

## SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

EVERETTE E. KIRBY and wife,	)	
MARTHA KIRBY; HARRIS TRIAD	)	
HOMES, INC.; MICHAEL	)	
HENDIRX, as Executor of the	)	
Estate of Frances Hendrix;	)	
DARREN ENGELKEMIER; IAN	)	
HUTAGALUNG; SYLVIA MAENDL;	)	<u>FROM FORSYTH COUNTY</u>
STEPHEN STEPT; JAMES W.	)	NO. COA14-184
NELSON and wife, PHYLISS	)	
NELSON; and REPUBLIC	)	Case Nos. 11 CVS 7119
PROPERTIES, LLC, a North	)	11 CVS 7120
Carolina company (Group 1	)	11 CVS 8170
Plaintiffs),	)	11 CVS 8171
	)	11 CVS 8172
Plaintiffs,	)	11 CVS 8173
	)	11 CVS 8174
vs.	)	11 CVS 8338
	)	12 CVS 2898
NORTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Defendant.	)	
	)	

\* \* \* \* \*

MOTION BY WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION  
FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT  
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

\* \* \* \* \*

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

WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION  
("WMPO"), by and through its undersigned counsel, hereby moves the  
Court, pursuant to Rule 28(i) and Rule 2 of the North Carolina

Rules of Appellate Procedure, for leave to file an *amicus curiae* brief and conditionally submits the attached *amicus curiae* brief with this Motion.

In support of this motion, WMPO shows unto the Court the following:

**NATURE OF WMPO'S INTEREST**

WMPO is the designated Metropolitan Planning Organization ("MPO") for the greater Wilmington area. The WMPO consists of the following twelve member agencies: New Hanover County, Brunswick County, Pender County, City of Wilmington, Town of Leland, Town of Wrightsville Beach, Town of Carolina Beach, Town of Kure Beach, Town of Belville, Town of Navassa, Cape Fear Public Transportation Authority, and the North Carolina Board of Transportation.

The WMPO is one of 19 MPOs in North Carolina. MPOs are federally-funded organizations charged with coordinating and planning transportation projects in urbanized areas with more than 50,000 residents. MPOs are established pursuant to 23 U.S.C. § 134 and are recognized under North Carolina law pursuant to N.C. Gen. Stat. § 136-200.1.

The WMPO has authority under N.C. Gen. Stat. § 136-44.50(a)(5) to adopt or amend a transportation corridor official map for North Carolina Department of Transportation ("NCDOT") projects R-3300 and U-4751.

The WMPO is a co-defendant with NCDOT in a current total of seventeen (17) lawsuits related to the Transportation Official Corridor Map Act (Article 2E of Chapter 136 of the General Statutes) and NCDOT projects R-3300 and U-4751, which cases are pending in the Superior Courts of Pender and New Hanover counties.<sup>1</sup> One of these 17 cases is on appeal to the North Carolina Court of Appeals.<sup>2</sup>

On July 16, 2015, Governor McCrory signed Session Law 2015-151 (Senate Bill 654) into Law, which provides in new subsection (g) of N.C. GEN. STAT. § 136-44.50 as follows:

(g) The Department of Transportation shall defend, indemnify, and hold harmless the Wilmington Urban Area Metropolitan Planning Organization and its members against any claims, civil actions, and proceedings related to or arising out of the Wilmington Urban Area Metropolitan Planning Organization's adoption, filing, or amendment of a transportation corridor official map pursuant to this Article.

N.C. GEN. STAT. § 136-44.50(g). Section 5 of Session Law 2015-151 states in relevant part that subsection (g) of N.C. GEN. STAT. § 136-44.50 "is effective when this act becomes law and applies to maps filed, adopted, or amended before that date."

---

<sup>1</sup> Pender County Superior Court File Nos. 14 CVS 528, 15 CVS 433, 15 CVS 434, 15 CVS 556, 15 CVS 554, 15 CVS 557, 15 CVS 555, 15 CVS 624, 15 CVS 694, 15 CVS 788, 15 CVS 790, 15 CVS 844; New Hanover County Superior Court File Nos. 14 CVS 1036, 15 CVS 1579, 15 CVS 1562, 15 CVS 1923, 15 CVS 2046

<sup>2</sup> Jamestown Pender, L.P. vs. NCDOT and WMPO, NO. COA 15-925 (Pender County, 14 CVS 528).

WMPO respectfully urges this Court to reverse the Court of Appeals' decision and determine that this case is unripe based upon the U.S. Supreme Court's holding and analysis in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985).

**WHY AN AMICUS CURIAE BRIEF IS DESIRABLE**

In *Williamson County*, the U.S. Supreme Court held that a regulatory-based takings claim is not ripe for adjudication where a plaintiff has failed to pursue a variance, as the aggrieved property owner "has not yet obtained a final decision regarding how it will be allowed to develop its property". *Id.* at 190, 105 S. Ct. at 3118. The WMPO respectfully contends that the Court of Appeals' decision is inconsistent with *Williamson County*, and aggrieved property owners cannot file inverse condemnation claims based upon the Map Act without first resorting to the procedure for obtaining a variance from transportation corridor official map pursuant to N.C. GEN. STAT. § 136-44.52.

**ISSUE OF LAW TO BE ADDRESSED**

The Court of Appeals' decision "hold[s] the trial court erred when it concluded Plaintiffs' claims for inverse condemnation were not yet ripe based upon its determination that Plaintiffs did not suffer a taking at the time NCDOT filed the transportation corridor maps". *Kirby v. North Carolina Dep't of*

Transp., --- N.C. App. ---, 769 S.E.2d 218, 236 (2015) (emphasis added); Slip Op. p. 45. With the sole exception of Plaintiff Harris Triad Homes, Inc., however, "no Group 1 Plaintiffs applied for variances, permits, or the Hardship Program, or accepted any offers from NCDOT to purchase their respective properties" *Id.* at ---, 769 S.E.2d at 225 (emphasis added); Slip Op. p. 12. The Court of Appeals' decision is contrary to and inconsistent with the U.S. Supreme Court's analysis and holding in *Williamson County*.

WHEREFORE, WMPO respectfully moves this Honorable Court for leave to file this *amicus curiae* brief in support of the NCDOT.

Respectfully submitted,

This the 6th day of October, 2015.

SHANKLIN & NICHOLS, LLP

**ELECTRONICALLY SUBMITTED**

Kenneth A. Shanklin, NCSB #5826  
Attorney for *Amicus Curiae*  
Wilmington Urban Area Metropolitan  
Planning Organization  
214 Market Street  
P. O. Box 1347  
Wilmington, NC 28402  
Telephone: (910) 762-9400  
Telefax: (910) 251-1773  
shanklaw@earthlink.net

**ELECTRONICALLY SUBMITTED**

Matthew A. Nichols, NCSB #23403  
Attorney for *Amicus Curiae*  
Wilmington Urban Area Metropolitan  
Planning Organization

214 Market Street  
P. O. Box 1347  
Wilmington, NC 28402  
Telephone: (910) 762-9400  
Telefax: (910) 251-1773  
shanklaw@earthlink.net

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing MOTION BY WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT NORTH CAROLINA DEPARTMENT OF TRANSPORTATION has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope, and via e-mail properly addressed as follows:

Matthew H. Bryant  
T. Paul Hendrick  
Timothy Nerhood  
Kenneth C. Otis III  
Attorneys for Plaintiffs  
Hendrick Bryant & Nerhood, LLP  
723 Coliseum Drive, Suite 101  
Winston-Salem, N.C. 27106  
mbryant@hendricklawfirm.com  
phendrick@hendricklawfirm.com  
tnerhood@hendricklawfirm.com  
cotis@hendricklawfirm.com

John F. Maddrey  
Solicitor General  
Dahr Joseph Tanoury  
Special Deputy Attorney General  
John F. Oates, Jr.  
Assistant Attorney General  
N.C. Department of Justice  
1505 Mail Service Center  
Raleigh, NC 27699-1505  
jmaddrey@ncdoj.gov  
dtanoury@ncdoj.gov  
JOATES@ncdoj.gov

This the 6th day of October, 2015.

**ELECTRONICALLY SUBMITTED**

Kenneth A. Shanklin, NCSB #5826

Matthew A. Nichols, NCSB #23403

SHANKLIN & NICHOLS, LLP

Attorneys for *Amicus Curiae*

214 Market Street

P. O. Box 1347

Wilmington, NC 28402

Telephone: (910) 762-9400

Telefax: (910) 251-1773

[shanklaw@earthlink.net](mailto:shanklaw@earthlink.net)