No. 56PA14-2 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

EVERETTE E. KIRBY and wife, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, as Executor of the Estate of Frances Hendrix; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL, STEPHEN STEPT; JAMES W. NELSON and wife PHYLISS NELSON; and REPUBLIC PROPERTIES, LLC, a North Carolina company (Group 1 Plaintiffs),	)	From Forsyth County
Plaintiffs,	)	
v.	)	
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

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NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION'S
NEW BRIEF

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ISSUES PRESENTED

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

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

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

STATEMENT OF THE CASE

In Complaints filed in 2011 and 2012, Plaintiffs assert five claims for relief resulting from the filling of transportation corridor maps by the North Carolina Department of Transportation ("NCDOT") pursuant to the North Carolina Transportation Corridor Official Map Act, N.C.G.S. § 136-44.50, et seq. ("Map Act"): (1) a taking through inverse condemnation pursuant to N.C.G.S. § 136-111; (2) a taking under the Fifth Amendment of the United States Constitution, as applied to NCDOT through the Fourteenth Amendment; (3) a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (4) a taking in violation of Article I, Section 19 (the "Law of the Land" Clause) of the North Carolina Constitution; and (5) a declaration that the Map Act and specifically NCDOT's Hardship acquisition program are unconstitutional and "invalid exercises of legislative power as they effect a taking by the NCDOT without just compensation and are unequal in their application to property owners." Plaintiffs alleged that their entire "fee simple" property interests were taken, not partial takings or easement interests, and that none of them "want or require a building permit or subdivision." (R pp 4, 13, ¶¶ 52, 57; 141, 159, ¶ 4)

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

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

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

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

The Court of Appeals issued a decision on 17 February 2015, reversing and remanding the trial court's order. (Slip Op. 2) The Court ruled that Plaintiffs' inverse condemnation and takings claims were ripe and that NCDOT effected a taking of Plaintiffs' property rights when it filed protected corridor maps which triggered land use limitations pursuant to the Map Act. (Slip Op. 45) The Court of Appeals remanded the matter to the trial court for a determination of the "compensation due to each Plaintiff for such takings." (Slip Op. 45)

Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure, NCDOT filed a Notice of Appeal under N.C.G.S. § 7A-30(1) together with a Petition for Discretionary Review under N.C.G.S. § 7A-31(c) on 24 March 2015. In an Order certified on 21 August 2015, this Court dismissed *ex mero motu* the Notice of Appeal and allowed the Petition for Discretionary Review. Pursuant to an Order entered on 2 September 2015, the North Carolina Department of Transportation's New Brief is to be filed and served on or before 6 October 2015.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This matter is before the Court pursuant to N.C.G.S. § 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure by virtue of the Order allowing NCDOT's Petition for Discretionary Review as to these issues:

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

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

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

STATEMENT OF THE FACTS

This appeal involves allegations of the taking of Plaintiffs' property located within transportation corridors identified by the NCDOT in maps recorded in 1997 and 2008 pursuant to the Map Act, N.C.G.S. §§ 136-44.50, et seq. (2013). These are the same corridor maps that were the subject of this Court's decision in *Beroth Oil Company v. N.C. Department of Transportation*, 367 N.C. 333, 757 S.E.2d 466 (2014).

The Map Act

NCDOT and local governments may adopt corridor protection for proposed public transportation projects included in the Transportation Improvement Program, or other long-range transportation plans. N.C.G.S. § 136-44.50(a) (2013). Corridor protection is a planning tool that allows a highway's proposed location to fit into the long-range plans a community has for its future development. (Doc Ex Bk 6 p 2807) NCDOT uses the Map Act to preserve its ability to build highways that will have the least social and environmental impacts; to minimize the number of businesses, homeowners, and renters who will have to be relocated once or if the project is authorized; and to protect the planned highway alignment by limiting future development, which has the added benefit of reducing future right-of-way acquisition costs. (Doc Ex Bk 6 pp 2807-08, 2879) NCDOT adopted corridor protection on the Western and Eastern Loop routes that were selected during the environmental planning process required under the National Environmental Polices Act of 1969, 42 U.S.C. § 4321, et seq. (2012), and the North Carolina Environmental Policy Act of 1971, N.C.G.S. § 113A-1, et seq. (2013). (Doc Ex Bk 6 p 2807)[1]

[1]A detailed history of the environmental planning process and the federal court injunction delaying construction of the Western Loop for 11 years can be found in *N.C. Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 713 F. Supp. 2d 491, 497-99 (M.D.N.C. 2010).

The hallmark provision of the Map Act gives NCDOT and local governments authority to regulate the construction of new improvements on properties located within or adjacent to existing or planned highways and public transportation corridors. N.C.G.S. § 136-44.50, et seq. Under this section, NCDOT and local governments are authorized to adopt protected corridors and record the maps with the register of deeds. Prior to NCDOT's adoption of a map, the public must be given notice through newspapers and public hearings. Recording the map is required before NCDOT may restrict new improvements. Protected corridors can be amended or deleted. N.C.G.S. § 136-44.50(a), (e) (2013). Properties, including Plaintiffs', located within a protected corridor receive property tax discounts that are unavailable to properties outside the corridors. N.C.G.S. § 105-277.9 (2013) (unimproved property); N.C.G.S. § 105-277.9A (2013) (improved property).

Once maps are recorded, the Map Act creates a temporary three-year limitation on new improvements to properties located within the mapped corridor. The Map Act's regulations do not affect current property uses. N.C.G.S. § 136-44.51(a) (2013).[2] Moreover, the regulations do not apply to buildings or structures that existed prior to the filing of the corridor maps if the size of the building or structure is not

[2]N.C.G.S. § 136-44.51 was amended on December 1, 2011. That amendment affects only those properties subject to protected corridor maps filed on or after that date. 2011 N.C. Sess. Laws 242.

increased and the occupancy type is not changed. N.C.G.S. § 136-44.51(a). The limitations are lifted, i.e. sunset, three years from when the property owner first submits a permit request to the local government. N.C.G.S. § 136-44.51(b) (2013). A property owner may petition DOT for a variance to be exempt from the regulations. N.C.G.S. § 136-44.52 (2013); 19A NCAC 2B.0317. If a request is denied by DOT, an owner may appeal the matter. 19A NCAC 2B.0317.[3]

An owner of property within a protected corridor has the right to petition NCDOT for advance acquisition due to an imposed hardship. N.C.G.S. § 136-44.53 (2013). An advance or "early" acquisition is an acquisition of real property prior to "Federal authorization or agreement" to acquire rights of way on a project or segment-wide basis. 23 C.F.R. § 710.105 (2015). NCDOT's decision to acquire properties in advance of receiving project-wide right of way authorization from the Federal Highway Administration ("FHWA") is discretionary. N.C.G.S. § 136-44.53. Participating in the advance acquisition program is voluntary by the owner and occurs after both parties have agreed upon a purchase price. The purchases do not involve the filing of condemnation actions. If an owner qualifies for a Hardship acquisition

[3]Approximately 203 building permit applications have been submitted to the city for property located in the Western Loop corridor since 1997; 184 were approved. The city has received 94 building permit applications for Eastern Loop corridor properties since 1 November 2008, of which 84 were approved. (Bk 6 Murphy Dep pp 3081-82)

and the property is not acquired within three years from the finding, then the corridor map limitations for that parcel are removed. N.C.G.S. § 136-44.53(a) (2013).

Federal regulations authorize DOT to engage in advance acquisition for corridor preservation, access management, and other purposes. 23 C.F.R. § 710.501 (2015). NCDOT may request from FHWA reimbursement for advance acquisition of particular parcels "to prevent imminent development" or to "alleviate hardship to a property owner" on the preferred project location identified during the environmental assessment process. 23 C.F.R. § 710.503(a) (2015). FHWA reimbursement may be granted if, *inter alia*, the property owner supports the request on health, safety or financial grounds and shows that "remaining in the property poses an undue hardship compared to others . . . and [d]ocuments an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project." 23 C.F.R. § 710.503(c)(1), (2) (2015).

NCDOT has made advance acquisitions of properties for right of way purposes in the Beltway corridor. The acquisitions were approved by FHWA. Owners have the responsibility to contact NCDOT and provide documentation supporting a Hardship request. (Doc Ex Bk 6 pp 2828-30) Though owners often submit "realtor letters" with their Hardship requests stating that the owner is unable to sell the property at fair

market value due to the impending project, NCDOT does not agree or disagree with the value opinions expressed in the letters. (Doc Ex Bk 6 p 2830) NCDOT merely accepts the letters to meet FHWA's requirements for acquisition cost reimbursement. The opinions expressed in the letters are not those of NCDOT. (Doc Ex Bk 6 pp 2692, 2830) In addition, funding must be available for the acquisition, an appraisal obtained, and an offer extended to the owner. (Doc Ex Bk 6 pp 2692-93)

The Plaintiffs

The properties owned by Plaintiffs Kirby, Maendl, Engelkiemer, Hutagalung, Stept, Hendrix and Republic Properties ("Republic") are located in the Eastern Loop of the Beltway and subject to the 2008 map; the Harris Triad Homes, Inc. ("Harris") and Nelson properties are located in the Western Loop and subject to the 1997 map. (Doc Ex Bk 6 p 2805)

Plaintiffs Maendl, Engelkiemer, Hutagalung and Stept ("California Plaintiffs") are real estate investors residing in California who purchased their properties in 2006 in the Oak Hill Place neighborhood in Winston-Salem, planning to rent them for a short period. They learned about the Beltway plan while attending a real estate seminar in 2006 where representatives pitched the idea of buying property in the path of the Beltway with the expectation that their properties would be condemned by DOT in five years at fair market prices. (Bk 8 Maendl Dep pp 11, 14-16, 17, 19, 21,

37; Hutagalung Dep pp 43-44, 48; Stept Dep pp 20-25, 44, 77; Engelkemier Dep pp 16, 17, 28, 30) A map of the Beltway was displayed to attendees at the seminar. (Bk 8 Hutagalung Dep pp 50, 68) Seminar representatives told Plaintiffs they could earn upwards of $1,400 in monthly rent for five years, then sell the properties to NCDOT at about 33 percent above the purchase price (six percent market appreciation). (Bk 8 Hutagalung Dep pp 62-67, Ex 5)

Maendl purchased her single-family house in August 2006 for approximately $260,000. (Bk 8 Maendl Dep pp 14, 28) Hutagalung purchased his property for $215,000 in 2006. (Bk 8 Hutagalung Dep pp 8, 64) Stept purchased his property for $207,000. (Doc Ex Bk 6, 2768) He never visited the property. (Bk 8 Stept Dep pp 65-66) Stept read about NCDOT's project in 2006 prior to his purchase. (Bk 8 Stept Dep p 74 Ex 4) Maendl signed a disclosure statement at closing affirming that she knew the Beltway would likely impact her property. (Bk 8 Maendl Dep p 23) The Engelkemiers purchased their rental in Oak Hill Place for $207,710. (Bk 8 Engelkemier Dep pp 11, 12, 27) They viewed the prospect of a future condemnation to be an investment safety net. (Bk 8 Engelkemier Dep pp 16-17) All of the California Plaintiffs' properties are depicted entirely within the Eastern Loop's protected corridor. (Doc Ex Bk 6 pp 2765-68)

The Kirbys' property consists of about 41 acres on High Point Road in Forsyth County and is partially inside the Eastern Loop's protected corridor. (Bk 8 Kirby Dep p 11; Doc Ex Bk 6 p 2762) The Kirbys have operated a successful dog kennel and training center on the property for 22 years, and have earned income from the business. (Bk 8 Kirby Dep p 46) Several buildings are on the property. (Bk 8 Kirby Dep p 101) The kennels started out as a hobby but turned into a business. (Bk 8 Martha Kirby Dep p 18) Mrs. Kirby does not want to leave the kennel business and would like to see the dog training operations continue on the property. Nor does she want NCDOT to acquire her property because it has sentimental value to her. (Bk 8 Kirby Dep pp 18-19)

The Hendrix's property is located north of Winston-Salem and partially inside the Eastern Loop's protected corridor. (R p 52; Doc Ex Bk 6 pp 2782-89) Two single-family dwellings once stood on the property but were demolished by the owner due to code violations. (Bk 8 Hendrix Dep pp 22, 23, 52, Ex 6) Frances Hendrix died in 2007. Her son and sole heir, Michael Hendrix, was appointed executor and filed with the court an inventory for the estate on 19 December 2007, estimating the fair market value of the property at $1,857,000. (Bk 8 Hendrix Dep p 50, Ex 3, 5)

Thomas M. McInnis, the managing member of Republic, is an experienced real estate developer and broker. (Bk 8 McInnis Dep pp 5, 19, 21, 33) One of his

companies specializes in the sale of real estate using accelerated marketing methods. (Bk 8 McInnis Dep p 33) In 2005 Republic purchased the subject property, containing approximately 188 acres, for $775,000, after the Eastern Loop's preferred route was selected and communicated to the public. (Bk 8 McInnis Dep pp 42-44; Doc Ex Bk 6 pp 2759-61, 2763-64) The property has access to three public roads. (Bk 8 McInnis Dep p 35) The property is partially inside the Eastern Loop's protected corridor. (Doc Ex Bk 6 p 2763)

Ben Harris is the sole owner of Plaintiff Harris Triad Homes, Inc. (Bk 8 Harris Dep p 9) He was a speculative home builder and purchased 15 vacant lots in the McGregor Park subdivision in 1991. (Bk 8 Harris Dep p 22) He has rented houses in McGregor Park since the early 1990s, and currently has five rentals in the Western Loop corridor. (Bk 8 Harris Dep pp 55, 57, 124, 130, 173-88) He paid off the notes for the subject properties in approximately 1994. (Bk 8 Harris Dep p 52) He believes that damages to his property values began in 1991 after the city wrote on his building permits that his property was within the proposed Beltway and subject to acquisition. (Bk 8 Harris Dep p 28) He continued to build houses on the lots. (Bk 8 Harris Dep p 29) Harris has had no difficulty obtaining mortgages on his properties even though they are in the path of the planned Beltway. (Bk 8 Harris Dep p 157)

The Nelsons purchased their two properties in 1989 and reside on one of them. (Bk 8 Nelson Dep pp 5, 31, 35) In March 2002, they signed a lease with Bell South/Cingular allowing it to install a telecommunications tower on their property. The Nelsons receive $11,000 in annual rent under a lease that expires in 2047. (Bk 8 Nelson Dep pp 41-42) They had to obtain a special use permit from the local jurisdiction to use the property for a cell tower. (Bk 8 Nelson Dep p 43) Mr. Nelson is a former general contractor and real estate broker. (Bk 8 Nelson Dep p 21) He refinanced the mortgage on his property in 2007; the lender did not care that the Beltway was being planned for his neighborhood. (Bk 8 Nelson Dep p 47)

All of the Plaintiffs testified as to property damages that predated NCDOT's filing of the protected corridor maps in 1997 and 2008 and attributed their injuries to activities unrelated to the Map Act's regulations. Harris alleged property damage arising in 1991 after the city placed a stamp on his building permit about the Beltway (Bk 8 Harris Dep pp 28-29, 37, 138-40); the Nelsons' asserted damages arising in 1996 due to surveyor stakes placed in their yard (Bk 8 Nelson Dep pp 51, 73); Maendl testified to a property value decrease in 2007 due to real estate market slump (Bk 8 Maendl Dep pp 49, 70); the Kirbys claimed damages occurring in 2004 due to public communications relating to NCDOT's environmental planning (Bk 8 Kirby Dep pp 36, 40-42, 67, Ex. 7); Hendrix's estimated damages arose in 1993 upon notice

of potential routes for Beltway (Bk 8 Hendrix Dep pp 25-26); and Republic alleged its property was rendered "unmarketable and economically useless" after receiving an offer from NCDOT to purchase the property in 2006 (Bk 8 McInnis Dep p 58).

STANDARD OF REVIEW

"Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals." N.C. R. App. P. 16(a) (2015). In the appellate courts questions of law receive *de novo* review such that the Court "considers the matter anew and freely substitutes its own judgment." *In re Appeal of the Greens of Pine Glen Ltd. Partnership*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

ARGUMENT

The Court of Appeals erred by apparently creating a per se taking cause of action for Plaintiffs and any owner of property within the limits of a transportation corridor map filed under the Map Act. The Court found a categorical taking without determining that the Map Act's "perpetual" regulations resulted in a deprivation of all practical or economically beneficial use of the properties, and without any evaluation of Plaintiffs' ability to use their properties. The court incorrectly held that the Map Act is an eminent domain statute which falls outside the State's police

power, that recording maps under the Map Act was an exercise of eminent domain and a taking, and that Plaintiffs' inverse condemnation and declaratory relief taking claims were ripe.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S HOLDINGS ON TAKINGS LAW AND PROCEDURE.

This Court's decision in *Beroth* rejected any generalized analysis of the merits of the takings claims asserted by various property owners arising from the same transportation corridor maps at issue here. The class action advocated by those property owners was denied because the plaintiffs had not and could not show that all properties "within the corridor are affected in the same way and to the same extent." *Beroth*, 367 N.C. at 343, 757 S.E.2d at 474. This Court held:

> While NCDOT's generalized actions may be common to all, the Court of Appeals correctly determined that "liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." This discrete fact-specific inquiry is required because each individual parcel is uniquely affected by NCDOT's actions.

Id. (citation omitted; emphasis supplied). In the decision below, the Court of Appeals erroneously set out a sweeping pronouncement of a categorical taking arising from the filing of the transportation corridor map, without analyzing the factual circumstances of any of plaintiff's individual claims, contrary to holdings by this Court and by the United States Supreme Court. *Chapel Hill Title & Abstract Co. v.*

Town of Chapel Hill, 362 N.C. 649, 655, 669 S.E.2d 286, 289 (2008); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 120 L. Ed. 2d 798, 813 (1992) (a deprivation of all economically beneficial use necessary to establish a per se categorical taking); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548, 161 L. Ed. 2d 876, 894 (2005) (upholding the categorical taking analysis in *Lucas* but rejecting the "substantially advances legitimate state interest" standard); *cf. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323, 152 L. Ed. 2d 517, 541 (2002) (government regulation affecting only a portion of a property does not constitute a categorical taking and "entails complex factual assessments").[4]

A. THE COURT OF APPEALS RELIED UPON A GLOBAL TAKINGS RULING INSTEAD OF UNDERTAKING CASE-BY-CASE DETERMINATIONS OF LIABILITY.

In apparent disregard of this Court's directive, the Court of Appeals' decision seemingly creates a cause of action based upon a per se, categorical taking of any property located within a Map Act corridor. The Court of Appeals declared that "NCDOT exercised its power of eminent domain when it filed the transportation corridor maps" which triggered "perpetual" land-use restrictions (Slip Op. 43), and

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[4]This Court has held that decisions by the United States Supreme Court are persuasive regarding the "interpretation by this Court of the law of the land clause of our state Constitution." *Department of Transportation v. Rowe*, 353 N.C. 671, 678, 549 S.E.2d 203, 209 (2001).

found error by the trial court when it determined "that Plaintiffs did not suffer a taking at the time NCDOT filed the transportation corridor maps" (Slip Op. 45). The decision below asserts its general takings conclusion without any discussion of the particular facts and circumstances related to any specific property or owner. And it does so based upon an incomplete and improper discussion of the legitimate state interests furthered the Map Act as well as reliance upon an unprecedented and incorrect application of the legal standards relevant to the issue of whether Plaintiffs' property has been taken.

The Court of Appeals contradicted the express guidance of this Court that a taking cannot be broadly declared but instead must be established on an individual property basis. The Court utterly failed to perform "ad hoc, factual inquiries into the circumstances of each particular case" to determine whether an actual taking of any plaintiff's property rights occurred. *Beroth*, 367 N.C. at 342, 757 S.E.2d at 473 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 648 (1978)).

The Court of Appeals' conclusion that Plaintiffs sustained a substantial interference with their property rights merely because of the "potentially long-lasting statutory restrictions [of the Map Act]" (Slip Op. 42) does not satisfy the takings jurisprudence requirements set forth by this Court or by the United States Supreme

Court. *Penn. Cent.*, 438 U.S. at 124, 57 L. Ed. 2d at 648 (regulatory taking analysis involves "essentially ad hoc, factual inquiries"); *Chapel Hill Title*, 362 N.C. at 655, 669 S.E.2d at 289.

While the court below made reference to the constraint on "Plaintiffs' ability to freely improve, develop, and dispose of their own property," (Slip Op. 42-43), it is well recognized that the "right to improve property is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627, 150 L. Ed. 2d 592, 613 (2001). "A taking does not occur simply because government action deprives an owner of previously available property rights." *Finch v. Durham*, 325 N.C. 353, 366, 384 S.E.2d 8,18 (1989) (quoting from *Penn Cent. Transp. Co.*, 438 U.S. at 130, 57 L. Ed. 2d at 652.

Under any as-applied taking standard, the court's proper focus must be on the extent to which an owner's ability to use property has been deprived. *Penn v. Carolina Virginia Coastal Corporation*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950) (substantial ousting test–court must examine whether government action was such as "substantially to oust the owner and deprive him of all beneficial enjoyment"); *Finch*, 325 N.C. at 366, 384 S.E.2d at 16 (ends-means regulatory taking test–does property retain practical use and a reasonable value); *Lingle*, 544 U.S. at

538, 161 L. Ed. 2d at 887 (categorical regulatory taking test–has owner been deprived of "all economically beneficial use"); *Penn Central*, 438 U.S. at 124, 57 L. Ed. 2d at 648 (partial regulatory taking test–court must examine the extent of the interference on the party's distinct investment-backed expectations). The Court of Appeals wholly failed to undertake such an inquiry here.

B. THE COURT OF APPEALS REACHED AN INCORRECT CONCLUSION REGARDING THE EXERCISE OF EMINENT DOMAIN.

In furtherance of its blanket pronouncement of a taking occurring on the date of the filing of the transportation corridor maps, the Court of Appeals declared that NCDOT'S actions were an "exercise of the State's power of eminent domain" and, as such, "requires the payment of just compensation." (Slip Op. 34-35) This conclusion was buttressed by characterizing the Map Act as merely "a cost-controlling mechanism" (Slip Op. 34), and rejecting any proper public purpose because "there is no detriment to the public interest that the Map Act's purported 'regulations' will prevent unless NCDOT needs to condemn" the properties within the transportation corridor (Slip Op. 34). The fundamental flaw in the decision below is the failure to acknowledge the regulatory nature of the actions alleged by Plaintiffs and to apply an appropriate regulatory taking analysis to determine whether the Map Act constitutes legislation outside the scope of the State's police power.

1. THE MAP ACT IS A PROPER REGULATORY ENACTMENT WITHIN THE SCOPE OF THE STATE'S POLICE POWER.

It has long been recognized that "[t]he question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain." *Barnes v. N.C. State Highway Commission*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962). The scope of legislative authority pursuant to the police power is broad and expansive:

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

Durham v. Cotton Mills, 141 N.C. 615, 640, 54 S.E. 453, 462 (1906). Furthermore, "[t]he police power is inherent in the sovereignty of the State. . . . It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979). And, "it may be extended or restricted to meet changing conditions, economic as well as social." *Id*. at 214, 258 S.E.2d at 449 (citation omitted).

It is well-settled that the effect of the authorized exercise of the police power may result in limitations on the absolute scope of an owner's fundamental property

rights. "Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative action to declare what general regulations shall be deemed expedient." *Cotton Mills*, 141 N.C. at 639, 54 S.E. at 461. And, "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id*. at 642, 54 S.E. at 462. This Court has held that regulation of a property owner's right of access when a public roadway is designated as a controlled access highway "in the interest of public safety, convenience and general welfare" is an exercise of the State's police power, and that "impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation." *Wofford v. N.C. State Highway Commission*, 263 N.C. 677, 682, 140 S.E.2d 376, 380 (1965).

The Map Act, similar to zoning ordinances, regulates future uses of property in furtherance of the general welfare and for the public benefit. In the context of a challenge to a local zoning ordinance, this Court has held that "the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason" to invalidate the ordinance as an inappropriate or unconstitutional

exercise of the police power. *A-S-P*, 298 N.C. at 218, 258 S.E.2d at 451. Here, the Court of Appeals has declared that the Map Act is not regulatory legislation appropriately enacted pursuant to the police power but instead is "a cost-controlling mechanism" that was enacted "with a mind toward property acquisition." (Slip Op. 34) The asserted character of the Map Act is gleaned from a Florida case discussing legislation in that State and from the title of the Session Law enacted by the North Carolina General Assembly. (Slip Op. 30-32) Neither supports the conclusion that the Map Act is outside the scope of the police power as recognized by this Court.

The Florida decision that the Court of Appeals found "persuasive and instructive" (Slip Op. 30 (discussing *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622, 626 (Fla. 1990)), expressly referenced a "legislative staff analysis" (Slip Op. 31; *Joint Ventures*, 563 So.2d at 626) as the basis for its ruling that the statute's purpose was improper. There is no rationale upon which to impute the asserted motives of the Florida legislature as a basis for the legislation enacted by our General Assembly. And as discussed *infra*, subsequent decisions by the Florida Supreme Court expressly hold that the *Joint Ventures* decision does not stand for the proposition that Florida's legislation enabled the per se taking of properties located within a protected highway corridor.

The decision below makes much of the title to the 1987 Session Law in which the General Assembly enacted the Map Act. That discussion, however, is incomplete and misleading. First, the complete title to Chapter 747 of the 1987 Session Laws is "An Act To Control The Cost Of Acquiring Rights-Of-Way For the State's Highway System; And To Make Other Changes In The Laws Affecting The State's Highway System." The Map Act comprises only one of the twenty-seven sections (Section 19) in the Session Law as enacted by the General Assembly. Other provisions of the Session Law concern municipal participation in the cost of improvements to the State highway system including right-of-way costs, the authority of municipalities to acquire highway rights-of-way in or around a municipality, the dedication of right-of-way under local ordinances, and the process for consideration of local acts affecting the State highway system.

It is hard to understand why the Court of Appeals considers the prudent management and use of public funds outside the legislative prerogative to enact statutes to protect and further the public welfare. It should be undisputed that saving taxpayer's money, lowering the cost of designing and building the State's transportation infrastructure, and minimizing disruption to the community and

environment are within the scope of matters that the General Assembly can properly take into account.[5]

It is inaccurate to describe cost-cutting as the only purpose of the Map Act regulation of development within a protected corridor. The decision below acknowledged but dismissed numerous other policy considerations that were articulated by the NCDOT including facilitating orderly and predictable development, preserving the ability to build roads in locations that have the least impact on the natural and human environments, and minimizing the number of businesses, homeowners and renters who will have to be relocated when a project is authorized for right-of-way acquisition and road construction. (Slip Op. 32-33) The Court of Appeals, however, gave no weight to matters "that are purportedly prevented or averted as a result of the Map Act's restrictions" because "there is no detriment to the public interest that the Map Act's purported 'regulations' will prevent unless NCDOT needs to condemn Plaintiffs' respective properties." (Slip Op. 34) The apparent

[5]The Court of Appeals implies an improper motive when it suggests that NCDOT's recording of the corridor maps will "decrease the future price the State must pay to obtain" properties needed for highway right-of-way. (Slip Op. 34) The Map Act, in N.C.G.S. § 136-44.54, incorporates the "project influence rule" of 49 C.F.R. § 24.103(b) requiring that properties be purchased at fair market value, disregarding any decrease in value caused by the project for which the property is being acquired. The effect of the Map Act is to prevent the squander of public funds that would occur if property characteristics change prior to acquisition.

invalidation of the prevention of a harm as a legitimate public interest within the scope of the police power, as well as the implication that such legislation must be in response to an existing impairment of the public interest, cannot be reconciled with this Court's prior decisions regarding the police power.

The requirement that a harm to the general welfare must occur prior to governmental action to address a matter through preventive measures and statutory mechanism is misplaced and inimical to the fundamental principles of the police power. That concept would seemingly preclude the Department of Transportation from installing a guardrail until after a vehicle had failed to stay on a dangerous roadway. Any claim that the legitimate state interest in regulations designed to enhance the public welfare cannot be anticipatory or motivated by the prevention of future harm cannot withstand rational analysis.

The state is not required to wait for the public to actually suffer injury before regulating in furtherance of the public interest, as demonstrated by prior decisions of this Court. In *Responsible Citizens in Opposition to the Flood Plain Ordinance v. The City of Asheville,* 308 N.C. 255, 262, 302 S.E.2d 204, 209 (1983), this Court held that "the object of th[e] legislation -- the prevention or reduction of loss of life, property damage, etc., due to flood -- falls well within the scope of the police power." This is because, as recognized by this Court in support of its conclusion that the

preservation of historically significant residential and commercial districts protects and promotes the general welfare,

> [p]roper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy . . . . Nor need the values advanced be solely economic or directed at health and safety in their narrowest senses. The police power inhering in the lawmaker is more generous, comprehending more subtle and ephemeral societal interests.

A-S-P, 298 N.C. at 215, 258 S.E.2d at 449 (quoting from *Maher v. City of New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975)).

Here, the Court of Appeals has effectively second-guessed the wisdom of the General Assembly's determination that legislation is necessary in furtherance of the State's duty to design and build transportation infrastructure. As such, the Court improperly "substitute[d] its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *A-S-P*, 298 N.C. at 214, 258 S.E.2d at 449. The police power permits regulation of the use of property "when the legislative body has reasonable basis to believe that it will promote the general welfare by conserving the values of other properties and encouraging the most appropriate use thereof." *Blades v. City of Raleigh*, 280 N.C. 531, 546, 187 s.E.2d 35, 43 (1972).

The regulation of land use is a common police power function. The Map Act is similar to other legislation allowing governments to place limitations on certain types of land use in planned highway corridors to promote orderly grown and development. *See* N.C.G.S. § 136-66.10 (2013) (cities and counties authorized to limit development in the path of future highways designated in comprehensive transportation plans). And this Court has recognized the public purpose of protecting the general welfare by the preservation of a future roadway corridor from residential development.

A local subdivision ordinance requiring that a property owner take into account future road plans was expressly upheld by this Court in *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990). The General Assembly's authorization for the town to require a developer to take future as well as present road development into account as a condition for obtaining a subdivision permit was found in N.C.G.S. § 160A-372, with parallel authority for counties provided in N.C.G.S. § 153A-331. *Batch*, 326 N.C. at 13, 387 S.E.2d at 663. This Court then held:

> A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned

> road development in some logical manner when designing a proposed subdivision.

Id.

A proper analysis of the Map Act demonstrates why the Court of Appeals was in error when it characterized the purpose and effect of the legislation as an invalid exercise of the police power because it was motivated by future property acquisition. The circumstances presented, as documented in the Record before the trial court, established that the legislative purpose was within the proper scope of the police power as defined by prior decisions of this Court. Furthermore, "there is a presumption that a particular exercise of the police power is valid and constitutional . . . and the burden is on the property owner to show otherwise." *A-S-P*, 298 N.C. at 226, 258 S.E.2d at 456 (citations omitted).

The Court of Appeals should not have declared that the Map Act was not a valid regulatory enactment because it effected a taking of properties within a protected transportation corridor for, as recognized by this Court:

> the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

Finch, 325 N.C. at 373, 384 S.E.2d at 21 (quoting *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938)).

2. THE COURT OF APPEALS FAILED TO APPLY ESTABLISHED STANDARDS FOR DETERMINING WHETHER A TAKING HAS OCCURRED.

The Court of Appeals should have employed the taking analysis articulated by this Court in *Responsible Citizens* to determine whether the Map Act's land-use regulations fell outside the government's police powers and created a taking requiring payment of just compensation. *Finch*, 325 N.C. at 363, 384 S.E.2d at 14. The analysis is appropriate in situations where, like here, plaintiffs alleged a taking under several theories. *Responsible Citizens*, 308 N.C. at 257, 302 S.E.2d at 206 (Fifth Amendment of the United States Constitution and article I, section 19 of the North Carolina Constitution). The failure to employ the established analysis conflicts with decisions of this Court because all of the elements to support application of the test are present.

Under that "ends-means" test, the court must engage in a two-part analysis to decide whether the "particular exercise of the police power was legitimate, by determining whether the ends sought, i.e., the object of the legislation, is within the scope of the power, and then whether the means chosen to regulate are reasonable." *Finch*, 325 N.C. at 363, 384 S.E.2d at 14 (citations and quotation marks omitted). *See also A-S-P*, 298 N.C. at 214, 258 S.E.2d at 448-49. Under the reasonable interference prong, the court must examine the facts and determine whether the owner "was

deprived of all practical use of the property and the property was rendered of no reasonable value." *Finch*, 325 N.C. at 364, 384 S.E.2d at 15 (citation and quotation marks omitted).

This Court's ends-means analysis is similar to the standard articulated by the United States Supreme Court in *Lucas*, which determines whether a regulation deprives an owner of all economically beneficial use.

As detailed above, the Court of Appeals gave inappropriate consideration to the legitimate state interests and the public purposes which bring the Map Act within the proper scope of the State's police power to legislate in furtherance of the general welfare. And as shown below, the Court of Appeals improperly substituted a lesser standard for the proper requirement that a property owner prove a deprivation of all practical use of the property to establish a cause of action.

3. THE COURT OF APPEALS RELIED UPON THE INCORRECT APPLICATION OF A "SUBSTANTIAL INTERFERENCE" STANDARD TO ESTABLISH A COMPENSABLE TAKING.

The Court of Appeals described the applicable inquiry as "whether the restrictions of the Map Act that were applicable to Plaintiffs at the time the maps were filed substantially interfered with the elemental rights growing out of Plaintiffs' ownership of their properties so as to have effected a taking." (Slip Op. 40) The

"substantially interfered" concept is extracted from the opinion of this Court in *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982), a case finding a right to bring an inverse condemnation action by the owners of property in the direct line of the take-off and landing paths of aircraft using a newly opened runway. A review of that decision demonstrates the improper reliance of the Court of Appeals on this short-hand statement as authority for the creation of a compensable taking resulting from a lesser degree of governmental interference with property ownership.

The opinion in *Long* reviews the developing jurisprudence involving airport noise cases following the landmark case of *United States v. Causby*, 328 U.S. 256, 90 L. Ed. 2d 1206 (1946), and discusses the trespass and nuisance taking theories advanced by the plaintiffs as a basis for recovery. The court then observes:

> Modern construction of the "taking" requirement is that an actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of the property.

Long, 306 N.C. at 198-99, 293 S.E.2d at 109. In proper context, the language regarding "substantial interference" serves to illustrate the concept that "actual occupation" or "physical touching" is not a requirement for the finding of a taking. The requisite degree of interference to support a claim for inverse condemnation is

set forth in the next paragraph of the decision in a quotation from *Penn*, 231 N.C. 481, 57 S.E.2d 817 (1950), indicating that a "taking" has been defined as:

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

Id. at 484, 57 S.E.2d at 819. The opinion then observes that "[o]bviously not every act or happening injurious to the landowner, his property, or his use thereof is compensable." *Long*, 306 N.C. at 199, 293 S.E.2d at 109.

Though the Court of Appeals referred to the *Penn* standard, it applied a truncated version of the analysis to Plaintiffs' claims, finding that the "statutory restrictions . . . constrain Plaintiffs' ability to freely improve, develop, and dispose of their own property" (Slip Op. 42-43), and holding that Plaintiffs were entitled to recover compensation resulting from the taking that occurred when NCDOT filed the transportation corridor maps (Slip Op. 43).

Application of the erroneous legal standard allows Plaintiffs to recover for a taking without showing that the statutory regulation was such as to "deprive him of all beneficial enjoyment" of his property, contrary to the long-standing requirement set forth in this Court's decision in *Penn*. *See also Responsible Citizens*, 308 N.C. at 264, 302 S.E.2d at 210 (a taking results when owner "deprived of all 'practical' use

of the property and the property was rendered of no 'reasonable value"). Allowing a takings claim to go forward based upon the limited impairment of some property rights is inappropriate because "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66, 62 L. Ed. 2d 210, 223 (1979).

The inverse condemnation action upheld in *Long* involved a complaint alleging frequent and intense noise and vibration created by aircraft at low altitudes "so great that it is unbearable to a normal human being" rendering the plaintiffs' property "almost unlivable." *Long*, 306 N.C. at 191, 293 S.E.2d at 105. As such, this Court's holding fully comported with the requirement that the complaint establish action injuriously affecting property "in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Penn*, 231 N.C. at 484, 57 S.E.2d at 819. Application of the *Penn* standard to the facts and circumstances here, where Plaintiffs universally have continued to occupy and use their properties, conclusively demonstrates that the Court of Appeals erred when it found they have suffered a compensable taking. Allegations of a threat to take are an insufficient basis upon

"which a cause of action for a taking would arise in favor of the owner." *Id*. at 485, 57 S.E.2d at 820.

4. THE COURT OF APPEALS OPINION ERRONEOUSLY RELIED ON FLORIDA CASE LAW.

The Court of Appeals erroneously relied on a Florida case for the conclusion that a taking occurred in this matter, construing the Florida Supreme Court's holding in the case it cited in a manner expressly disavowed in later decisions. (Slip Op. 30-32; *Joint Ventures*, 563 So. 2d 626)

As previously discussed, the decision below inappropriately relied upon a "legislative staff analysis" regarding the purpose of the Florida statute in assessing the purpose and intent for the North Carolina General Assembly's enactment of the Map Act. Furthermore, subsequent decisions by the Florida Supreme Court make clear that the *Joint Ventures* decision did not establish that a per se taking occurred as to every owner of property located within a highway map of reservation. *See Palm Beach County v. Wright*, 641 So. 2d 50, 52 (Fla. 1994) ("[W]e held that landowners with property inside the boundaries of maps of reservation invalidated by *Joint Ventures* are not legally entitled to receive per se declarations of taking."). The determination of whether a highway map constitutes a taking must be conducted on a case-by-case, ad hoc factual basis. *Id*. at 54. Additionally "*Joint Ventures* should

not be read to mean that all properties located within the maps of reservation were per se taken without just compensation;" instead, a taking occurs only where the "regulation denies substantially all economically beneficial or productive use of land." *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

Florida's jurisprudence therefore provides no proper support for the Court of Appeals' assertion that the Map Act is an invalid exercise of the police power because it was enacted "with a mind toward property acquisition" (Slip Op. 31-32 (emphasis removed)), or that "NCDOT exercised its power of eminent domain when it filed the transportation corridor maps" (Slip Op. 44). Indeed, the Florida Supreme Court acknowledged that the state had a legitimate goal of conserving public funds. (Slip Op. 44)

This Court should disavow the reasoning and result of the Court of Appeals and instead reaffirm the holding that

> the mere laying out of a right of way is not in contemplation of law a full appropriation of the property within the lines. Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property.

Browning v. State Highway Comm'n, 263 N.C. 130, 138, 139 S.E.2d 227, 232 (1964).

II. THE COURT OF APPEALS ERRONEOUSLY REMANDED THE CASES FOR TRIAL ON THE ISSUE OF DAMAGES.

The Court of Appeals' decision "remand[s] this matter to the trial court to consider evidence concerning the extent of the damage suffered by each Plaintiff as a result of the respective takings and concerning the amount of compensation due to each Plaintiff for such takings." (Slip Op. 45) As previously explained, this result fails to comply with the directive from this Court that the issues involving NCDOT's liability for a taking resulting from the recordation of the transportation corridor maps triggering land-use regulations are not susceptible to resolution at a global level and instead must be determined on a case-by-case basis. Additionally, it fails to comport with the established substantive and procedural considerations applicable to eminent domain proceedings.

All Plaintiffs testified that their asserted damages arose prior to the recording dates for the corridor maps. And all Plaintiffs are currently using their properties in various practical and economically useful manners, with no genuine indication that they have demonstrated any constraint on developing them as a result of the Map Act's regulations.

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

The Court of Appeals erred by holding that both the inverse condemnation and declaratory judgment taking claims were ripe where none of the Plaintiffs desired, applied for, or were denied building permits or subdivision approvals, the very things that are the focus of the Map Act's restrictions. (Slip Op. 2, 47); N.C.G.S. § 136-44.51 (2013). Nor is there record evidence showing that Plaintiffs sought variances from the Map Act's restrictions.

The Court of Appeals' holding conflicts with established precedent that inverse condemnation and due process takings claims are not ripe until a final decision is made by the governing body as to how the regulation will be applied to the plaintiff's property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190, 194, 200, 87 L. Ed. 2d 126, 143, 147 (1985) (petitioner's claims were not ripe because he did not apply for a subdivision or variance or obtain a final decision on how he would be allowed to develop his property); *Andrews v. Alamance County*, 132 N.C. App. 811, 815, 513 S.E.2d 349, 351 (1999). "Any challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted." *Id*. (citation omitted). *See also Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C. App. 533, 542, 386 S.E.2d 439,

445 (1989) (requiring property owner to take affirmative steps by following regulatory process to make new improvements did not effect a taking and was within the scope of the police power where the current property use was not affected).

This Court's decision in *Beroth* detailed the various ways property owners impacted by the filing of a transportation corridor map can seek relief pursuant to the Map Act. *Beroth*, 367 N.C. at 333-34, 757 S.E.2d at 468. Because Plaintiffs never applied for building permits, subdivisions, or variances, the trial court properly ruled that their inverse condemnation and constitutional claims were not ripe and they lacked standing to challenge the constitutionality of the Map Act and its restrictions as applied to them.

B. THE COURT OF APPEALS ERRED IN DIRECTING THE TRIAL COURT TO UNDERTAKE FURTHER PROCEEDINGS ON THE AMOUNT OF COMPENSATION DUE EACH PLAINTIFF.

The Court of Appeals' decision "remand[s] this matter to the trial court to consider evidence concerning the extent of the damage suffered by each Plaintiff as a result of the respective takings and concerning the amount of compensation due to each Plaintiff for such takings." (Slip Op. 45) As previously explained, this result fails to comply with the directive from this Court that the issues involving NCDOT's liability for a taking resulting from the recordation of the transportation corridor maps

are not susceptible to resolution at a global level and instead must be determined on a case-by-case basis.

Chapter 136, Article 9 of the General Statutes contemplates a two-stage process in condemnation actions in which "any and all issues raised by the pleadings other than the issue of damages" are determined by the judge before the case proceeds to a jury trial. N.C.G.S. § 136-108 (2013) The Court of Appeals' decision indicates that the date of taking here is when NCDOT "filed the transportation corridor maps for the Western and Eastern Loops" (Slip Op. 44) in 1997 and in 2008. That critical determination, upon which all valuation testimony relevant to the statutory measure of damages established in N.C.G.S. § 136-112 must be premised, is inconsistent with Plaintiffs' testimony that their properties were harmed by disparate events prior to such dates. Furthermore, one purpose of a Section 136-108 hearing is to determine prior to submission of the case to the jury any question as to the areas and interests taken. *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967).

Remanding this case for the presentation of evidence on the issue of damages is erroneous because neither the Court of Appeals nor the trial court has identified the areas and interests allegedly taken, e.g., a fee simple, an easement, or some other interest. (Slip Op. 45-47) For example, approximately 139.73 acres of Republic's

mostly vacant 188-acre tract lies outside the protected corridor (and not subject to the Map Act's restriction) and are suitable for residential development. (Doc Ex Bk 6, pp 2886, 2903, 2963, 2973, 3011-A) The Court of Appeals did not state how much of the 188 acres was taken by NCDOT. Similar issues apply to all Plaintiffs' claims.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the Court of Appeals and reinstate the decision entered by the superior court.

Respectfully submitted this the 6th day of October 2015.

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

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **NORTH CAROLINA DEPARTMENT OF TRANSPORTATION'S NEW BRIEF** in the above titled action upon all parties to this cause by:

[ ] Hand-delivering a copy hereof to each said party or to the attorney thereof;

[X] Transmitting a copy hereof to each said party via email; and

[X] Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly addressed to:

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This the 6th day of October 2015.

Electronically Submitted
John F. Maddrey
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