NORTH CAROLINA **FORSYTH COUNTY**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION**

KIRBY	**11 CVS 7119**	)
HARRIS TRIAD HOMES, INC.	**11 CVS 7120**	)
HENDRIX	**11 CVS 8170**	)
ENGELKEMEIR	**11 CVS 8171**	)
HUTAGALUNG	**11 CVS 8172**	)
MAENDL	**11 CVS 8173**	)
STEPT	**11 CVS 8174**	)
NELSON	**11 CVS 8338**	)
REPUBLIC PROPERTIES, LLC	**12 CVS 2998**	)
		)
v		)
		)
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION		)
Defendant.		)

PLAINTIFFS' MEMORANDUM OF LAW

COME NOW Plaintiffs (individually each a "Plaintiff" and collectively "Plaintiffs"), hereby files this Memorandum of Law in support of its motion for summary judgment.

SUMMARY OF THE CASE

Since 1915, NCDOT has built tens of thousands of miles of roads without the need for the restrictions or comfort of the Map Act. After decades of announcements and planning, sixteen years of official mapping, restrictions, and acquisition of nearly five hundred of their fellow Beltway neighbors, Plaintiffs demand that they be paid just compensation by NCDOT.

There is no argument that NCDOT intends to buy or condemn the Plaintiffs' property or that there will be a road over their land. Ivey p. 36-37, 97-121; Depo. Ex. 84-97. NCDOT has purchased all 454++ Beltway properties to date to build the Beltway. Pridemore p. 66; Depo. Ex. 7. NCDOT has stated it will someday buy the other Plaintiffs' property, either by negotiation or all legal means. Ivey p. 97-121.

NCDOT contests Plaintiffs claims not because it has no desire to buy the Plaintiffs but

that it wants to do so on its timetable and on its unilateral terms. Plaintiffs are unwilling to wait another decade while NCDOT controls their property, their financial future and lives. If left to NCDOT, Plaintiffs' eventual confrontation over just compensation would be left to be resolved by the Plaintiffs' heirs.

FACTUAL BACKGROUND

Plaintiffs have previously provided its Statement of Facts outlining the evidence. Reference will be made to the outline in this memorandum.

A. Northern Beltway Project Planning Began in the 1980s though Early 1990s.

The Northern Beltway has been an issue for owners for decades. Winston-Salem Planning was discussing the path of the Beltway in the 1980s. Depo Ex. 73 & 74; Lasley Aff.; Hunt p. **. Newspaper articles show maps in early 1990s. Lasley Aff. Sellers were disclosing the fact of the proposed beltway in late 1990. Bowen Aff. ¶ 2-4. Building permits were imprinted with Beltway notices in October 1991. Harris Aff. ¶7; Harris Depo. Ex. 5. Newsletters about the Eastern Loop date at least from February 1993 (RH00582). NCDOT was buying property in both the western and eastern loop since the mid-1990s. In the Western Loop, NCDOT began purchases in March 1996. Depo. Ex. 7. In the Eastern Loop, Mr. Hendrix lost a $1.2m sale in 1999 due to the Beltway. Hendrix Aff. ¶ 5. Builders were not being denied permits in the Eastern Loop in 1998 with NCDOT buying lots from a Larry Callahan on Marshallberg Road in July and August 1998. Depo. Ex. 63 & 64.

B. Vienna Baptist Church Acquisition.

A factual point that Judge Hunter made in the *Beroth* opinion requires correction. Judge Hunter stated that Vienna Baptist Church was purchased as a protective acquisition. Judge Hunter's statement was made without the benefit of the record that is before this court. Vienna Baptist was a straight-forward hardship acquisition, although approved by NCDOT without any

financial or medical document of its hardship. The church did not apply for a building permit on this parcel or even threaten development. Depo. Ex. 14, Lambert p. 23. To the contrary, the church actually applied for a building permit for its property outside the Beltway at 1831 Chickasha Drive in 2008.

C. Judge Bullock's Decisions on Beltway Matters.

Two decisions from Judge Bullock of the U.S. District Court for the Middle District of North Carolina provide judicial findings of fact directly related to this case: *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 151 F. Supp. 2d 661 (M.D.N.C. 2001) ("*Case 1*") and *N.C. Alliance For Transp. Reform, Inc. v. U.S. Dept. Transp.*, CIV.1:99-CV-00134, 2002 WL 1009725 (M.D.N.C. Feb. 26, 2002) ("*Case 2*").

In *Case 1*, Judge Bullock provides the history of the western loop of the Beltway project. NCDOT submitted draft environmental impact statements as early as June 1992. *Case 1* p. 669. The Record of Decision ("ROD") was submitted and approved within one day. The day after the ROD was approved the Clean Air standards changed and the Forsyth County TIP was non-conforming. The TIP for Forsyth County again lapsed into non-conformity with the Clean Air Act in April 1999. As a result, Forsyth County's lapse of conformity meant that the western section could not receive any federal funds until the TIP was again brought into conformity with the Clean Air Act. In April 1999, Federal Highway Administration ("FHWA") told NCDOT that the environmental process was being reopened to consider whether new or supplemental analysis and documentation were warranted on the western section. On April 21, 1999, Walter Holton, the U.S. Attorney for the Middle District of North Carolina, issued a press release that confirmed that no further funding for the western Beltway could occur until the environmental assessment was re-done, funding was curtailed and that the lawsuit was moot. Depo. Ex. 83;

Holton Aff. The new environmental assessment was not completed until January 2007 and the new ROD approved February 2008. *N. C. Alliance*, 713 F. Supp. 2d 491, 500 (M.D.N.C. 2010).

In *Case 1*, Judge Bullock held that the "FHWA" failed to analyze the Eastern Loop and Western Loop of the Northern Beltway together in one environmental impact statement, and thus violated NEPA. *N.C. Alliance,* 151 F.Supp.2d at 676–78. Judge Bullock also found that Federal defendants acted in bad faith by approving the ROD after only a one-day review.

> The cursory one-day review undertaken by FHWA, which was the final agency action on a project of considerable magnitude and controversy, indicates a complete disregard for this "hard look" requirement. When considered in combination with the non-conformity announcement on the next day, Federal Defendants' one-day review of the ROD ***constitutes bad faith in performing a statutorily imposed duty***. The decision to reopen the entire NEPA process, which alone would not indicate bad faith conduct, provides further evidence that Federal Defendants would not have issued the ROD so rapidly had they undertaken a more deliberate consideration of the environmental analysis for the Western Section. As a result, the court finds attorney's fees and expenses warranted under 28 U.S.C. § 2412(b). *Id.* at 676.

In short, the western Beltway project was stopped and delayed for over a decade (and counting) because NCDOT and FHWA's environmental assessment was out of compliance with federal standards and the approval of the ROD in 1996 was done recklessly (because the agencies knew the Clean Air standards would render the project non-conforming) and in bad faith in the first instance. The Plaintiffs are innocent in this exercise of "bad faith" and have suffered for their state and federal governments' mistakes and dilatory pace.

In *Case 2*, Judge Bullock reviewed a set of hardship applications by property owners in the western Beltway: the Harpers (a property owner adjacent to Plaintiff Harris Triad's property), the Talley's (owners one mile from Plaintiffs Nelsons), and Mr. Hicks (who died before his hardship request could be processed, also property less than a mile from the Nelsons). Judge Bullock found that these three western Beltway property owners "have established that the

property is unmarketable." NCDOT bought these owners.

ARGUMENT

In his concurring opinion in *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 654, 669 S.E.2d 286, 289 (2008), Justice Brady reminds us of the sacred place property rights hold in our society:

> The legal protection of private property rights dates back to the Magna Carta, which declares: "No free-man shall be seized, or imprisoned, *or dispossessed,* ... excepting by the legal judgment of his peers, or by the laws of the land." In his *Commentaries on the Laws of England,* William Blackstone wrote that "[an] absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

Plaintiffs repeat Justice Hugo Black's admonition against government burdens on a few for the benefit of the public as the touchstone of this case:

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

Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)(J. Black), *L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, 2011 WL 1467366 (N.C. App. 2011)(citing *Armstrong*); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980)(Governmental action which places a burden on an individual's property which in fairness the entire community should share constitutes a taking and the government must compensate the property owner for the loss). "When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981).

In *Burrows v. City of Keene*, 432 A.2d 15, 20-21 (N.H. 1981), the City of Keene sought to enjoy a public benefit by forcing plaintiffs to devote their land to a particular purpose and prohibiting all other economically feasible uses of the land, thus placing the entire burden of preserving the land as open space upon the plaintiffs.

> public officials have a duty to obey the constitution, and they have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual. The greater the cost of accomplishing something which is considered to be in the public interest, the greater the reason why a single individual should not be required to bear that burden. . . . [T]he prospect of a great public benefit "may afford an excellent reason for taking the plaintiff's land in the constitutional manner, but not for taking it without compensation." Id at. 20-21(internal cites omitted)

The inequity of the situation created by NCDOT is accurately expressed in *Althaus v. United States*, 7 Cl. Ct. 688 (1985), which involved the ten year saga of acquisition of park land subjected to development restrictions and threatening conduct by the government:

> It is one thing to have the sword of condemnation resting available but unpointed in the government sheath. It is another to have it suspended like that of Damocles directly above one's property.

NCDOT has placed the "sword of condemnation" over the Plaintiffs' properties and hundreds of other owners for over a generation. NCDOT has burdened the Plaintiffs' property so that the North Carolina taxpayer will get a better price for the property at some time in the unspecified future. This cannot stand. Plaintiffs have been forced to indefinitely bear the burden of the Beltway for the sake of the taxpayers. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

I. THE MAP ACT DOES NOT PASS THE "ENDS – MEANS" TEST.

The "ends-means" test is to be applied to the facts of this case.

> The test for a reasonable exercise of a police power rule or regulation is known as the "ends-means" test. In evaluating the regulation's effect, one first looks to the 'ends,' or goals, of the legislation to determine whether it is within the scope of the police power, and second, to the 'means,' to determine whether the interference with the owner's right to use his property as he deems appropriate is reasonable. ***A failure in either 'ends' or 'means' results in a taking.***
>
> . . .
>
> The purpose of employing the ends-means test is to determine whether the regulation at issue is a legitimate exercise of State police power, or, ***whether the "regulation" is in substance an exercise of eminent domain power requiring just compensation.*** In other words, the ends-means test is a tool used by the courts to determine whether the state has exercised its police power or its eminent domain power. The question whether NCDOT has exercised its police power versus its eminent domain power in the instant case is tantamount to asking whether NCDOT has effected a taking of Plaintiffs' property.

Beroth Oil Co. v. N. Carolina Dept. of Transp., 725 S.E.2d 651, 662-663 (N.C. Ct. App. 2012)

A. The Ends.

The Map Act controls and protects NCDOT's costs for future acquisition of public rights of ways. N.C.G.S. § 136-44.50 et seq. The control of future acquisition costs for State rights of ways is a public benefit to all North Carolina taxpayers. NCDOT has confirmed this "ends" in its "FAQ" publications on its web site and in testimony:

> Why: This protection is designed to ***protect North Carolina taxpayers from excessive increases in expense*** when the State starts to buy property to build the road.
>
> Sometimes, a potential route becomes a 'protected corridor' because the area is growing so quickly it is important to limit new buildings ***to help save taxpayers money***. Id.
>
> [I]t is ***highly unlikely*** that property owners will be allowed to do things that ***will increase the cost of building the road*** (by dramatically increasing the cost of buying the property)"; Compl.

Ex. A; Depo. Ex. 71, Trogdon Depo. Ex. 7; Trogdon p. 39. (emphasis added)

****

(Examination of Jim Trogden by Asst. AG Tanoury)

Q. So what is your understanding as to the most important reason behind corridor protection?

A. We would -- we would want to discourage, you know, more and rapid development within a corridor that would change the impacts from having to acquire, you know, one or two pieces of residential property, to, you know, several hundred because of the development pattern. So it's really how do we use the Map Act to coordinate with local government who does the planning and zoning, and the development community, make sure we're not putting our citizens at a disadvantage.

Q. Now, if there's unrestricted development in a -- in a highway corridor that's unprotected, what impact would that have on the ability for DOT to plan and construct a highway in that protected corridor?

A. It would make it much more complicated, and it would certainly drastically increase our number of relocations required. (Trogden. p. 49.)[1]

*****

(Examination of Virgil Pridemore by Asst. AG Tanoury)

Q. So if unrestricted development is allowed to occur in the path of a future highway, such as the Winston-Salem Northern Beltway, if unrestricted development were allowed and it were not a protected corridor, would that jeopardize the future highway construction?

A. It could jeopardize a -- construction from the standpoint of funding, of the amount of funds that are required. And the other part of it is, as corridors and projects are studied, one of the things that's certainly to take into consideration is the number of and complexities of relocations. (Pridemore p. 79)

B. The Means: NCDOT Uses Multiple Methods to Control Acquisition Costs.

[1] Increased relocations could only occur if property owners increased the number of homes or businesses on their properties.

The NCDOT employs many different methods – the "means" – to achieve controlled and lower future acquisition costs for State right of ways - the "ends.". These methods are:

i. NCDOT legally designates specific properties as being in a Protected Corridor and marked for future acquisition by NCDOT for the roadway. N.C.G.S. 136-44.50 et seq (the "Map Act").; Depo. Exs. 4, 4A, 5.

ii. NCDOT, using the Map Act, imposes development restrictions on the designated properties (Depo Exs. 4, 4A, 5).

iii. NCDOT coordinates with local planning authorities to interfere with owners trying to get building permits. Harris Aff. ¶ 7; Harris Depo. Ex. 5; Depo. Ex. 63 (Bates No. 00090 – planning would not issue a permit in Eastern loop as early as January 1998); McInnis p. 14-16, Republic Depo. Ex. 3 (RH00154).

iv. The Official Map is recorded with the register of deeds, county tax office and cross-indexed in the grantors registry. N.C.G.S. § 136-44.50(b).

v. The mapped Protected Corridor and restrictions have no stated deadline for NCDOT to take action, complete funding for construction or purchase property. As noted above in *Case 1*, re-doing the FEIS and ROD took from April 1999 until June 2008 to accomplish.

vi. The development restrictions on property do not have a stated expiration.

vii. NCDOT overtly and expressly discourages and prohibits owners from improving their property, telling owners not to improve their properties at NCDOT meetings and in publications on the NCDOT web site. Depo. Ex. 71, Hriniak Aff. ¶16-17, Clapp ¶ 8-9; P. Smith Aff. ¶ 8; Reynolds Aff. ¶ 11-12. See Depo. Ex. 63 (Bates No. 00090)(Callahan would not be issued a building permit on the Eastern Loop – ten years before the Map was filed for the Eastern Loop).

viii. Prior to funded acquisition, NCDOT makes purchase offers <u>only</u> to owners that have significant safety issues, medical or financial distress (hardships); N.C.G.S. § 136-44.53; Depo. Exs. 8 & 104.

ix. N.C.G.S. § 136-44.53, the "Hardship Program," is operated as a "case by case" discretionary program, with no appeal procedure for owners. Pridemore p. 25-26; Joines p. 29, 71; Joines Aff. Depo. Ex. 11 (¶¶ 8-19).

x. NCDOT tells "hardship" owners that NCDOT's purchase offers are made on a take it or leave basis and if agreement cannot be reached NCDOT will return when the project is funded. Depo. Ex. 8; Lambert p. 100-101; S. Williams p. 7-11, 17; Barr p. 30-34, Hriniak Aff. ¶ 11-15, Barrett Aff. ¶ 17-22, M. Hendrix Aff. ¶ 8; Reynolds Aff. ¶ 19, McInnis. p. 73-74; Bowen Aff. ¶ 10.

xi. Detailed roadway maps of the Northern Beltway showing controlled access, rights or way and other features are made publically available on NCDOT's website. Depo. Exs. 45-46; Ivey. p. 123.

xii. NCDOT rents the residential properties it buys in the Beltway (annual net income of over $700,000). Hatton. p. 70-71; Depo. Ex. 31.

xiii. NCDOT removes or demolishes structures in the Beltway, reducing its maintenance costs. Hatton p. 194-196.

xiv. NCDOT will not condemn property in the Beltway until there is funded acquisition for that relevant section of the Beltway. Depo. Ex. 8; Ex. 24.

xv. NCDOT will notify owners that the property seeking to improve their property that the property is in the planned Beltway, that NCDOT plans to make an offer and then makes a take it or leave it offer with no exercise of condemnation. Republic Depo. Ex. 3 RH0084 and RH00180.

C. The Means: The Actual Execution and Impact of the Means in the Beltway.

As a result of the various means and methods utilized by NCDOT in the Northern Beltway, the record indicates that impact of the NCDOT's methods are that Beltway properties have not been sold, improved or condemned and have been rendered unmarketable.

The execution of the "Means" is unequal, standardless, arbitrary and capricious.

i. There have been no building permits or subdivision applications submitted to or approved by NCDOT. N.C.G.S. § 136-44.51 ("The Secretary of Transportation or his designee, ... shall be notified within 10 days of all requests for building permits or subdivision approval within the transportation corridor"). NCDOT has only approved variances for a shed and closing in a garage. Ivey p. 66-69.

ii. City of Winston-Salem Planning provided a list of permits that have a "beltway" designation. A review of the permit list indicates that many permits pre-date the Protected Corridor filing in 11/2008, that 74 are demolition permits, many are sign permits and that no permit is for constructing an improvement in the Beltway itself. Robertson Affidavit.

iii. There have been no less 454 hardship acquisitions in the Beltway; meaning 454 concurrences by a governmental authority that those 454 Beltway properties are unmarketable. Depo. Exs. 8, 59 & 106 (23 CFR §710.503(c)).

    a. NCDOT has made 70+ hardship acquisitions since July 2010 costing over $15 million of public money. Depo. Ex. 25.

b. 300 hardship applications since 2006 (Yancey p. 28) and 154 hardship purchases between 2007 to March 2011. Depo Ex. 23 - Hatton Aff. ¶ 15.

iv. Judge Bullock made a finding of fact that three properties (each near the Plaintiffs Harris & Nelson) are "unmarketable." See *Case 2*.

v. Since the Protected Corridors were filed, there have been 16,162 qualified sales transactions of property within one (1) mile of the 34 mile long Beltway, ***but*** only 49 qualified sales transactions of property significantly in the Beltway. Joyce Affidavit; Crawford Affidavit.

vi. NCDOT's evidence of qualified sales in the Beltway is that there have only been 39 and most all of these "qualified" sales in the Beltway are slightly or not in the Beltway at all. McCracken p. **; McCracken Exs. 5 & 6.

vii. NCDOT's expert stated there is no market for unimproved land in the Beltway. NCDOT's expert could not find enough qualified sales of unimproved land in the Beltway to conduct any analysis. McCracken p. **.

viii. There is a very significant statistical difference in commerce / sales transactions between Beltway property and non-beltway property within one-mile of the Beltway; sales activity statistically decreases as property is closer to the Beltway. Patrick McMullan Affidavit and attached Exhibits.

ix. Owners have lost sales due to the Beltway or been unable to sell the property. Hendrix Aff. . ¶ 5-6, Reynolds Aff. ¶ 4-7, Barrett Aff. ¶ 14; Kirby p. 71-77.

x. Owners purchased under hardship elected to take NCDOT prices that they thought were too low and unfair because NCDOT told them NCDOT would walk away. Hriniak Aff. ¶ 11-15, Barrett Aff. ¶ 17-22, Reynolds Aff. ¶ 20-24; Bowen Aff. ¶ 10-14. See Depo. Ex. 24 (the 10 Beltway owners condemned all received 33% to 150% over NCDOTs deposit).

xi. NCDOT tells some owners not to even bother applying for Hardship. Weisner Aff. ¶ 11-18, Stept p. 67; Engelkeimer Depo. Ex. 9.

xii. NCDOT has unwritten standards for evaluation of hardship applications. Pridemore p. 81-83.

xiii. NCDOT applies the written standards in an arbitrary and capricious manner, buying some owners while refusing to buy others. (ie; NCDOT says it does not buy businesses such as Harris Triad, but buys Vienna Baptist, Reynolds Garage, builder Chris Blocker and HVAC business owner Toni Stewart). See Statement of Fact Section F, Pridemore p. 72-74 (March 2012). AC Reynolds Aff. ¶ 2.

xiv. Hardship acquisition decisions are in the sole discretion of one person – the NCDOT Right of Way manager. Pridemore p. 25-26.

xv. NCDOT refuses to buy owners (Harris Triad) that have been forced to rent their property as landlords; then, NCDOT turns around and competes in the rental market against these Beltway owners, depressing rents. NCDOT does not pay taxes, insurance or debt service. Depo. Ex. 31; Hatton p. 52, 54; Pridemore p. 67, 106.

xvi. NCDOT buys owners that are renting their properties, but does not buy Plaintiff Harris Triad, Maendl, Stept, Hutagalung, or Engelkeimer. Depo. Ex. 29 7 Ex. 105; Pridemore p. 55-57; Yancey p. 102.

xvii. NCDOT earns net income of over $700,000 on its rental of over 100 Beltway rental properties. Depo. Ex. 31.

xviii. NCDOT has changed the character of Beltway neighborhoods by:
   a. turning the neighborhoods into rental communities from the former single family owner occupied subdivision;
   b. renting to a class of tenants that do not fit in with the nearby home owners
   c. tearing down / removing structures;
   d. not maintaining its property;
   e. increased crime and vandalism in Beltway neighborhoods.

xix. NCDOT does not completely review the hardship packages sent to it.

xx. Owners purchased at the same time with similar properties within one-quarter mile are offered completely different prices, and NCDOT refuses to adjust its comparable sales. Bowen Aff. ¶ 11-14.

xxi. NCDOT continues to provide shifting acquisition dates to owners. Depo. Exs 75-81. NCDOT Chief of Operations Trogdon said it would be over 10 years before acquisition might start. Trogdon p. 22, Hriniak Aff ¶ 16-17, Clapp Aff. ¶ 8-9, Reynolds Aff. ¶ See Lasley aff. (local newspaper articles).

D. The Means Are Unreasonable.

An endless restriction on the use of property on a select few owners, prolific, indiscriminate buying of some owners and not others and the "take it or leave it" offers made to the "hardship" owners[2] are unreasonable methods of saving North Carolina taxpayers money. NCDOT does not compensate the owners in the Protected Corridor. Welborn p. 26-29. The

Map Act is not a valid use of the police powers and goes far beyond the legitimate goals of planning and notice.

Plaintiffs acknowledge a line of cases supporting the proposition that planning does not subject the government to liability for a taking.

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

6214 S. Blvd. Holdings, LLC v. City of Charlotte, 178 N.C. App. 562, 631 S.E.2d 893 (2006). Plaintiffs do not challenge or contest legitimate planning. While NCDOT has discretion in how it exercises its duties, such discretion is not unfettered. *Drewry v. NCDOT,* 168 N.C. App. 332, 338, 607 S.E.2d 342, 346-47 (2005) (NCDOT vested with broad discretion in carrying out its duties . . . "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse").

In the Northern Beltway, NCDOT long ago stopped planning and transitioned to restricting and acquiring properties. The recording of the Map and listing of properties on the public record, publishing roadway right of way maps, imposition of restrictions, and the continual purchase of hundreds of properties with millions of public dollars is far beyond the concept of plotting and planning. NCDOT has finalized its roadway location, acted and is only waiting for funding. Waiting for funding is not plotting or planning.

Plaintiffs have found no other states that permit their departments of transportation to indefinitely map and restrict their citizens' properties all in furtherance of eventually buying

---

[2] "Hardship" is a euphemism for desperate owners with no option but to ask NCDOT to buy their property.

future rights of way through the power of eminent domain. In contrast to North Carolina, Tennessee mandates that "Any highway placed on the official map shall be removed from the map unless the governing body or the department of transportation, as the case may be, has begun acquisition of right-of-way, begun the construction of the highway, or begun the widening or other planned improvement of the highway official map . . . . in seven years for state highways" Tenn. Code Ann. § 54-18-208. "Upon adoption of an official map, the advance acquisition of rights-of-way for those streets on the official map shall proceed as expeditiously as feasible." Tenn. Code. Ann. § 54-18-208(c). The Map Act has had the opposite effect on NCDOT. Instead of imposing a sense of urgency and acceleration upon NCDOT to prevent harm to innocent owners, the Map Act empowers NCDOT to be dilatory and arbitrary because it knows owners cannot increase the value of their property and will become desperate to accept any low ball price absent actual condemnation.[3] NCDOT has discretion to cease negotiations with these hardship owners. This is a shameful exercise of NCDOT's discretion over owners who had ***no*** discretion over whether they are in the Protected Corridor or not.

1. These Means Are Unreasonable In Other Jurisdictions.

The court may turn to cases from numerous other jurisdictions that have found lengthy restrictions on property to be unreasonable. [4] Delaware struck down a similar planning regime as the Map Act in *Lackman v. Hall* 364 A.2d 1244 (Del. Ch. Ct. 1976). The Delaware legislature by statute authorized the establishment of prospective highway right-of-way areas designated as "corridor routes." The purpose of the "corridor route" restrictions was to save the state and its taxpayers money with regard to the acquisition of land for highway expansion.

[3] Protected Corridors have been in place for well over ten years in Guilford, Wake and Cumberland Counties.
[4] Plaintiffs have not found any situation approaching the temporal, geographic and quantitative magnitude of this case.

> The 'Corridor Route' legislation . . . places a limitation on the rights of private property based on the possibility or probability that the property will be needed for a public use at some indefinite future time. The primary difference is that it purports to do so without a taking and without compensation. Rather it merely 'sets it aside' for a possible public use subject to certain conditions which otherwise would not apply to its utilization by its owners.
>
> . . . .
>
> Zoning cannot be used as a substitute for eminent domain proceedings to defeat the payment of just compensation by depressing (property) values and so reducing the amount of damages to be paid when private property is to be taken for public use.
>
> The Corridor Route legislation, as I view it, not only has this unacceptable regulation of property values as its primary purpose, ***it goes even further by virtue of the ax it hands the State to hold over the head of selected property owners.*** While it is undoubtedly an administrative planning act, ***it is also one which contemplates condemnation.*** The flaw in its overall administrative goal is that portion of it which would enable the State to lawfully accelerate the taking of presently unneeded property as a virtual punishment to a private owner who dared to improve his land or use it in any manner which would increase its value.
>
> A mere contemplation of a road improvement at some indefinite time within the next thirty years is too speculative and too remote to justify the exercise of the power of eminent domain. While long range planning by the State Highway Department is certainly commendable, nevertheless, ***the rights of private property, which the law guards so zealously, may not be subordinated to the mere Possibility or probability of a public use at some indefinite, remote time in the future.***'

In *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex. App. 1975), the local government was using zoning laws to prevent the development of a subdivision on property intended for future acquisition to be a lake and park. The local government's main reason for preventing the development of the subdivision was that it would increase the future acquisition cost of the property in question. *Id.* at 270. The court held that when the government

acts in this manner it is not neutral.

> But where the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government, the situation is patently different. Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer an impartial weigher of the merits of competing interest among its citizens. ***Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor.*** The social desirability of leaving government free to seek its own enrichment at the expense of those whom it governs under the guise that it has the power to regulate harmful conduct is not readily apparent. ***To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.***
>
> To hold a governmental agency liable under [these] facts ... will not cause the heavens to fall.... The only result will be that it will not be able to "rig" the market in its favor. That is, government will merely be discouraged from giving itself, under the guise of governing, an economic advantage over those whom it is pretending to govern. Id. at 273-274 (emphasis added) Cited with approval by *Mentzel v. City of Oshkosh*, 432 N.W.2d 609, 614 (Wisc. Ct. App. 1988).

In *Joint Ventures v. Florida*, 563 So.2d 622 (Fl. 1990), a well know invalidation of protected corridors, the Florida Supreme Court invalidated Florida's map of reservation statute that prevented improvements to property in the mapped areas for five (5) years.

> We perceive no valid distinction between "freezing" property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings. Such action has been consistently prohibited. We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal. Here, the means are not consistent with the constitution.

Joint Ventures affirms the proposition that in the context of a restricted corridor the state must pay when it regulates private property under its police power in such a manner that the

regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.

The Maryland-National Capital Park and Planning Commission v. George A. Chadwick, 405 A.2d 241 (Md. Ct. of App 1979) case invalidated placing owners land in reservation for a period up to *three (3) years*. The Maryland Court of Appeals did "condemn as beyond the police power the enactment of reservation statutes which are reasonable in their application both as to duration and severity" yet ruled that the three year reservation had the effect of depriving the landowners, for that extended period of time, of all reasonable use of their property. See *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951)(action in plotting ground for a park and freezing it for three years was in reality a "taking").

In *Lomarch Corp. v. Mayor & Common Council of City of Englewood*, 237 A.2d 881 (N.J. 1968), the New Jersey Supreme Court upheld the use of a *one (1) year* 'option' for the purchase of land, which had the effect of restricting property use, but only upon the implied duty and obligation to make payment of adequate compensation to the landowner for the temporary taking and his deprivation of use. See *Grosso v. Board of Adjustment of Millburn Tp. in Essex County*, 61 A.2d 167 (N.J. 1948)(A municipality in exercise of planning power could not dedicate tract of land to highway uses on "official map" and thereby deprive land owner of all use of tract without making compensation until municipality was prepared to lay out the highway. This would be a public use for which private property is subject to appropriation only under the power of eminent domain. Private property may not be confiscated under the guise of police regulations.)

The First Circuit Court of Appeals struck down an official map application in *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 996 (1st Cir. 1983), The use of the official map freezing property constituted a taking. The First Circuit found that the "cloud of

condemnation" had hung over the appellee's property for *14 years*. The government's dilatoriness was inescapable.

In *Benenson v. United States,* 548 F.2d 939, 947 (Ct.Cl. 1977), a property owner subject to historic preservation restrictions had been prevented from selling his property or using it for any income-producing purpose for *five years*. The court of claims held that this "cloud of condemnation" was unreasonable and compensable as the it operated to so restrict and interfere with owners' use of property as to constitute a complete taking of owners' fee.

In *Ventures In Property I v. The City Of Wichita*, 594 P.2d 671 (Kan. 1979), the city required land be held out in reservation in an undeveloped state in a defined highway corridor. The sole purpose of the restriction was to control the use of the plaintiff's property to reserve the corridor for possible future condemnation. The owner's property was considered taken and compensation was due. The court cited Nichols on Eminent Domain, "Nature and Origin of Power" s 1.42(1), p. 116-121 (3d rev. ed. 1976):

> 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, 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. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. *It is invalid as an exercise of the power of eminent domain since no provision is made for compensation*.

These cases cited above address the misuse of the police powers restrictions to effectuate the actual purpose which is eminent domain and condemnation. They are each instructive and factual akin to the NCDOT's use of the Map Act. As stated before, there are no cases that combine the entire panoply of unreasonable means that NCDOT has exhibited in the Northern Beltway. No other jurisdiction appears to have employed the Hardship Program, neighborhood destruction and "take it or leave" offers with as much gusto and heavy

handedness as NCDOT. Combining all these NCDOT "means" with the more straightforward development restriction should leave but one conclusion – NCDOT's means are not a proper exercise of the police power but the State's exercise of the power of eminent domain.

II. PROPERTIES HAVE NO PRACTICAL USE or REASONABLE VALUE.

This brings Plaintiffs to the issue of "practical use" and "reasonable value" as expressed by Judge Hunter (whereby he applied zoning law to this case about acquisition). The standard Judge Hunter set forth is essentially the same under the state and federal constitutions. *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 655, 669 S.E.2d 286, 289 (2008) citing *Agins v. Tiburon,* 447 U.S. 255, 260-61, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) and *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123-28, 98 S.Ct. 2646, 2658-61, 57 L.Ed.2d 631, 647-51, *reh'g denied,* 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978). However, Judge Hunter did not provide guidance on what is a "practical use" of properties that are unmarketable, unequivocally slated for condemnation and will certainly have construction, slope and drainage easements over and around them in the future.

An examination of the North Carolina cases dealing with the issue of real property's "practical use" reveals first, that each of those cases involved re-zoning and secondly, that the properties had either existing income producing structures or uses or that the owner was still allowed to develop the land but at greater expense or for different purposes.

These cases are: *Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8 (1989)(contesting rezoning of property from office-institutional to residential); *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville,* 308 N.C. 255, 302 S.E.2d 204 (1983) (regulations on property in a flood zone required new improvements on property be built so as to prevent or minimize flood damage resulting in greater building expense); *Weeks v. N. Carolina Dept. of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 388 S.E.2d 228 (1990) (property owner on Bogue

Sound denied permit for a pier for his sailboat); *King By & Through Warren v. State*, 125 N.C. App. 379, 481 S.E.2d 330 (1997) (environment regulations left 6 of 8 acres developable); *City of Concord v. Stafford*, 173 N.C. App. 201, 618 S.E.2d 276 (2005)(owner disputed necessity for median in front of his property); *Guilford County Dept. of Emergency Services v. Seaboard Chem. Corp.,* 114 N.C. App. 1, 441 S.E.2d 177 (1994)(fact that zoning change caused remediation costs for hazardous waste property not a taking); *E. Appraisal Services, Inc. v. State*, 118 N.C. App. 692, 457 S.E.2d 312 (1995) (private appraiser not due compensation for commissioner's taking of claims files in connection with liquidation of insolvent insurer*); Messer v. Town of Chapel Hill*, 346 N.C. 259, 485 S.E.2d 269 (1997) (owner sold property for $1,500,000 established that property had "a practical use and a reasonable value" following the amendment to the zoning ordinance); *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990) (developer's claim that total restriction on development of three acres resulted in taking ignored fact that in return for developer's promise to set aside three acre common area, the city permitted development of developer's subdivision tract in a more intensive manner than otherwise permitted).

Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961), cited in *Finch*, is a case that offers an example of a court addressing if a re-zoned property can be practically used. The trial court found that that a house could be built on lots in compliance with zoning and building code requirements. The Supreme Court remanded holding that simply because a residence could be built did not mean that it would be practical, desirable and of reasonable value. "In short, the court did not find that the lot had any reasonable value for residential use and that such use was practical." Id at 647, S.E. 2d 825. In *Chapel Hill Title & Abstract Co., Inc., supra,* the city's conservation ordinance left only a quarter of the parcel buildable but that remaining portion was subject to restrictive covenant. The Supreme Court found there was no reasonable use even

though a building permit could be issued. Justice Brady concurred and expressed his opinion that there was a *de facto* taking because the subject ordinance "depletes petitioners' property of all reasonable use and economic value." Id at 656.

Justice Frye in his dissent in *Finch* used the automobile analogy to illustrate practical use:

> the rezoned property is analogous to an automobile which has been completely destroyed, "totaled" in the vernacular, in a collision. Although the automobile has some value as junk, its owner has been deprived of all practical use of the automobile so that it has no reasonable value as an automobile. Similarly, here plaintiffs' evidence tended to show that after rezoning the property had only minimal, residual value as undevelopable land. The rezoning deprived plaintiffs of all practical use of their property so that its minimal, residual value as undevelopable land was simply no longer reasonable. *Finch supra at*, 386-87, S.E.2d at 27.

The automobile analogy is apropos here and should be expanded, especially for Beltway Plaintiffs that are homeowners. Residential Beltway properties are analogous to a car that has had all four of its wheels removed and put up on blocks. The car owner can sit in the car, run the engine, turn on the radio and the heat, but that is not a practical use of a car and the property has no value as a car. While a house is to be lived in, it is impractical to have an homeowner or landlord service mortgage interest, and pay maintenance, taxes and insurance on an asset that the owner / landlord can never dispose of in order to extract the equity.

NCDOT's approach to practical use is essentially to adopt the properties' current uses or to say the Plaintiffs should do what *NO OTHER BELTWAY OWNER* has been brave or imprudent enough to do in 16 years -- invest precious sums of money to build on his condemned property all with no prospect of buyers, tenants, investors, or financing on top of a three-year development freeze. NCDOT dooms Plaintiffs to be landlords, farmers, homeowners or kennel operators in perpetuity. NCDOT's position on practical use ignores the destruction of the market for Beltway property and the utter uncertainty it has created in, near and adjacent to the Beltway.

Judge Hunter and the North Carolina Supreme Court rely on *Lucas* for guidance on practical use. "If the effect of a government regulation 'denies all economically beneficial or productive use of land,' then a taking has occurred and compensation must be given to the owner, regardless of the intent of the regulation or how favorably it affects public welfare. *Chapel Hill Title , supra citing Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886 (1992). Under state and federal case law, use and economic value are examined together, not independently. You can't have one without the other.

A. Kirby, Hendrix, Republic & Nelson (see Statement of Facts Section II ¶¶ B to E).

Is there any practical use for unimproved land that has a three-year restriction on building permits, no marketability and is unequivocally slated for acquisition by NCDOT? Is there any financing available on such property? Mr. McCracken testified for NCDOT that unimproved land is not developed or used. McCracken p. **

The Beltway significantly impacts unimproved land owned by plaintiffs Kirby, Hendrix, Republic and Nelson. The NCDOT prohibits the development of their properties. Kirby, Hendrix, Republic and Nelson own property worth from several hundred thousand dollars to several million dollars. These plaintiffs earn nothing on their assets (Mr. Kirby's annual rent of $20,000 on a 40 acres asset is essentially nothing; (Duke Power negotiated a $55,000 / acre easement with him in 2011).

In the sixteen years since restrictions were officially imposed on Western Loop properties (and four years on the Eastern Loop), ***no*** property owner (out of thousands of tax parcels) has seen the practical or financial advantage of obtaining a building permit or subdivision approval. This large sample size and lengthy duration for this marketplace behavior is dispositive proof that the restrictions imposed by NCDOT coupled with its acquisition activities throughout the Beltway have render unimproved property of no practical or reasonable

use. Sophisticated developers and prudent owners have refused to invest in improvements even before the restrictions were imposed. See Hendrix Aff. ¶¶ 5-6 (Granite Development backs out of $1.2m contract); McInnis. p. 14-16 (could not go forward with subdivision); Kirby p . 71-77. There has been *no* market activity in the Beltway as evidenced by the incredible dearth of qualified transfers of Beltway property (and on average transferred parcels have only a quarter or half of the property in the western and eastern loops respectively). If there was a reasonable / practical use and a reasonable value for Beltway properties, then at least one of the 1616 parcels would have been put to an improved use by one of the hundreds of owners. There is no better proof of *no practical use and no reasonable value* than the actual laboratory of the free market as it has examined the Beltway for over 16 years. The marketplace has determined that unimproved land has no use or value since the Map restrictions were filed in October 1997 and November 2008 – the date of "taking."

1. Republic Properties.

The treatment of Republic Properties evidences the true intent and design of NCDOT's Protected Corridor and "planning." In 2006 and two years before the Official Map is filed in the Eastern Loop, Republic inquired about subdividing its 190 acres with the local planning staff, who informed Republic that its property was in the path of the proposed Beltway. A few days later NCDOT informs Republic that it intends to make an offer for the entire property save six acres. The majority of the property is in the Beltway and left without access or easements. See Sheet 3 of Eastern Loop Right of Way Maps. Republic waited patiently for the offer which months later turns out to be unsatisfactory and is rejected. Instead of NCDOT increasing its offer or initiating condemnation, NCDOT disappeared unconcerned that Republic may improve its property. See Republic Depo. Ex. 3.

Why did NCDOT not protect the public purse and condemn the Republic property before

Republic continued on with its development plans? Simple. NCDOT knows from years of experience that developers will not move forward with development once the developer has to disclose NCDOT has made an offer on the property. NCDOT has no need to initiate condemnation and risk a large adverse settlement or verdict, or to start a precedent of condemning resolute owners. NCDOT will just let owners wait and wither financially and gamble with the odds in its favor of getting better prices years down the road. Republic's experience serves as a prime example of pre-condemnation behavior run amok.

2. Nelson Homestead.

The Nelsons are the only plaintiffs in the first group of plaintiffs that are seeking to have their residence purchased through inverse condemnation. Since they can live in their house, the question is have they been deprived of practical use. They are continually faced with the dilemma of whether to repair their house or not. As discussed above, the Nelsons have paid interest, taxes, and insurance and reduced principle but have lost the fundamental property right to dispose of the property to realize their equity. Applying *Lucas*, the regulation has deprived the Nelson's of all economically beneficial or productive use of their house other than to sleep in it and let it wither away over time, its equity locked down, never knowing when NCDOT will show up to take it.

B. Harris Triad (Statement of Facts; Section II, ¶ A)

Harris Triad is the hole in the donut. Harris owns five rental homes in McGregor Park subdivision. These homes were built to be sold as single-family owner occupied residences. Harris Aff. ¶ 2-6, Linville Aff. ¶ 6. Before the NCDOT arrived, the subdivision was owner occupied, single family residences. Id. Harris was able to sale a few homes, but the disclosure of the impeding Beltway left Harris with nine homes he could not sell. Harris was forced to use the property as rental property (plaintiff N&G received 4 of the homes in equitable distribution).

NCDOT owns eight lots in the subdivision, being two vacant lots and six rental homes. NCDOT owns the majority of the property within one-quarter mile of the subdivision (including large unimproved parcels), and renting 15 homes. NCDOT has also bought other Beltway owners that are landlords because the owners are unable to make economic use of their rental properties. Depo Ex. 29 (Chris Blocker purchased by NCDOT because Blocker says renting does not relieve financial pressure), Pridemore. p. 55 (admits Blocker renting two homes).

Harris has satisfied the NCDOT's hardship criteria at least twice. Depo. Ex. 49, 50; Tornow Aff. In 2010, Harris submitted tax returns to NCDOT documenting that the rental income was insufficient to support the five homes. Depo. Ex. 50. The properties' tax values total $860,000, but his rental income only supports an income valuation of $260,000, but that value assumes that the homes were not in the Beltway: result is a 300% devaluation. Considering that no one has purchased Beltway property in the area near Harris, the market value of Harris Triad's asset is nowhere near $260,000. Linville Aff ¶ 9-12.

Competing against the NCDOT to rent single-family homes in and near McGregor Park that were intended to be owner occupied is not a reasonable use of the Harris property. It is unreasonable for any property owners to be forced to that compete against NCDOT renting next door and demolishing homes within yards. The five properties do not (and cannot) financially support themselves or provide reasonable value. Mr. Harris, like other homeowners, pays interest on a debt he cannot retire by selling these houses. His rental payments must also include interest payments, taxes, insurance and maintenance costs. He has suffered annual losses since the 1990s. The head-to-head rental contest with NCDOT will not change is not practical or reasonable.

Clearly NCDOT agrees with this lack of practical use proposition as it has bought other landlords in the same situation as Harris Triad including a landlord in McGregor Park. Depo.

Ex. 66 p. 12 (William Shelton rented 709 Bluffridge because he could not sell it; vacant for over a month and cannot pay mortgage; cannot charge enough rent to cover mortgage as NCDOT's tearing down homes and neighborhood "has lost a lot its appeal." He was bought by NCDOT); Depo. Ex. 29 (Chris Blocker); It is unreasonable for North Carolina and NCDOT to negatively impact the former character of the neighborhood, engage in a commercial enterprise in direct competition with its citizens, drive rents down and then tell that owner that he has a reasonable use for his property: go lose money renting your single family houses.

As for reasonable economic value; there is no evidence that Mr. Harris has any marketable value in his properties as rentals. His homes are an $860,000 tax asset for which the rental income only supports a $260,000 valuation, and then ***only*** if the homes are not in the Beltway. Linville Aff ¶¶ 9-12. This is an economic underperformance of 300% or more. These properties were only intended to be sold to owner occupied buyers.

C. Maendl, Stept, Hutagalung, Engelkeimer – Oak Hill Subdivision.

The arguments made above for Harris Triad apply with equal force to the Plaintiffs in the Oak Hill subdivision. The Oak Hill subdivision and Meredith Drive directly across the street are predominately owned by NCDOT. The Plaintiffs are the hole in the donut. The properties were bought to be rented, but not in competition with 21 homes owned by the State. NCDOT bought out landlord Chris Blocker, another owner renting property in the subdivision who knew that he was investing in a subdivision slated for NCDOT acquisition. Plaintiffs are trapped paying interest on loans that can only be retired with a fair market sale price just as the other Oak Hill property owners have already received from NCDOT. Plaintiffs are also paying taxes, maintenance and insurance. Renting is not a practical use, and there is no value.

D. Value.

NCDOT simply slaps an appraised value on property ignoring the lack of buyers in the

market. This also ignores the idea of economic value set out in *Lucas*. NCDOT does not dispute Plaintiffs' findings on qualified sales of property in the Beltway, or the lack thereof. In fact, NCDOT's own research supports the conclusion there are no qualified sales. Nor does NCDOT dispute the evidence that Plaintiffs Harris, Hendrix, and Kirby lost sales because of the Beltway, that owners Reynolds, Barrett, and Bowen could not find buyers or that NCDOT has purchased a massive number of properties under its Hardship Program which mandates a concurrence that the properties are unmarketable. Other Beltway owners have had to carve out the portion in the Beltway in order to sell acreage not in the Beltway. Jones Aff., Myers Aff., Shropshire Aff. If there is no market, there is no value.[5] In *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Cl. Ct. 1970) the court noted the dormant sales activity in the area subject to development restricts compared to the 2,500 sales within 5 miles of plaintiff's land. In the Northern Beltway there have been 16,188 transfers in a thirty-four mile, two-mile wide area but essentially no qualified sales of Beltway property.

III. NCDOT IS EXERCISING ITS POWER OF EMINENT DOMAIN, NOT ITS POLICE POWERS.

A. The Power To Purchase Is *Ipso Facto* The Power Of Eminent Domain.

Judge Hunter makes a statement in the *Beroth* opinion that NCDOT has yet to exercise the power of eminent domain.

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

This statement, arguably dicta, is wrong and was made without the benefit of the record or citation to *Carolina Mills, Inc. v. Catawba County Board of Education*, 27 N.C. App 524, 219

[5] Plaintiffs will concede that business property such as the shopping center and gas stations in the Beltway have income value.

S.E.2d 509 (1975). Assistant Attorney General Douglas Corkhill's letter regarding NCDOT acquisitions in Forsyth County contradicts Judge Hunter and expresses the actual facts in the Beltway. Corkhill's statement related to the NCDOT's October 2005 hardship acquisition of Eugene and Dale Bottoms of 4440 Meredith Drive:

> As you may be aware, the Department is in *the acquisition stage of purchasing property for construction of the Winston-Salem outer loop*. Forty-nine of the eighty-seven homes in the Meredith subdivision are in the path of the proposed highway. *The Department will first attempt to purchase these homes from the property owners, and failing to reach an agreement on the price is empowered to exercise eminent domain*.
>
> Once acquired by the Department, the property is no longer subject to the restrictive covenants. "By definition eminent domain represents the power of the state to acquire all private property rights for a public purpose," *Carolina Mills, Inc. v. Catawba County Board of Education*, 27 N.C. App 524, 219 S.E.2d 509 (1975). ***Whether the property was purchased voluntarily or title was acquired by eminent domain is irrelevant as the power to purchase is tantamount to the power of eminent domain***. (emphasis added). (Depo. Ex. 16 Bates No.8861)

At the time the attorney general takes the above stated position with a representative of a Beltway landowner, NCDOT is seven (7) years away from scheduled acquisition date of 2012. Depo Exs. 75-81. The attorney general's position was correct then and is correct now. NCDOT has the power to buy each of the 454+ properties it has acquired to date. N.C.G.S. § 136-44.53, N.C.G.S. § 136-104. NCDOT's voluntary purchases have the same effect as if the properties were condemned. The Hardship acquisitions are the exercise of NCDOT's power of eminent domain and the NCDOT treats them as such. NCDOT pays no property tax, many of its properties are removed from the Forsyth County tax records and it avoids Beltway subdivision's restrictive covenants. Can NCDOT have its cake and eat it too?

At the hearing on the motion to dismiss, NCDOT tried to depict the 454+ purchases as

voluntary market transactions between the NCDOT and Beltway owners. The fact the Bottoms' transaction was a ***hardship acquisition*** which prompted the Assistant AG's "tantamount to the power of eminent domain" position undermines the notion that these 454+ acquisitions are voluntary market transactions. They are voluntary only on the NCDOT side. The pernicious acts of NCDOT create desperate owners who do not have the wherewithal to outlast NCDOT. Reynolds Aff ¶ 20-24; Barrett Aff. ¶ 19-22, Hrinaik Aff. ¶ 12-15, Bowen Aff. ¶ 13-14. The owners can die before this is over, but NCDOT will still be there. The idea that an owner's request of his only buyer (NCDOT) in times of financial or medical desperation is a voluntary transaction has no support. Under what theory can NCDOT close 454+ acquisitions and *NOT* be exercising eminent domain; NCDOT continues to do so in both actual practice and in a *de facto* sense.

B. Police Powers Prevent Public Harms; Eminent Domain Pays for Public Benefit.

The Court of Appeals determined that NCDOT is exercising its police powers in a regulatory manner, rather than finding that NCDOT is actually using its power of eminent domain to acquire property. NCDOT does not build roadways by zoning land. The Court of Appeals did not have the benefit of an evidentiary record. NCDOT's only intent in the Northern Beltway is the acquisition of land, not zoning for overpasses, interchanges or bridges. It builds these things.

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

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

Smoke Rise, Inc. v. Washington Suburban San. Comm'n, 400 F.Supp. 1369 (D.Md.1975) quoting Professor Freund, The Police Power, § 511, at 546-47 (1904). See *Matter of Recycling & Salvage Corp.*, 586 A.2d 1300, 1313-14 (N.J. App. Div. 1991) (the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful). *DeMello v. Town of Plainville*, 368 A.2d 71, 73 (Conn. 1976) (eminent domain takes property because it is useful to the public, police power regulates the use of property or impairs the rights in property, because the free exercise of these rights is detrimental to public interest.)

Forcing a citizen to indefinitely "donate" property to the State for a public benefit ("better prices") is an act of eminent domain which requires just compensation. NCDOT cites no public harm threatened by the Plaintiffs. NCDOT's avowed purpose in creating a Protected Corridor is to "save the taxpayers money" and to prevent owners from increasing the value of their property so the State's eventual acquisition costs are controlled when "North Carolina gets enough money." Ex. 71. This purpose bestows a public benefit to the citizens of North Carolina: the State obtains the property at the best prices possible. This purpose is constitutional ***only if*** the owners are provided just compensation.

With the evidentiary record before the court, the proper test should examine the interference with the Plaintiffs' fundamental property rights – the right to dispose, use and enjoy - and whether the designation "results in such governmental intrusion as to inflict virtually irreversible damage." *Fifth Ave. Corp. v. Washington County, By & Through Bd. of County Com'rs*, 581 P.2d 50, 63 (Ore. 1978); *Dodd v. Hood River County*, 855 P.2d 608, 614 (Ore. 1993) (*Fifth Avenue* test applied in cases where the zoning decision is made in contemplation of the eventual taking of private property for public use). Not a single case heretofore relied on by NCDOT deals with a situation where the State was regulating property for the ultimate act of

acquisition. As *Fifth Avenue* illustrates, the NCDOT's eventual and unequivocal goal of acquisition is determinative to the test to be applied.

NCDOT is flexing its power of eminent domain to bestow a public benefit, not using its police powers to prevent a public harm. The correct test examines the NCDOT's interference with the owners' fundamental property rights and the de facto taking by the State that has irreversibly occurred. It is indisputable that Plaintiffs have lost the right to use, enjoy and dispose of their property. There is no market for their property, as it cannot be freely sold. There are legal restrictions on the properties prohibiting improvement. The economic reality of no marketability deters improvement and investment in the properties. There has been a taking requiring just compensation.

C. General Assembly Acknowledges The Map Act Interferes With Property Rights.

NCDOT has acquired more than 454 properties through its Hardship Program in every section of the Northern Beltway. Depos. Exs. 7, 9, 12, 59. There have been over 70 hardship acquisitions since the *Beroth* case was filed in September 2010. Depo. Ex. 25. This legislatively mandated "remedy" is offered to all owners (N.C.G.S. § 136-44.53) but only those who are sick or in financial distress (as determined by NCDOT in its sole discretion), ultimately qualify for the Hardship Program. R. p. 139. Hundreds of healthy and financially sound owners are otherwise unable to sell their Property at fair market value to anyone other than NCDOT.

Judge Hunter noted, correctly in part, that by providing the "Hardship Acquisition" program (N.C.G.S. § 136-44.53), the General Assembly "tacitly" acknowledged that the Map Act interferes with "some" owners' property rights. Slip opinion p. 20-21. More correctly stated however, the General Assembly acknowledges that the Map Act interferes with *every* owner's property right but that some owners are more capable or tolerant of bearing the burden than

others. Our Constitution says that this burden cannot be unreasonable, indefinite and should be borne by the public not the few.

IV. THE DE FACTO TAKING REQUIRES JUST COMPENSATION.

Does NCDOT exercise its power of condemnation when NCDOT 1) announces the impending condemnation, 2) delays for 16+ years and counting, 3) buys one-quarter of all Beltway properties, 4) spends millions on acquisitions, 5) buys some owners but refuses or ignoring others, 6) has unwritten and unequal standards it applies to owners, 7) makes "take it or leave it offers", 8)prevents economic use of owners' properties, 9) makes public statements that owners cannot add value to their property and 10) publically announces that it will be over a decade before it begins acquisitions. Plaintiffs say yes to this question. Plaintiffs argue that if their neighbors are bought then Plaintiffs must be bought. As discussed with the court at the prior hearing, North Carolina has never had occasion to address the issue of *de facto* taking or the facts presented here. The allegations in Takings Allegations section of the Plaintiffs' complaints (sub-paragraphs (a)-(m)) set forth the instances of de facto condemnation in the Northern Beltway.

"Condemnation blight" is a symptom of a *de facto* taking. It is the "diminution in the market value of a property due to pending condemnation action." Appraisal of Real Estate 13th edition; see also *8A-G18 Nichols on Eminent Domain G18.* The NCDOT wants to define "condemnation blight" as a physical manifestation such as peeling paint, rotting wood and dilapidated structures. While there is plenty of poorly maintained NCDOT property and empty concrete pads on NCDOT lots, these physical manifestations are simply evidence supporting the *de facto* condemnation of Plaintiffs' properties.

A. Unreasonable, Extraordinary Delay In Formal Acquisition.

The record indicates that NCDOT and local officials were planning this road in the 1980s, that sellers were disclosing the Beltway to buyers in 1990, that NCDOT was actively involved in the Northern Beltway as early as October 1991, that the ROD was approved in 1996 and the Protected Corridor established in October 1997. The governmental agencies responsible for the environmental work in 1992 and 1996 acted in bad faith in approving the ROD in one day. See *Case 1.* In 1999, the governmental agencies elected to start the environmental impact study all over, only getting the ROD approved in 2008. Plaintiffs had no hand in this federally mandated decision. In the intervening sixteen years since restrictions were placed on property and while NCDOT went through a "re-do" on its environmental work, Beltway owners remained subject to the NCDOT's Protected Corridor restrictions and the mercy of NCDOT's Hardship Program, frequent demolition of neighborhood structures, wholesale rental of homes and the "take it or leave it" purchase offers.

Today, the Plaintiffs and all other Beltway owners are no more certain of NCDOT's timetable for acquisition or condemnation. NCDOT has told owners it will be a decade or more of waiting. Yet, NCDOT remains committed purchasing every owner in the Beltway buying over 70 properties since July 2010.

B. ***De Facto* Taking Is Judicially Recognized In Multiple Jurisdictions.**

Numerous jurisdictions recognize a cause of action for *de facto* taking. Plaintiffs have found no jurisdiction that has categorically refused to recognize the claim. The factors considered in examining *de facto* takings allegations are: i) project announcements are widely published, ii) project maps are published, iii) development restrictions are placed on property, iv) some owners bought, others left behind like a hole in the donut, v) oppressive behavior by State. MAKING A CASE FOR PRE-CONDEMNATION BLIGHT, SD40 ALI-ABA 93. *Littman v. Gimello,* 557 A.2d 314, 321 (N.J. 1989)(when the threat of condemnation has had such a

substantial effect as to destroy the beneficial use that a landowner has made of the property, which are: (1) extraordinary delay or unreasonable conduct on the part of the condemning authority; (2) the imminence of condemnation; and (3) the severity of the injury and hardship to the property owner.)

The uncontested evidence is that there have been numerous Beltway meetings, numerous Beltway announcements and media stories, recorded / published maps, prolific acquisitions, development restrictions, over a decade delay in condemnation proceedings, no market sales of property, no development of property and oppressive behavior by NCDOT.

The oppressive behavior has been discussed above and is summed up as follows: NCDOT putting unfit tenants in single family neighborhoods, NCDOT's pervasive presence in neighborhoods, NCDOT's poor maintenance of its properties, NCDOT tearing down structures in subdivisions, its unwritten acquisition guidelines, written standards are arbitrarily applied, buying some owners but not others, "take it or leave it" offers to owners, only buying "sick" or financially distressed owners, failing to condemn owners once offers are made by NCDOT, telling owners not to bother applying for hardship because they will not qualify, renting in competition with owners who are left no option but to rent, renting to unfit and undesirable tenants, failure to fully review hardship applications (i.e., Harris Triad), buying some businesses but not others (i.e., Harris Triad).

The Plaintiffs cases (and the entire Beltway) have multiple counts on each and every possible factor for *de facto* condemnation. The following cases support finding a *de facto* condemnation of Plaintiffs' properties.

- *Althaus v. United States*, 7 Cl. Ct. 688 (1985) progressive accumulation of events and governmental actions for *ten (10) years* resulted in de facto exercise of power of eminent domain

- *Levine v. City of New Haven*, 294 A.2d 644 (Conn. Super. Ct. 1972) If long periods of time elapse after initial condemnation proceedings in connection project, and there is no "taking" *nine years*, property owner has a constitutional right to damages. "When [this diminution] reaches a certain magnitude ... there must be an exercise of eminent domain and compensation to sustain the act."

- *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 586 (Cl. Ct. 1970). Land transfers within the restricted Seashore contrasted with the rate of turnover outside its perimeters. Within a 5-mile radius of its exterior boundary, during the *4-year period* after July 23, 1963, there were approximately 2,500 transfers of real property. Plaintiff was unable to sell its land to private purchasers. Court decried the harsh results which plagued an owner after Congress had specifically earmarked his property for acquisition by the Government:

> Thus plaintiff remains without a market for its land. The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation of Seashore realty. The public sector, namely the National Park Service, is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure.

- *Gaughen v. Commonwealth,* 554 A.2d 1008 (Pa. Commw. Ct. 1989). Proposed highway condemnation delayed by the State, and if such actions deprived owner of the use and enjoyment of his property they may result in a *de facto* taking. PDOT made repeated efforts to delay subdivision in corridor and had interfered in landowner's attempt to obtain financing for planned residential development within corridor.

- *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977) Compensable taking occurred when as a part of City redevelopment, property was designated as blighted and neighboring properties were acquired and improvements located thereon were demolished; *Twelve years later*, owner was advised his property would not be acquired. When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking.

- *Elmwood Park Project Section 1, Group B, City of Detroit v. Cassese,* 136 N.W. 2d 896 (Mich. 1965) Razing of vacated and vandalized buildings, or boarding them up created a deserted and wasteland appearance.

- *Klopping v. City of Whittier,* 500 P.2d 1345 (Cal. 1972) City's resolution dismissing condemnation action also stated it would be back to acquire the land if bond litigation was successful, resulted in a pre-condemnation cloud hovering over the property. When the pre-condemnation activities of the government are unreasonable or oppressive and the affected property has diminished in market value as a result of the governmental misconduct, the owner of the property may be entitled to compensation.

- *People ex rel. Dept. of Transp. v. Diversified Properties Co. III*, , 17 Cal. Rptr. 2d 676 (1993): evidence supported determination that state had accomplished de facto taking of real estate developer's property by delaying eminent domain action for *two and one-half years*; state and city had cooperated with each other in insisting upon nondevelopment of developer's property within proposed state freeway route, state knew that city had deprived developer of virtually all rights to develop property and that restriction rendered property virtually unmarketable, state knew that city's restrictions on development of subject property were based solely on fact that property was located within proposed freeway route, and *state had no intention of condemning property for several years*.

- *Garland v. City of St. Louis,* 596 F.2d 784 (8th Cir. 1979): targeting area for redevelopment, City demolished buildings around owner's property stripping the area of its commercial character; *after five years*, City dropped redevelopment plans without acquiring owner's property;

- *Clay County Realty v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008); in a *five year* delay, property owners can prevail against condemning authorities for claims relating to condemnation blight where they provide specific evidence demonstrating aggravated delay, bad faith, or untoward activity by the condemning authority

- *Reichs Ford Road Joint Venture v. State Roads Commission of the State Highway Administration,* 388 Md. 500, 880 A.2d 307, 319-20 (2005): holding that a property owner was entitled to seek compensation in inverse condemnation action for lost rental income and costs of maintaining property caused during *14-year delay* in condemnation proceedings;

- *Luber v. Milwaukee County,* 177 N.W.2d 380, 384 (Wis. 1970): finding that alleged precondemnation damages for loss of rental income for *four years* deserved compensation under the "just compensation" provision of the state's constitution;

- *Foster v. City of Detroit,* 254 F. Supp. 655 (E.D. Mich. 1966): Detroit announced condemnation proceedings against an area which included the plaintiffs' property. Plaintiffs were instructed not to make improvements because they would not be compensated. *After ten years*, the City discontinued condemnation proceedings without acquiring plaintiffs' property., Plaintiffs' property was vandalized and not rentable due in part to the change in the neighborhood. After plaintiffs were forced to raze their buildings, the City reinstated condemnation proceedings and compensated plaintiffs for the value of their vacant lots. The court found that the actions of the City contributed substantially to the decline of property values. Sixth Circuit held that the actions of the City constituted an unconstitutional taking before the actual condemnation.

- *Roth v. State Highway Comm'n of Missouri*, 688 S.W.2d 775, 777-78 (Mo. Ct. App. 1984) "aggravated delay" after *seven years* from the announcement by defendant of its condemnation plans to its paying of the funds into court, as well as defendant's failure to employ methods available to it to expedite compensation to plaintiff, and its repeated but long unfulfilled promises to institute formal condemnation proceedings. Court could find

"untoward activity" on the part of defendant and its agents in their many supplications to the municipalities to deny plaintiff building permits.

- *Textron Inc. v. Wood,* 355 A.2d 307(Conn. 1974): state highway officials expressed their irreversible intent to take the plaintiff's land "*by filing a map which had the statutory effect of depicting that property as part of a legally laid out state highway.*" For *six years* highway officials had demonstrated an "unequivocal intention" to ultimately acquire the plaintiff's property. Wholly futile for owner to have seriously considered expanding its activities or its facilities on the baseless hope that formal condemnation somehow would not occur. State substantially interfered and lessened the plaintiff's right to the *use and enjoyment* of the property. The landowner's capacity to freely *dispose* of his property was effectively arrested which constituted a "*substantial interference*" with his property rights; and amounted to a "taking of the property in a constitutional sense." Id.

- *Lincoln Loan Co. v. State, By and Through State Highway Commission* 545 P.2d 105 (Ore. 1978): highway commission caused notices to be published that plaintiff's land would be taken for highway purposes, took property surrounding plaintiff's property, demolished surrounding buildings and caused notices to be published that it would pay moving expenses and other compensation to tenants if they vacated plaintiff's premises and that such actions over *ten-year period* resulted in a 'condemnation blight' stated cause of action in inverse condemnation.

- *Johnson V. The City Of Minneapolis*, 667 N.W.2d 109 (Minn. 2003), the city's activities created a "cloud of condemnation" over properties for *eight years*. City's actions significantly reduced the fair market value of the owner's properties and caused a loss of rental income, thereby causing a substantial and adverse economic impact on the properties and rendering appellants' businesses commercially impracticable. City uniquely burdened owners by impairing their existing and prospective uses of the properties for an *unreasonable period of time*.

- *Ehrlander v. State, Dept. of Transp. & Pub. Facilities*, 797 P.2d 629, 635 (Alaska 1990) possession of unimproved and untenanted property is a desirable economic asset only if: (1) the property may appreciate in value; and (2) the owner is afforded the opportunity to improve the property toward whatever end he might desire. These economic attributes were lost when a condemnation action was brought.

> Once the state manifested its unequivocal intent to appropriate the Lange property, appellants were precluded from exercising their business judgment and selling the property before the market fell further. Moreover, appellants were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus appellants were deprived of the most important incidents of ownership, the rights to use and alienate property.

- *Sayre v. U.S.*, 282 F.Supp. 175, 185 (D.C. Ohio 1967). The *ten year* delay stated an abuse of the exercise of the power of eminent domain that would constitute a taking of

property without just compensation if that abuse directly and proximately contributed to, hastened, and aggravated, acting alone or in combination with other causes, the deterioration and decline in value of the area and the subject property.

- *Buzz Stew, LLC v. City of North Las Vegas,* 181 P.3d 670 (Nev. 2008): landowner may recover damages from municipality for making announcement of intent to condemn and then acting oppressively. 'The pivotal issue ... is whether the public agency's activities have gone beyond the planning stage to reach the "acquiring stage." The acquiring stage occurs "when condemnation has taken place, steps have been taken to commence eminent domain proceedings, or there has been an official act or expression of intent to condemn." See also *Department of Transportation v. Barsy,* 941 P.2d 971 (Nev. 1997)

V. HARDSHIP PROGRAM TREATS SIMILARLY SITUATED PERSONS DIFFERENTLY IN VIOLATION OF EQUAL PROTECTION CLAUSE.

N.C.G.S. § 136-44.53 provides that after filing the map, a Property Owner has the right to petition NCDOT for acquisition due to an imposed hardship.

> The Department of Transportation, . . .may make advanced acquisition of specific parcels of property when . . . the transportation corridor official map creates an undue hardship on the affected property owner. . . . . Any property determined eligible for hardship acquisition shall be acquired within three years of the finding or the restrictions of the map shall be removed from the property.

N.C.G.S. § 136-44.53. NCDOT administers the Hardship Program pursuant to 23 CFR § 710.503(c). Depo. Ex. 106. Plaintiffs assert the Hardship Program is a violation of the Equal Protection Clause. The Equal Protection Clause forbids North Carolina from denying any person the equal protection of the laws. North Carolina Const. Art. I, § 19.

Plaintiffs have been treated differently from the other 454 Beltway owners with whom they are similarly situated. This unequal treatment is purposeful discrimination. Strict scrutiny applies when a regulation infringes on the ability of some persons to exercise a fundamental right. If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *Department of Transp. v. Rowe,* 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Our Supreme

Court has held that "Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution." *Id.* The right to dispose, use and enjoy one's property are fundamental property rights. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), *Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E.2d 252, 256 (1941) ("property" extends to every aspect of right and interest capable of being enjoyed; property means land owners *right to possess, use, enjoy and dispose of it)*

NCDOT purchases property in the Beltway pursuant to 23 CFR §710.503(c) and its hardship guidelines. Depo. Ex. 8. NCDOT approves acquisition of a Property if the owner demonstrates that for *"health, safety or financial reasons, that remaining in the property poses an undue hardship compared to others."* By the "compared to others" language, NCDOT is necessarily comparing some Beltway Property Owners to other Property Owners. NCDOT will only purchase property from Property Owners that are unhealthy or financially troubled. Healthy, employed, undistressed Property Owners do not qualify for acquisition.

'[T]he touchstone of due process is protection of the individual against arbitrary action of government,'.... Arbitrary and capricious acts by government are also prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions." *Dobrowolska v. Wall,* 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000). "Further: The equal protection 'principle requires that all persons similarly situated be treated alike.' Accordingly, to state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated." *Id,* at 14, 530 S.E.2d at 599).

All the Property Owners are similar situated. Their Properties are in the Beltway; however, NCDOT has only paid just compensation to Beltway Property Owners that satisfy unequal criteria based on personal health or finances. The Hardship Program is administered on a case-by-case, discretionary basis with unwritten rules and this is an arbitrary and capricious

exercise of government's power. Because a fundamental right is involved (just compensation), NCDOT must come forward with a compelling government interest. Saving the taxpayers money at the expense of burdening Plaintiffs and substantially interfering with their property rights is not compelling because the State has the awesome power of eminent domain with which to accomplish that goal. Justice Black denounced placing burdens on the few for the benefit of the public in *Armstrong v. U.S.*, supra. The Hardship Program must be stricken or applied to all owners, but offer an appeals process and condemnation if price cannot be agreed upon between owner and NCDOT. Plaintiffs are therefore due a trial before a jury on just compensation.

VI. THE MAP ACT IS UNCONSTITUIONAL.

The Map Act creates a negative easement for which just compensation is due. As Judge Hunter noted, the owners have gone unpaid for this easement. The Fifth Amendment requires just compensation for the loss of any property right and the Map Act fails to provide for just compensation. The Map Act and its application interferes with owner's fundamental right to use their property for an unreasonable period of time. As discussed above, similar mapping restrictions have been struck down as unconstitutional as should North Carolina's Map Act.

CONCLUSION

Plaintiffs have been damaged by NCDOT's conduct of delay, arbitrary purchase of their neighbors, transformation of neighborhoods and destruction of the market for their properties. The only remedy is for NCDOT to pay just compensation from filing of the Maps which is the date of taking.

This is the 7 day of February

Matthew Bryant
N.C. Bar No. 21947

Of Counsel:
Hendrick, Bryant Nerhood & Otis, LLP
723 Coliseum Drive, Suite 101
Winston Salem, NC 27106
Telephone: (336) 723-7200
Facsimile: (336) 723-7201
www.hendricklawfirm.com

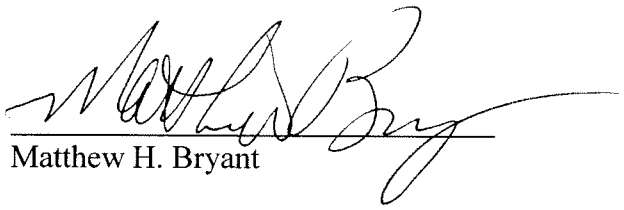
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney licensed to practice law in the State of North Carolina and is a person of such age and discretion as to be competent to serve process.

That on February 7, 2013 he served a copy of the attached Plaintiff's Memorandum of Law by placing said copies in depository of the United States Postal service, postage prepaid, and addressed to the person(s) hereinafter named, at the address(es) stated below and via email.

ADDRESSEE(S):

Dahr Tanoury
Special Deputy Attorney General
NC Department of Transportation
1505 Mail Service Center
Raleigh, NC 27699-1505
Attorney for Defendant



Matthew H. Bryant