintiff as a result of the respective takings and concerning the amount of compensation due to each Plaintiff for such takings. In light of our disposition that the trial court erred by dismissing Plaintiffs' claims for inverse condemnation, we need not consider NCDOT's issue on appeal concerning whether the trial court erred by failing to dismiss Plaintiffs' claims for inverse condemnation with prejudice, rather than without prejudice.

Additionally, we note that the relief sought by Plaintiffs in their respective complaints was: for the recovery of damages suffered when NCDOT exercised its power of eminent domain against their properties by recording the transportation corridor maps pursuant to the Map Act; for NCDOT to be compelled to purchase Plaintiffs' properties; and for recovery of fees, costs, taxes, and interest. Plaintiffs' challenge to the constitutionality of

the Hardship Program was one of five alternative claims alleged in order to obtain this relief. Because our disposition allows the trial court, upon consideration of evidence to be presented by Plaintiffs, to award Plaintiffs the relief they sought in their respective complaints, we decline to consider the arguments presented on appeal concerning the constitutionality of the Hardship Program as applied to Plaintiffs. Therefore, we decline to further address the arguments presented for this issue on appeal. We also decline to address NCDOT's suggestion that Plaintiffs' claims for inverse condemnation are barred by the statute of limitations because, as NCDOT concedes, construction on the Northern Beltway Project has not been completed. *See* N.C. Gen. Stat. § 136-111 ("Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the [NCDOT] and no complaint and declaration of taking has been filed by [NCDOT] may, ***within 24 months of the date of the taking*** of the affected property or interest therein ***or the completion of the project involving the taking, whichever shall occur later***, file a complaint[.]" (emphases added)). We further decline to address any remaining assertions for which Plaintiffs and NCDOT — as appellants and cross-appellants, respectively — have failed to present argument supported by persuasive or binding legal authority.

Reversed and remanded.

Judges BRYANT and STROUD concur.